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### Deadlock DA

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#### Bedoya’s confirmation is likely, BUT opposition to the antitrust agenda threatens to indefinitely deadlock meatpacking enforcement – and everything else

Moran 1-6-22 (Max Moran, Research Director of the Personnel Team at the Revolving Door Project, studied International Relations and Journalism at Brandeis University, “Merrick Garland Is Undermining the Biden Antitrust Strategy,” The American Prospect, 1-6-2022, https://prospect.org/justice/merrick-garland-is-undermining-biden-antitrust-strategy/)

The Biden administration is threatening new anti-monopoly enforcement actions against the Big Four meatpacking companies, in part to counter inflation at the grocery store and in part to address decades of exploitation of small farmers. On Monday, the president dispatched Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to hear grievances from small ranchers, while the White House builds a new web portal to gather complaints. While the White House’s proposals for funding small meat processors to increase competition are rather unsatisfying, the enforcement piece could have a real impact.

This initiative has caused the usual grumbling from neoliberal economists, and the usual corrections to the usual grumbling. But no one has yet explained how Biden plans to actually follow through on his threat—a problem for which Garland is partly to blame.

As The Information’s Josh Sisco reported on Tuesday, there are currently just two deputies trying to manage the entire DOJ Antitrust Division (ATR) alongside Assistant Attorney General Jonathan Kanter, who was confirmed only two months ago. ATR typically has at least 12 deputies and top advisers in the “front office” who oversee about 700 career staffers. And that was under past administrations, which didn’t have nearly as ambitious an antitrust agenda as Biden’s. Reversing four decades of Borkian antitrust sloth requires a cohesive and energetic senior leadership team.

Meanwhile, the Federal Trade Commission, the executive branch’s other main antitrust enforcer, remains in a 2-2 partisan deadlock, as Senate Republicans blockade Biden nominee Alvaro Bedoya from being confirmed as a commissioner. He has a path to 51 Senate votes, but arcane (and unnecessary) procedural hurdles have slowed the process to a crawl, hindering the other avenue to antitrust action.

Biden can only do so much to move Bedoya’s nomination. But in theory, nothing prevents him from hiring whomever Kanter personally trusts to help execute their shared agenda. The deputies at ATR are not Senate-confirmed positions. So what’s causing the chaos?

The problem isn’t procedural; it’s political. In addition to diversity concerns, Sisco reports that “ideological divisions” about anti-monopoly enforcement within the Biden administration are causing fights over any potential selection for the ATR deputies.

These divisions should be familiar to anyone who followed the initial fight over antitrust nominees during the Biden transition last year. While Biden himself seems sold on the benefits of a strong anti-monopoly agenda, Garland testified last year that he sees no problem with hiring big corporations’ preferred defense attorneys to oversee their former firms and clients. Garland and other anonymous voices floated a slew of names to run ATR throughout last year—anyone but Kanter, whom progressives favored.

While Garland lost that initial fight, he seems content to starve Kanter of resources as a work-around, even if it means sabotaging his own president’s agenda. Garland, after all, appears to consider it core to his job to throttle the better parts of the Biden administration for the sake of an imagined apolitical comity. He rushed to the Trump administration’s defense over the objections of the White House many times over the last year, and continues to undermine environmental action wherever he can. It’s perfectly in keeping with his priorities to undermine antitrust enforcement too.

The corporate revolvers and pro-monopoly hacks Garland boosted also haven’t gone anywhere. Again according to Sisco, Sonia Pfaffenroth is now in the mix for one of those coveted jobs in the ATR “front office.” Pfaffenroth revolved from Arnold & Porter into the Obama ATR and back over the last two decades. In private practice, she’s defended pharmaceutical firms, fossil fuel companies, and mining companies from class actions, price-fixing cases, and of course antitrust lawsuits.

One should look to Pfaffenroth’s record from her past stint at ATR to get a sense of what a second go-around might look like. Under the Obama administration, Pfaffenroth blessed tie-ups between Virgin America and Alaska Airlines, as well as US Airways and American Airlines. Today, just four mega-airlines control 80 percent of U.S. air traffic.

Pfaffenroth even approved the $107 billion merger between Anheuser-Busch InBev and SABMiller, allowing 30 percent of the world’s beer market volume and 60 percent of the world’s beer market profits at the time to be controlled by one firm. Today, AB InBev has essentially hacked the multitiered regulatory system that kept the alcohol market competitive for decades. In some cases, AB InBev’s distributors only allow craft brewers to distribute their drinks to retailers if they keep overall production low. This bottlenecking, alongside the pandemic, has been devastating for craft brewers.

Pfaffenroth’s record at ATR reveals someone whose poor judgment has harmed major American industries. But her judgment is reflective of the failed antitrust status quo, and in antitrust and everything else, Garland sees maintaining the status quo as inherently salutary. Where you or I might see bad calls, Garland likely sees jurisprudence executed according to a well-worn book. Whether the book is right or wrong is immaterial, in his eyes.

To state the obvious, Biden ought to reject Pfaffenroth and empower Kanter with deputies ready to throw that book aside, or else his antitrust agenda on meatpacking and everything else will get tossed on the growing pile of broken promises that are cratering his approval ratings. Doing so, however, will require standing up to Garland.

Thus far, Biden has appeared reluctant to do so, for fear of threatening the attorney general’s independence. There’s a kernel of truth here, after the Justice Department was turned into the president’s personal law firm under Trump. But there is a big difference between deploying the DOJ’s resources to help friends and target enemies and ensuring the DOJ has the staff and leadership necessary to execute its policy agenda. One is a blatant abuse of power, the other a clear presidential prerogative.

It’s an awkward situation for a president, but Biden must recognize that achieving his goals—especially the ones that improve working people’s economic fortunes—does far more for the health of the nation than sticking to a failed principle for its own sake. The president badly needs to remember that the buck stops not at Main Justice, but the Oval Office. Biden can demonstrate his commitment to fulfilling his promises and vision by empowering those of his appointees who are showing the necessary courage.

#### It’s NOT about Bedoya – it’s a referendum on the scope of the current agenda – deadlock is the point

Murphy 21 (Kathleen Murphy, Senior Reporter at FTC Watch, former Section Research Manager, Specialist at Congressional Research Service, former Managing Editor at CQ Roll Call and Bill Analysis Editor at Congressional Quarterly, “Bedoya’s confirmation hearing draws closer,” FTC Watch, Issue 1016, 11-1-2021, <https://www.mlexwatch.com/articles/13940/print?section=ftcwatch>)

When Alvaro Bedoya, President Joe Biden’s nominee to the Federal Trade Commission, faces US senators, he will be asked about his scholarly views on privacy. But the hearing also gives senators a chance to assess the agenda of the last FTC nominee they confirmed, Chair Lina Khan.

The Senate Commerce, Science and Transportation Committee is set to consider Bedoya’s nomination, although no hearing date has been set. It’s most likely to occur the week of Nov. 15 or early December, based on the 2021 Senate calendar.

Serving on the FTC means Bedoya, a Georgetown University professor and former congressional lawyer, would end a 2-2 split and give Democrats a majority to implement the chair’s policies. Bedoya, founding director of the Center on Privacy & Technology at Georgetown Law, would replace former Commissioner Rohit Chopra who left Oct. 8 to serve as director of the Consumer Financial Protection Bureau.

Biden nominated Bedoya in mid-September. Khan, meanwhile, started serving as FTC chair in mid-June after an 83-day confirmation process. (See FTCWatch, No. 1002, March 29, 2021.)

‘99% about FTC Chair Lina Khan’

Michael Keeley, co-chair of the antitrust practice at Axinn, Veltrop & Harkrider, tweeted: “Bedoya confirmation is going to be 99% about FTC Chair Lina Khan, and 1% to do with Alvaro Bedoya. (And hopefully 0% about the Vertical Merger Guidelines.)”

Keeley said he expects the focus of the hearing to be assessing the wisdom of the policies being pursued by Khan.

#### Plan expands opposition, derailing confirmation

Kovacic 20 (William E. Kovacic, former FTC Chair, Global Competition Professor of Law and Policy, George Washington University Law School, JD Columbia University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy,” U. of Pennsylvania Journal of Business Law, 23(1), 2020, https://scholarship.law.upenn.edu/jbl/vol23/iss1/3/)

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.107 Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. 108 Many matters involved powerful economic interests,109 and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of intellectual property. 110 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.111

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.112 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.113 The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.114

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. 115 The complaints of industry resonated with a large, powerful bipartisan coalition of legislators116 who criticized the Commission’s activism, proposed various measures to curb the agency’s authority, 117 and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act). 118 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. 119 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.120

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.121 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.122 As Congress considered bills in 1979 to limit the Commission’s powers, Congressman 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.123

The Commission, Frenzel concluded, was “a rogue agency gone insane.”124

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.”125

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.”126

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 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 ofstructural relief in non-merger cases.127 This was a shot across the bow of the FTC’s pending “shared monopoly”128 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.129 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.130

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 crazy (“insane”), as well.131 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.” 132 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.”133

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.134 Leading members of Congress demanded that the agency transform its competition and consumer programs or face extinction.135

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.136 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.”137 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.”138

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.139 In his appearances as FTC chair before 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. . . . 140

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.” 141 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.”142 McGee closed the proceedings with 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.”143

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. 144

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.” 145 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.” 146 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.”147

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 – our statutory powers.” 148 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.”149 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.”150 He said he and his fellow board members “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.”151

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal152 and petroleum refining industries.153 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.154 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.”155 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.”156

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. 157 Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors.158 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.159 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.160 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.161 In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.162

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 should do and how it should do it. As described below in Section IV.D., 163 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.164

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.165 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).166 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 1976.167 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.

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.168 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’sflaws 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.169

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.” 170 In 1987, in discussing Reagan-era federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced “the most lenient antitrust enforcement program in fifty years.” 171 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.” 172 Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, “enforcement ceased.”173

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.” 174 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.175

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe.176 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 disappeared.”177 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.” 178

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.179 A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.180

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.181 The Reagan administration 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. 182 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.183

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. 184 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.185 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.186 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.187

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.188 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.189

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 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.

#### Meatpacking deconsolidation’s key to food security

Luke 21 (Colonel Charles Luke, Army Strategic Plans Officer and Fellow with the US Army War College, “PERSPECTIVE: Hidden Security Dangers in the American Industrial Agriculture System,” Homeland Security Today, 5-14-2021, https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-hidden-security-dangers-in-the-american-industrial-agriculture-system/)

In unstable or war-torn regions, food security is a basic required element for national security stabilization. As a result, the United States and the United Nations spend billions of dollars providing food to the developing world. [1] In contrast, Western governments spend limited effort or funding on creating resilient and healthy agriculture systems to sustain food security for themselves. The COVID-19 pandemic exposed an ignored truth of the American agriculture system: While the U.S. agricultural system is able to produce more than enough calories for all U.S. citizens, the system may be less resilient than the third-world countries receiving aid. The U.S. food system is a fragile and completely overlooked, yet essential, element of the country’s national security.

The COVID-19 pandemic and efforts to minimize its impacts have cost millions of lives and billions of dollars in the U.S. and the world. The mitigation efforts highlighted a multitude of vulnerabilities in nations around the world, particularly in developed nations’ food systems. In the U.S., grocery stores ran out of toilet paper, bacon, and many other necessary food and commodities. Toilet paper is not a national security issue, but the ability to grow, process, and distribute food is an essential component of the U. S. government’s security oversight for the nation. In support of the fragile agriculture system, former President Donald Trump used the authority of the National Defense Act of 1950 and a series of executive orders to declare agriculture workers and meat industry employees as essential workers. [2] The effects of the COVID-19 pandemic provide a unique opportunity to examine the fragility of America’s industrialized agriculture system, specifically the meat industry, and provide military specific recommendations.

A FRAGILE SYSTEM

COVID-19 has fundamentally shifted Americans’ access to and availability of food. Before the pandemic, approximately half of the money Americans spent on food was made outside of the home. Since the pandemic began, that number has dropped to approximately 10 percent.[3] Americans are eating less seafood and more snacks, bourbon consumption is up, higher-end wines are down. Hunger is at a historic high not seen since pre-WWII. Farmers worldwide are struggling with the virus and the economy.[4] The vulnerability of the American agriculture system lies in the consolidation of systems at all levels. American agriculture producers have become highly efficient by consolidating over time into corporate farms and single-source distribution systems.[5] This increased system efficiency comes at the cost of overall resiliency. At its base, the industry is dependent on vulnerable workers, monoculture products, and an intricate national distribution system. While this enables consumers nationwide to buy tomatoes from California inexpensively in February, it is a delicately balanced system. From field to fork, each node has proven vulnerable to the COVID-19 pandemic food supply and distribution frailty.

FARMERS AND FIELD HANDS

American farmer owners and field workers are both vulnerable in the industrialized agriculture system. Since WWII, the general trend in farming has been toward fewer but bigger. Even today the U.S. Department of Agriculture seems to advocate for larger and less diversified farmers, at the expense of smaller farmers. At a dairy conference in 2019, former Secretary of Agriculture Sonny Perdue (2017-2021) stated, “In America the big get bigger and the small go out. I don’t think in America, for any small business, we have a guaranteed income or guaranteed profitability.”[6] This is a worrisome perspective from the senior advisor on agriculture policy. Farmers are vulnerable, as they rely on government crop subsidies, and compound their debt as cash dwindles. As relayed by Secretary Perdue, it appears the Department of Agriculture operates on a mandate of larger farms dependent on subsidies reliant on a large-scale distribution system. For example, to offset possible damage from the Trump administration’s trade war with China the United States Department of Agriculture (USDA) created the Market Facilitation Program (MFP). The Environmental Working Group (EWG) determined that “the top 1 percent of farms, the largest agribusinesses in the country, received 16 percent of MFP payments, or more than $3.8 billion. The average total payment for a farm in the top 1 percent was $524,689.” Furthermore, the Coronavirus Food Assistance Program (CFAP) for farmers hurt by the pandemic-induced economic downturn yielded “the top 1 percent of farms got 22 percent of CFAP payments, for an average payment of $352,432.”[7] The overall effect is a weakening of the American food system, as it is reliant on a range of external supports. COVID-19 demonstrated the vulnerability of these external supports. A system geographically dispersed over long distances and reliant on a small number of individuals in questionable economic conditions fundamentally lacks resiliency under any emergency circumstances. Financially secure regionally dispersed farms growing diverse crops are significantly better at providing a resilient source of food for communities.

American writer and farmer Wendell Berry has prophetically advocated for the small farmer system for decades. In an interview in December 2020, Berry argued that the lack of food in grocery stores as the pandemic hit resulted from the decline in the number of local farmers: “If we had kept all the people, we would have been ready for this plague.” According to the 2017 U.S. Agriculture Census released in 2019, the total number of farms and ranches has dropped 3% since 2012. The report data showed there were about 273,000 small farms (1-9 acres) in 2017, representing just 0.1% of all farmland in the U.S. The report added that 85,127 large farms (2,000 or more acres) made up nearly 60% of total farmland.[8]

Larger dairy farms inevitably mean a system less geographically dispersed, larger environmental challenges with farm waste, and a less resilient system. The Institute for New Economic Thinking detailed these impacts in a recent report on the pandemic’s effects on dairy farmers, Spilt Milk: COVID-19 and the Dangers of Dairy Industry Consolidation: “The COVID-19 pandemic led to the collapse in commercial demand as restaurants, caterers, schools and other institutional customers were forced to close. Dairy plants serving supermarkets and grocery stores were already operating at close to full capacity when the coronavirus struck. Capital equipment specialized to produce for commercial customers were incapable of producing for consumers served by supermarkets or food banks. Some farmers had no choice but to dump milk.”[9] For the smaller dairy farmers, international (primarily Canadian) competition and price fluctuations are daily economic challenges.

The old tobacco program is a successful economic model that could provide a model to support local farmers without a reliance on subsidies, including the dairy industry. Berry advocates looking at models that do not require farm subsidies, and cites the tobacco programs from early last century as an example: “the tobacco program combined price support with production control based on parity.”[10] The farm subsidy model barely supports local farmers, often encourages debt, and supports reliance on large agriculture corporations. While attractive sounding in Congress, farm subsidies have evolved over time and now “only large producers can take advantage of them. Out of all the crops that farmers grow, the government only subsidizes five of them: corn, soybeans, wheat, cotton, and rice.”[11] Such programs provide predictability to small farms, restrict overproduction, and encourage local production. In his book, The Art of Loading Brush, Berry argues, “The principles of the Burley Tobacco Growers Co-op – production control, price supports, service to small as to large producers – are not associated with tobacco necessarily, but are in themselves ethical, reputable, economically sound, and applicable to any agricultural commodity.”[12] Programs for other crops would help reduce reliance on subsidies and encourage smaller local farming.

Farmers also face challenges with labor. In the United States, there is an extreme shortage of domestic farm workers.[13] Americans generally have no desire to work as hired hands in the farm industry. Farmers across the United States rely on immigrant workers to do the majority of the hands-on field harvesting. Efforts to source domestic American labor in the fields have largely failed. Even during the last recession farmers’ efforts to recruit domestic labor failed, as “the work was too hard.”[14] The result is that most of the domestically grown food Americans consume is not planted or harvested by Americans.

According to the USDA roughly half of hired crop farmworkers lack legal immigration status.

Even the USDA recognizes that “legal immigration status is difficult to measure: not many surveys ask the question, and unauthorized respondents may be reluctant to answer truthfully if asked.”[16] This means that the number of undocumented farm workers might exceed what is reported. The next highest category of farm worker is the temporary immigrant covered under the H-2A visa program. This program enables farms to apply for temporary immigrant status based on need and “employers must provide housing for their H-2A workers and pay for their domestic and international transportation.”[17]

Migrant workers have no long-term reliable income or real protections. Their housing and annual incomes are never predictable, and they are under constant threat of deportation. Yet, as a result of the pandemic, they suddenly became “essential.”[18] These workers are essential to almost every aspect of the American agriculture system, but lack of status is a weakness to the very base of the system. That the majority of the food produced in the U.S. relies on an unsecure foreign source of labor is precarious and vulnerable. Without reliable workers, agricultural produce cannot be planted, harvested, and prepared for distribution from the fields.

AN INTRICATE NETWORK

The U.S. agriculture system is highly reliant on an intricate transportation and distribution system. Very few farms are self-sufficient. From seed distribution, pollination, field workers, and the delivery to supermarkets, every aspect of our food is dependent on cross-country movements.

To pollinate most crops, bees are transported across the country on a strict schedule. These bees are reliant on a small corps of beekeepers and the ability to move them continuously across the country regardless of disease or quarantine hot spots.[19] Whole crop species are affected if the bees are delayed or unable to pollinate. The transportation of bees is one small yet significant example of how dependent farming is on the transportation system.

Once the produce leaves the fields it depends on a complex packaging and transportation system. Food prepared for restaurants is not ready for grocery store shelves. Even while there were shortages in grocery stores, food meant for restaurants was rotting in warehouses.[20] As a leading consumer and retail consultant described, “Companies that produce, convert, and deliver food to consumers and businesses face a web of interrelated risks and uncertainties across all steps in the value chain – from farmers to end-customer channels. Food-service suppliers, for example, faced abrupt order cancellations across their entire customer bases. That left many of them with excess stock that they couldn’t easily redirect to consumers because of packaging-size mismatches.”[21]

Most seeds are proprietarily owned, and farmers cannot save seeds from year to year. As cited in a 2009 report and article, “The proprietary seed market (that is, brand-name seed that is subject to exclusive monopoly – i.e., intellectual property) now accounts for 82% of the commercial seed market worldwide.”[22] This means that farmers cannot save the seeds from year to year, and they must purchase new seeds from the corporations annually. These are manufactured, proprietary seeds, for which the farmers do not have any production rights. Any disruption to the centralized production and distribution of seeds would be catastrophic to the entire industry and mean worldwide starvation.

MONOCULTURE: A LACK OF DIVERSITY

Agricultural industrialization’s increased efficiencies have led to historical systematic monoculture in the variety of produce grown and animals raised. Beyond the well-documented environmental impacts – pesticide toxicity, water pollution, erosion, and soil depletion – monoculture is fragile in its lack of biodiversity. [23] This lack of diversity is twofold: types of varieties within a species and the overall specialization of large farms.

A 2019 UN report notes that of the 6,000 plant species cultivated for food, just nine account for 66% of total crop production.[24] Genetic diversity in farming is important for resiliency and ensuring food security. By growing fewer varieties of essential crops such as corn, tomatoes, and potatoes, the genetic pool for adapting to disease and climate change is lost. Loss of genetic diversity is a well-documented scientific concern for long-term food security.[25] The loss of this diversity is largely driven by proprietary seed production of large biotech companies such as Monsanto. “Seed laws” have evolved that severely restrict local farmers from saving their own seeds, losing the local sources, and forcing farmers to buy from a handful of companies. As Grain, a nonprofit organization supporting local farmers, pointed out, “Today, just 10 companies account for 55% of the global seed market. And the lobbying power of these giants – such as Monsanto, Dow or Syngenta – is very strong. As a result, they have managed to impose restrictive measures giving them monopoly control.”[26] The monopolization and concentration of seed rights is another contributing weakness factor to the system.

The lack of diversity extends to animals raised as food sources as well. Chickens have been bred to unnatural growth specifications with just two main varieties where once American farms raised hundreds of different types of chickens. This lack of diversity in commercial meat chickens is of particular vulnerability if a disease or virus were to spread throughout the industry, such as the avian flu (H51N) outbreak in 2005. IA 2008 Purdue University report noted, “Despite the fact that hundreds of chicken breeds exist … today’s commercial broilers descend from about three lines of chickens, and poultry used in egg production come from only one specialized line.”[27] This lack of diversity in commercial meat chickens is of particular vulnerability if a disease or virus was to spread throughout the industry that millions of people rely on for food. The hog and beef cattle industry has followed suit as well, but to a slightly lesser extent, as there are more laws and regulations governing their raising and slaughter.

The lack of diversity extends from the genome to the farm itself. It is common for farms to dedicate thousands of continuous acres to one food crop. This industrial system is more efficient and profitable, but requires chemical resources that weaken the supporting biological infrastructure. Many of these large farms have evolved to grow single commercial food crops, largely corn and soybeans. Neither of these two commercially grown crops produce food that is directly edible for humans, adding to the production network to process them. In general, corn and soybeans are considered feed crops for industrially raised farm animals. Corn is also used to make ethanol, which according to the USDA “now accounts for nearly 40 percent of total corn use. While the number of feed grain farms (those that produce corn, sorghum, barley, and/or oats) in the United States has declined in recent years, the acreage per corn farm has risen.”[28] Put simply, even though there is plenty of farmland, we are not producing food we can eat now, or could eat in an emergency. Most farm areas, if under strain or in a crisis, could not feed themselves. The combination of crop specialization, fewer farmers, and a decline in grocery stores has created farm deserts in farm country. As noted by the New York Times, “Farm towns … that produce beef, corn and greens to feed the world are becoming America’s unlikeliest food deserts as traditional grocery stores are forced out of business by fewer shoppers and competition from dollar-store chains.”[29]

THREATS

Agricultural monocultures “putting all the eggs in one basket” could be prime targets for natural blights and manufactured diseases. Just as the DNA of crops and animals have been manipulated to increase yield and growth rates, viruses could conceivably be tailored to target specific seeds and animals raised largely in the United States or by specific companies. With gene editing technology such as CRISPR “clusters of regularly interspaced short palindromic repeats,” an avian flu tailored to American chicken breeds or specific potatoes is technically possible.[30] While the Chinese military is gaining headlines for using gene editing on its own troops, the gene editing of viruses is a possible long-term threat to American industry and agriculture.[31]

THE MEAT LOCKER: WHERE’S THE BEEF?

Consolidation of the meat industry makes the production and distribution of meat particularly fragile. This fragility became clear during the first few months of COVID-19 when many states put “lockdowns” in place for manufacturing and production. The New York Times reported in April 2020 that “meat plants, honed over decades for maximum efficiency and profit, have become major ‘hot spots’ for the coronavirus pandemic, with some reporting widespread illnesses among their workers. The health crisis has revealed how these plants are becoming the weakest link in the nation’s food supply chain, posing a serious challenge to meat production.”[32]

Meat processing has consolidated over time. As of March, 2020, just four companies in the United States controlled over 80% of beef production.”[33] These meat factories, while well-regulated by the USDA, are crowded, loud, and cold, making virus prevention very difficult, and hence highly susceptible to employee-to-employee contamination. While there is little chance of foodborne illness transfer to the meat in the factories, meat processing plants are an employee contagion potential disaster. Many of the meat processing plants are staffed by immigrants who do not speak English or have access to healthcare, which compounds the challenge.[34] This combination does not engender trust with the government or the companies, making infection reporting much less likely.

The most significant limitation to local processing is adequate facilities as defined by the USDA. Current USDA regulations make it difficult and costly for local producers to process and sell meat other than directly to the consumer. Chef and butcher David Wells owns Smoke and Pickles Artisan Butcher shop in Mechanicsburg, Pa., which specializes in locally sourced meats. Wells reported that in order to butcher and sell locally raised meat to local grocery stores and restaurants, his facility would need to meet overly strict standards, pay a USDA inspector for the day, and provide a dedicated office with dedicated restroom for the inspector.[35]

For small to medium processors that have been able to navigate the USDA regulations, the trickle-down effects of COVID-19 have increased demand significantly. For example, Appalachian Meats, one of the only meat processors in Eastern Kentucky that is USDA compliant and conducts custom processing for retail and wholesale, cannot keep up with demand and has experienced a 50% increase directly attributable to COVID-19. As of December 2020, hog processing was scheduled over four months out and beef processing was scheduled over 12 months out. According to the owner Marlin Gerber, they could schedule 24 months out with the current demand.[36]

Even in light of the regulatory restrictions and producers’ backlogs, individual farmers are working to fill the gap with traditional methods. A result of the pandemic was the practice of selling off pigs they were not able to butcher to novice farmers and home butchers. This, combined with the small but growing niche of heritage breed hog raising by small local farmers, further stretched a network of small-scale meat butchers already hamstrung by USDA and Food and Drug Administration regulations geared towards the larger meat industry. The result created an abundance of hogs without knowledgeable people to harvest them.

The Kentucky Agriculture Commission recognized the facility limitations for local farmers, the system vulnerability, and in October 2020 Commissioner Dr. Ryan Quarles sent a letter to Kentucky Gov. Andy Beshear “requesting that he allocate $2 million from the Coronavirus Aid, Relief, and Economic Security (CARES) Act to expand meat processing in Kentucky and reduce reliance upon out-of-state meat processors.” Beshear accepted the proposal.

The issue drew bipartisan concern nationally, as Sens. Kevin Cramer (R-N.D.) and Ron Wyden (D-Ore.) sought regulatory relief from Agriculture Secretary Sonny Perdue. “When high-capacity processing facilities experienced outbreaks amongst employees, operations were forced to shut-off or slow down production, leaving the rancher with livestock they could not move and the consumer with either empty grocery shelves or overpriced products. These pitfalls can be avoided in the future if we take action today to promote a diversified food supply chain.”[37] The senators called for streamlined regulations to remove barriers to small- and medium-sized meat processors.

There is very little accommodation in USDA and most state regulations for local butchers. The current system is not tiered; the requirements are the same for the large-scale producers (40,000+ chickens a day) as for the small local processors. The provisions for cured meats (more profitable for butchers) are even more restrictive, requiring equipment and plans that have little to do with actual food safety. Diversifying meat processing by geography, scale, and product builds resilience in the system. It will also enable local economies and communities to establish niche character products, such as regions in Europe that have specialty cured meats. Increasing the numbers of local producers will not replace the large industrial meat factories, but will increase variety and quality. This would also increase access to meat products in times of food shortages or transportation issues within the fragile system.

ON FOOD STRATEGY: A MILITARY PERSPECTIVE

The security of the nation’s food supply is a national security concern that has been given little attention or planning. Even Wendell Berry, a lifelong pacifist, has begun thinking of food as a security issue, stating, “It seems preposterous to me that we should maintain an enormously expensive armory of weapons… ready to defend a country in which most people live far from sources of their food.”[38] Attention and planning for the security of the food system includes the security of the country and how to sustain military power without access to the current fragile system.

“Defending the Homeland” is a central theme of the 2018 Defense Strategy,[39] and securing America’s infrastructure is critical and a responsibility under Titles 10 and 32. Few military plans incorporate a full breakdown of the U.S. transportation and agriculture system. COVID-19 has exacerbated America’s food security crises, in terms of access to food. A Northwestern University report from summer of 2020 found that due to COVID-19 “food insecurity has doubled overall, and tripled among households with children.”[40] A stricter national lockdown or disruption to the system would logically exacerbate food insecurity across the United States. Civil unrest is a likely result for which state and national officials should consider now to plan the advent of widespread food insecurity.

The American military preparation plans include disruptions to energy and water vulnerabilities. To this end, the Army’s energy and water goal for installations is a minimum 14-day independence from local sources to reduce risk to critical missions.[41] Given the food system vulnerabilities, there should be a similar requirement for sustenance. In a review of the military response to COVID-19, Tell Me How This Ends: The US Army in the Pandemic Era[42] highlights the need to develop a long-term solution for sustaining soldiers in garrison during emergencies and recommends stockpiling food supplies. In planning for a likely scenario of further disruptions to the agricultural supply, the long-term solutions need to apply beyond garrison to include all service members and their families, on and off post, at home and abroad. The solutions should go beyond merely stockpiling, and include deliberate planning for building resiliency into garrison food supplies through increased sourcing from the local economy.

The USDA is not listed as a military interagency partner in the National Defense Strategy, although the Defense Logistics Agency (DLA) partners on a variety of supply issues that includes food for schools. While most military garrisons are located in rural communities with accessible farm economies, the DLA’s Subsistence Supply Chain currently incorporates only about 15% of local products into dining facilities and schools.[43] The Department of Defense should establish policies that enable local managers to develop relationships with state cooperative agencies and facilitate connections to local farmers. Dining facilities should also be encouraged to reserve space for local products and producers. Most state agriculture commissions also have programs dedicated to promoting local farming efforts, and they could team with military installations to establish and strengthen ties to local farmers.

Military installation land and resident populations could serve as a bridge to the local farming communities building resilient networks. To start, installations should host farmers’ markets and allow Community Supported Agriculture (CSA) on post. Current agreements with the Army and Air Force Exchange Service (AAFES) and Defense Commissary Agency (DECA) restrict access to these local programs. Some smaller military depots allow animal grazing and farming, but there is no coordinated policy to encourage agriculture use on installations. The Department of Defense should establish policies to encourage agricultural use of unused land. Most installations worldwide spend millions of dollars on grass cutting and field maintenance. Ft Knox, for instance, spends $2.4 million annually on lawn maintenance of non-residential areas.[44] Local farmers could maintain that same land generating hay and or crops for local use. Goats and sheep are growing in popularity as an alternative to grass cutting around the world.[45] Grazing versus cutting is more environmentally friendly in several ways, to include fire prevention, and could serve as a local meat source. Allowing local farmers to cultivate unused land and graze animals improves connections with local farmers that would be needed in times of emergency.

TO WHAT END

Former U.S. Secretary of Agriculture Sonny Perdue said that “food security is a key component of national security, because hunger and peace do not long coexist.”[46] While an accurate statement and an admirable start, his focus on food security was clearly on making farms bigger, and his priorities never addressed local farming. A fragile system reliant on such a complex centralized network system can never be truly secure. Italy provides a unique example as to a hybrid system that incorporates large-scale agriculture and locally sourced products. While hardest hit in Europe, Italy did not have the empty shelves or supply disruptions to the extent experienced in the U.S. This is largely due to town markets and locally sourced butcher shops common across the country. For example, Macelleria I Buoni Sapori, a butcher shop in Northern Italy, continued to supply its vast array of products because even the chickens, beef and hog products were locally sourced and prepared in the shop.[47] Italy’s regulations favor the smaller producer and local butcher. This combination of protectionism and support could be re-created here in the United States.

It is imperative for national security to make a deliberate effort to encourage local produce, livestock raising and meat processing. In light of the COVID-19 pandemic the issue is truly a national and strategic concern. President Joseph R. Biden’s pick for Agriculture, Tom Vilsack, does not appear any different from his predecessor. Vilsack previously served as Agriculture secretary in the Obama administration, and was lauded by big agriculture on the announcement of his selection again. His critics specifically point to his lack of support for local farms.[48]

As COVID-19 “hot spots” of virus transmission broke out in California and Washington state, whole counties were shut down to prevent the spread of the virus. While these disruptions were temporary, an uncontrolled outbreak or more severe disaster would significantly impact farm production and transportation of food across the country resulting in extreme shortages, starvation, and civil unrest. A prolonged emergency that restricts movement and access to food will quickly evolve into a domestic security crisis.

In light of COVID-19, both the U.S. Department of Agriculture and Department of Defense need to look at protecting the nation’s food supply in a new and holistic perspective to prepare for the next serious disruption. The Department of Defense can start building resiliency at the local levels. The new administration must focus on national agriculture policies and military preparedness plans that need significant review to prepare America’s food system and to prevent future disasters.

#### Extinction

Castellaw 17 (John Castellaw, 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.

### Congress CP

#### The Congress of United States should:

#### impose a general sunset on antitrust exemptions for regulated industries after five years,

#### order the GAO to report on the continuing need for such exemptions,

#### require the Senate and House Judiciary Committee to hold hearings on the exemption if the GAO finds its continued existence warranted,

#### require that the congress forward a law if exemption should be renewed.

#### Solves the aff.

Anne McGinnis, JD Michigan, ’14, "Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: a Proposal for Reform," University of Michigan Journal of Law Reform 47, no. 2 (Winter 2014): 529-[vi]

Once in place, exemptions are rarely revisited,112 and powerful industries continue to lobby for new ones.113 For example, regardless of whether the McCarran-Ferguson Act remains warranted or not, every attempt to repeal the Act has failed. In fact, every recent attempt to reform any current statutory exemption has failed.114 The harm, or, at the very least, the ineffectiveness of many of these statutory exemptions is neither partisan nor heartily contested by antitrust experts.115 But efforts to repeal exemptions rarely gain traction. Interest groups advocating for an exemption may be powerful and strongly motivated, but groups advocating against an exemption are often fragmented and have little stake in pursuing repeal."'1 Any effective solution must do two things. First, it must provide a way to review the statutory exemptions currently in place to determine whether they are still necessary and beneficial to society. Second, it must switch the default from one where a statutory exemption, once enacted, remains on the books until Congress acts affirmatively to repeal it to one where a statutory exemption is presumed to expire after a short period of time unless Congress believes that it is still necessary. Further, any solution must be an efficient use of congressional time and must break the institutional stagnation that has prevented the review and repeal of statutory exemptions to date. This Note's proposed solution is a federal law containing four provisions. Specifically, this Note urges Congress to adopt legislation that (1) imposes a general sunset on all statutory exemptions after five years, (2) orders the Government Accountability Office (GAO) to prepare a report on the continuing need for each statutory exemption currently in place, (3) requires the Senate and House Judiciary Committees to hold hearings on any exemption that the GAO finds still warranted, and (4) provides that, if the committees find that an exemption should be renewed after the hearings, they forward a law overriding the sunset provision for that exemption to the floor of each house to be voted on, signed by the President, and put into effect.117 A. The Sunset Provision Perhaps the most critical aspect of this Note's proposed reform is the five-year general sunset provision that would apply to all statutory exemptions currently in place.118 This provision switches the default from one where every exemption remains in effect indefinitely to one where irrelevant and harmful exemptions are automatically stripped from the law absent an affirmative act by Congress. This provision will force the proponents of a statutory exemption to once again make their case for why the exemption is appropriate. B. The GAO Report The provision requiring a GAO report on each existing exemption is also critical. Few, if any, hearings have been held on the vast majority of exemptions currently in place. Many exemptions have not been reconsidered in decades, and no one knows how effective most statutory exemptions actually are in accomplishing their stated goals. To reform this area of the law, more information is desperately needed. The purpose of the GAO report is to uncover this information. The GAO report should ask and answer several questions. First, it should determine whether the conduct immunized by a given statutory exemption could result in antitrust liability today. As explained in Part I, antitrust law has changed immensely over the past sixty years in response to evolving economic theory and market conditions. Many behaviors that were once per se illegal are now firmly analyzed under the rule of reason and rarely, if ever, found to violate antitrust laws." 9 Even many behaviors formerly deemed anticompetitive under the rule of reason are, when explained through modern economic theory, likely to be found legal.120 If the conduct exempted would not actually violate modem antitrust law, then the exemption is unnecessary and should not be renewed.121 Second, the GAO should determine if the behavior covered by the exemption actually occurs today, regardless of whether it would be subject to antitrust liability. Some amendments, like the Anti- Hog Cholera Serum Act'2 2 and parts of the Defense Production Act, 23 are irrelevant today not because the conduct would be permissible under contemporary antitrust laws but because the problem they were designed to address no longer exists. 24 Conduct that does not occur does not deserve an exemption, and any existing exemption should be allowed to lapse. Even if future conduct might warrant an exemption, it is better to repeal the current exemption and require Congress to enact a new one that is tailored to the circumstances at that later date. Third, the GAO should ask what justifications were given for the exemption's original passage. Was the exemption passed to remedy some apparent market failure? Was it designed to protect conduct that Congress deemed socially desirable, despite its anticompetitive effect? Was it designed to replace antitrust regulation with direct governmental regulation? Was it purely a reaction to an administrative or court decision finding liability where Congress believed the behavior was in fact procompetitive? To appropriately judge the success or failure of any given exemption, it is essential to know the intent behind its enactment. Fourth, the GAO should ask, in light of the findings made in the third inquiry, whether the exemption has served its intended purpose and whether it is still needed today. Has the exemption successfully achieved the aims that it was ostensibly enacted to achieve? Has it actually fostered the socially desirable behavior that it was designed to encourage? Has the exemption enhanced or harmed consumer welfare? What does the affected market look like today in comparison to when the exemption was passed? If the exemption was enacted to enable direct regulation, is there still a regulatory scheme providing oversight? C. Hearings and Renewal of Recommended Exemptions Only The GAO would then compile this information in a report and clearly recommend whether or not to renew the given exemption. This report would be submitted to the Senate and House Judiciary Committees. If the report recommends that a given exemption be extended, then both committees must, under this Note's proposed law, hold a hearing on the exemption. If, after the hearing, the committees find that the exemption should be renewed, then the committees must forward a provision overriding the sunset for the exemption to the floor of each house to be voted on and signed by the President. In contrast, if the report recommends that the statutory exemption be allowed to expire, and Congress does not decide on its own to hold hearings or override the sunset provision, then the exemption will expire at the end of the five-year sunset period. D. Summary of the Reform Proposal This reform is not perfect. It requires Congress to act-a requirement not easily fulfilled in today's era of partisan deadlock. Moreover, it places a heavy burden on the GAO and undoubtedly comes with costs, some of which will go toward studying exemptions that, for all practical purposes, cause no harm today. However, many statutory exemptions currently in effect are undermining the competitiveness and efficiency of the United States economy and, to date, no piecemeal reform has worked. Therefore, this Note suggests a bolder, most holistic approach. This reform allows non-partisan experts in antitrust law to examine existing exemptions and make recommendations regarding their continued utility. It then places the burden on supporters of an exemption to demonstrate, to the GAO and to Congress, why the exemption is still necessary. Because this solution requires minimal congressional action, it will hopefully limit the risk of political deadlock. Further, because it would mandate full committee hearings only on exemptions that remain useful, it would allow the docket of exemptions to be cleared with little wasted congressional time. Additionally, because the solution would require Congress to act affirmatively to retain a statutory exemption, the default would switch from perpetuating every exemption-regardless of effectiveness- to automatic sunset of all exemptions absent clear congressional intent to preserve specified ones.

#### The plan crushes rule of law and democracy promotion, the counterplan revives it – lack of congressional review is nontransparent, unaccountable and technocratic.

Spencer Weber Waller, Chair of Competition Law @ Loyola University of Chicago, ’19, "Antitrust and Democracy," Florida State University Law Review 46, no. 4 (Summer 2019): 807-860

Professor Harry First and I examined the democratic underpinnings of antitrust law in our 2013 article Antitrust's Democracy Deficit.35 In that article, we explained how the dramatic decrease in "antitrust's political salience," until very recently, affected the "antitrust enterprise," and "connect[ed] this shift to our concern for the political values that we believe underlie" all forms of competition law.3 6 "We connect[ed] free markets with free people, favoring open markets, . . . the opportunity to compete, ... [and] ... the connection between free markets and democratic values and institutions."3 7 We also argued that "a balance of institutional power is necessary to advance the goals that free markets embody."3 8 We characterize [d] the result of this shift toward technocracy as antitrust's democracy deficit . . . draw[ing] upon the concept of a democracy deficit from the literature analyzing and critiquing the European Union (EU) and the World Trade Organization (WTO). The term has generally been used to refer to policymaking by unaccountable and nontransparent technocratic institutions far removed from democratic (or national) control.... The concern for democratic decision-making has also been reflected in a new interest in global administrative law and the importance of basic principles of transparency and due process as a way to control the administrative state. This interest in administrative law principles has likewise led to a closer examination of how well antitrust conforms to due process and institutional norms. Our concern over antitrust's move away from more democratically controlled institutions toward greater reliance on [unaccountable] technical experts [was] not just animated by a theoretical preference for democracy. . . . A preference for democratic institutions implicitly assumes that more democratically arranged institutions will, in general, produce preferable antitrust policies and outcomes. We think this is particularly true today, when the imbalance between democratic control and technocratic control has put antitrust on a thin diet of efficiency, one that has weakened antitrust's ability to control corporate power.39 "[C]oncern about a democracy deficit does not lead to a full-throated embrace of . .. populism" in either its historical or more contemporary form. 4 0 One scholar has recently characterized antitrust populism as emphasizing social divides by using exaggerated claims. 41 He goes on to describe both a historical liberal strain of antitrust populism that is pro small business, and a more recent dominant conservative populist strain that questions the efficacy of antitrust itself.4 2 In Antitrust's Democracy Deficit, Harry First and I express our favoring of antitrust enforcement conducted by knowledgeable and committed public servants deciding cases in accordance with the law and due process, rather than directly by public opinion or the ballot box. 4 3 "Rather, we think that by redressing the democracy deficit we can move the needle back toward policies that reflect more general political understandings and views of antitrust policy." 44 These policies would improve the institutions and outcomes for antitrust law in the process. 45 First and I began our Article, Antitrust's Democracy Deficit, by charting the democracy deficit as shown through the conduct of the major antitrust system institutions, such as the courts, Congress, and public enforcers and by comparing the state of antitrust enforcement in the United States with the evolving enforcement regime found in Europe. 4 6 Second, we examined the link between technocracy and ideology, in particular, how a technocratic approach supports a radical laissez-faire ideology for antitrust enforcement. 47 First and I concluded our article with our thoughts on why antitrust would benefit from increased democracy. 4 8 This article expands on that work in an important way. The question of whether and how the promotion of democracy is an instrumental goal of antitrust law is an important one. There is an equally important issue of how antitrust can be enforced in a democratic manner (reflecting the values of a democratic market based society, as is the case in the countries belonging to the Organization for Economic Co-operation and Development) regardless of which values any particular individual or society believes are paramount in the antitrust laws themselves. That is the issue discussed below.

#### Extinction.

George Eaton 20. Senior online editor of the New Statesman. Citing Noam Chomsky, Laureate professor in the Department of Linguistics at the University of Arizona and professor emeritus at MIT, Ph.D. in linguistics from Penn. “Noam Chomsky: The world is at the most dangerous moment in human history”. The New Statesman. Sept 17 2020. https://www.newstatesman.com/politics/2020/09/noam-chomsky-the-world-is-at-the-most-dangerous-moment-in-human-history

Noam Chomsky has warned that the world is at the most dangerous moment in human history owing to the climate crisis, the threat of nuclear war and rising authoritarianism. In an exclusive interview with the New Statesman, the 91-year-old US linguist and activist said that the current perils exceed those of the 1930s. “There’s been nothing like it in human history,” Chomsky said. “I’m old enough to remember, very vividly, the threat that Nazism could take over much of Eurasia, that was not an idle concern. US military planners did anticipate that the war would end with a US-dominated region and a German-dominated region… But even that, horrible enough, was not like the end of organised human life on Earth, which is what we’re facing.” Chomsky was interviewed in advance of the first summit of the Progressive International (18-20 September), a new organisation founded by Bernie Sanders, the former US presidential candidate, and Yanis Varoufakis, the former Greek finance minister, to counter right-wing authoritarianism. In an echo of the movement’s slogan “internationalism or extinction”, Chomsky warned: “We’re at an astonishing confluence of very severe crises. The extent of them was illustrated by the last setting of the famous Doomsday Clock. It’s been set every year since the atom bombing, the minute hand has moved forward and back. But last January, they abandoned minutes and moved to seconds to midnight, which means termination. And that was before the scale of the pandemic.” This shift, Chomsky said, reflected “the growing threat of nuclear war, which is probably more severe than it was during the Cold War. The growing threat of environmental catastrophe, and the third thing that they’ve been picking up for the last few years is the sharp deterioration of democracy, which sounds at first as if it doesn’t belong but it actually does, because the only hope for dealing with the two existential crises, which do threaten extinction, is to deal with them through a vibrant democracy with engaged, informed citizens who are participating in developing programmes to deal with these crises.”

### Court PTX DA

#### SCOTUS will narrow Chevron in AHA v. Becerra but they will decline to overrule Chevron in its entirety

Nachmany 21 [Eli Nachmany is a third-year law student at Harvard Law School, where he serves as Editor-in-Chief of the Harvard Journal of Law & Public Policy. Prior to law school, Nachmany worked in the White House Office of American Innovation as a domestic policy aide and as the Speechwriter to the U.S. Secretary of the Interior. 8-9-2021 https://www.yalejreg.com/nc/scotus-faces-a-chevron-decision-tree-in-american-hospital-association-v-becerra-by-eli-nachmany/]

The Supreme Court recently granted certiorari in American Hospital Association v. Becerra, a case that presents a question relating to so-called Chevron deference. Chevron USA v. NRDC was a 1984 case in which the Court held that an administrative agency’s interpretation of an ambiguous statute was entitled to judicial deference. But this controversial precedent has come under attack in recent years, with some Justices suggesting that the Court scrap Chevron.

Plenty of good arguments exist for overturning Chevron, but to do so in American Hospital Association, the Court will need to clear a few hurdles. American Hospital Association concerns the Department of Health and Human Services’ (HHS) interpretation of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. The law sets forth certain formulas for drug reimbursement rates; in 2018, HHS cut reimbursement rates to hospitals that participate in the 340B program based on an interpretation of the statute. The American Hospital Association has challenged the interpretation, while HHS claims that its interpretation is entitled to judicial deference under Chevron.

Chevron has become the target of intense criticism over the years. Some argue that deferring to an agency’s interpretation of a statute that it is charged with administering scrambles the separation of powers. Others point out that Chevron runs counter to the Administrative Procedure Act, which instructs courts to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” And still others urge that Chevron offends due process, given the systemic advantage it confers upon the government in regulatory litigation.

But is American Hospital Association the proper vehicle for overturning Chevron? Three main obstacles block the way toward the overturning of Chevron in the case. The first is the Court’s resolution of an additional question that it asked the parties to brief, concerning the reviewability of HHS’s interpretation. The second is the Court’s potential interest in a sort of Chevron exceptionalism for interpretations about appropriations provisions. And the third is the possibility that the Court itself is just not ready to overturn Chevron, instead preferring an alternate path even if it reaches the question.

For starters, the Court could stop short of the Chevron question altogether if it finds that the agency action at issue in the case is unreviewable. The Court has long held that administrative action embodies a presumption of reviewability. Essentially, the Court assumes that a given agency action is reviewable unless a statute precludes judicial review or the court has “no law to apply” in evaluating the agency’s action. The presumption of reviewability may also be a check against broad agency discretion; some judges find such discretion—as the recent revival of interest in the nondelegation doctrine evinces—constitutionally dubious.

But Professor Nicholas Bagley has called the presumption of reviewability itself into question. In a recent Harvard Law Review article, Professor Bagley argued that the presumption has no basis in history, positive law, the Constitution, or sound policy considerations. Professor Chris Walker has made the point that because of the longstanding nature of the presumption, the Court is unlikely to shift gears in American Hospital Association. Still, the Court has asked the parties for briefing on the question whether HHS’s action is reviewable. This presents the Court with the opportunity to (1) find that the statute at issue in this case falls into one of the clearly established exceptions to the presumption of reviewability, (2) cabin the presumption somewhat, or (3) draw on Professor Bagley’s work to eschew the presumption altogether. Any of these three options would allow the Court to resolve the case on non-Chevron grounds.

Next, the Court might decline to apply Chevron deference for a reason that is particular to the facts of this case. While jurists and commentators often speak of Chevron in general terms, some have posited that certain areas of public administration should obtain a sort of Chevron exceptionalism. As it pertains to American Hospital Association, Professor Matthew Lawrence has written that “[c]ourts should adopt a bifurcated approach to the application of Chevron for appropriations that disfavors deference for permanent appropriations provisions, but not for annual appropriations provisions.” Because Medicare payment flows from a permanent appropriation of federal money, the argument goes, Chevron deference would be especially inappropriate for HHS’s interpretation of a Medicare appropriations provision. This is because, according to Professor Lawrence, deferring to agency interpretations of permanent appropriations provisions may do significant violence to the separation of powers and seriously encroach on Congress’s domain. The Court could resolve the case on these grounds, or even take a slightly broader view and find that Chevron is inapplicable in the appropriations realm as a general matter. Either way, such a result would likely produce a narrow holding applicable only to a subset of administrative action.

Finally, the Court could squarely answer the Chevron question and still refuse to overrule its precedent. The Court might (1) declare that the statute is clear and, therefore, Chevron deference does not apply; (2) issue a Kisor-esque decision that cabins Chevron’s general applicability but keeps the precedent on life support; or (3) simply reaffirm Chevron on stare decisis grounds and apply it to the present case. There is some overlap among these three doctrinal paths.

Beginning with the first option, Chevron itself set forth a two-step approach. At the first step, if Congress’s intent is clear, the Court must give effect to the clear statutory text. This part of Chevron is uncontroversial—if, for example, a statute commands that an agency “shall” do something, that agency’s interpretation that it “may” (and, by corollary, may not) do the thing would not be entitled to deference, because it conflicts with the clear language of the law. As such, if the Court finds the provision at issue unambiguous, it could answer the question presented in the negative without wading into the deference debate.

The second option laid out above uses the term “Kisor-esque” to refer to the Court’s recent decision in Kisor v. Wilkie. There, the Court was faced with the question whether to overturn Auer v. Robbins, which stands for the principle that courts must defer to agencies’ interpretations of their own ambiguous regulations. In Kisor, the Court upheld Auer, but significantly cabined its application. Writing for the Court, Justice Kagan explained that Auer deference is only proper when a regulation is “genuinely ambiguous,” determined after rigorous deployment of the full set of the canons of statutory interpretation. Moreover, the Court delineated a set of situations in which Auer deference would not come into play, even if the regulation was genuinely ambiguous—these include interpretations that create unfair surprise to regulated parties, interpretations that do not implicate the agency’s substantive expertise, and interpretations that do not reflect fair and considered agency judgment.

In a concurrence, Chief Justice Roberts supplied the key fifth vote for the Kisor majority. To be sure, he wrote that “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress,” citing Chevron. But in recent years, the Court has narrowed the set of situations in which Chevron applies, establishing what Professor Cass Sunstein once termed a “Chevron step zero.” Given what the Court did in Kisor, it would not be unheard of for the Court to come out a similar way in American Hospital Association, summarizing the step zero doctrine and declining to apply Chevron deference for any one of a host of reasons (perhaps because of the permanent appropriations issue, as described above), while leaving Chevron on the books.

#### The plan causes institutional balancing – SCOTUS couple’s the plan’s regulation with an equal and opposite pro-business ruling in AHA

Masters 20 (Brooke Masters, FT’s Chief Business Commentator and an Associate Editor, US Supreme Court adjusts to new tilt to the right, 12-10, <https://www.ft.com/content/16489a50-e828-4cc6-8d0d-a261c1f1f9d8>)

The US Supreme Court is having adjustment problems. The addition of three conservative appointees by President Donald Trump in four years has disturbed the balance and possibly destroyed the comity of America’s highest court. The arrival of Amy Coney Barrett in October, replacing the late Ruth Bader Ginsburg, gives the court a 6-3 conservative majority after decades of a 5-4 split or control by a moderate block.

A court that has been reliably pro-business for years will stay that way at a time when incoming president Joe Biden is expected to favour stricter regulation and labour rights. The court also appears poised to invalidate or sharply narrow social reforms and government programmes that are popular with the majority of Americans, including abortion rights, gay marriage and Obamacare.

Some of the justices cannot wait. Samuel Alito, long one of the most conservative, recently complained in a speech that the court’s landmark 2015 gay rights decision in Obergefell vs Hodges had made traditional views unacceptable. “You can’t say marriage is a union between one man and one woman,” he said. “Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry.”

The significance of Ms Barrett’s arrival was underscored last month when the court blocked New York’s Covid-19 related restrictions on public religious services, saying they violated the freedom to worship. Before Ginsburg’s death, the court had upheld similar rules in California and Nevada, holding that they were necessary to control the pandemic and did not treat religious gatherings differently from secular ones.

The New York ruling was also notable for its many sharply worded opinions. Trump appointee Neil Gorsuch declared bitterly it was “past time” to strike down such restrictions, writing: “Even if the constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”

The question now is not whether the court will move to the right, but how far. History shows that even though the justices are required to base their decisions on the constitution and legal precedent, popular opinion plays a role. After all, the court has no enforcement mechanism — it de­pends on the rest of government and the respect accorded to its rulings.

In the past, when Supreme Court rulings departed too far from public consensus, it has ended up adjusting. The best known instance is often described as the “switch in time that saved nine”.

In the 1935-36 terms, the justices capped a 40-year period of conservative rulings by striking down several New Deal statutes by 5-4 votes, drawing public opprobrium and a threat from then president Franklin Roosevelt to pack the court with additional liberals. While the bill was still pending, Owen Roberts changed sides — “switched” — and voted to uphold a Washington state minimum wage bill and continued to support regulation of business.

But liberals have seen the court shy away from confrontation as well. In 1954, in Brown vs Board of Education, the court invalidated segregated schools but put off immediate implementation, saying in Brown II a year later that states and school boards merely needed to act with “all deliberate speed”.

Chief Justice John Roberts has already shown he is deeply concerned with maintaining the Supreme Court’s institutional strength. For years, he has sometimes provided the liberals with a fifth vote on questions where he felt the court’s credibility could be at stake, including a 2012 ruling that turned back the first major challenge to the Affordable Care Act (ACA) that established Obamacare, and on cases regarding abortion rights and young immigrants last spring.

Supreme Court watchers observe that its history can place a powerful weight on members

#### Overruling Chevron wrecks emerging-tech regulation

Masur 7 – Jonathan Masur, Bigelow Fellow and Lecturer in Law, University of Chicago Law School, “Judicial Deference and the Credibility of Agency Commitments”, Vanderbilt Law Review, May, 60 Vand. L. Rev. 1021, Lexis

I. Administrative Flexibility: Temporal Adjustments and Judicial Entrenchment

Administrative agencies cannot function effectively if they do not possess substantial discretion to set agency policy. Agencies exist in large degree as institutional mechanisms for solving policy questions whose intricacies and difficulties exceeded the capacities of Congress itself. An agency that lacked the freedom to choose between competing policy solutions or the flexibility to adjust its regulations in the face of scientific or economic progress would be little more than a rigid executor of Congress's will, stripped of the expertise that made it an attractive repository of policy-making authority in the first instance. Consequently, a growing consensus of administrative law scholars has long favored granting agencies ever-greater authority to enact policy changes in concert with developments in the relevant markets and technologies. n8

Pursuant to this rationale, the Supreme Court has afforded agencies broad authority to alter extant regulations or select new policy courses. Under well-established law, an agency may discard a long-standing policy in favor of a novel one, provided that it offers a coherent rationale for its decision. n9 And if an agency's current interpretation of its empowering statute is not sufficiently capacious to permit the agency to pursue this new policy, the agency may adopt a reasonable new interpretation of an old statute without relinquishing the deference that it is due under Chevron's famous two-step formulation. n10

Yet, in the two decades after Chevron, one significant obstacle remained to an agency's ability to re-interpret ambiguous statutes and adapt to changing circumstances. Until 2005, the Supreme Court treated its statutory interpretation precedents - no matter the context and regardless of whether they had involved an agency interpretation and a judicial grant of Chevron deference - as absolute and decisive. Once a court had interpreted a statute, regardless of whether the agency had already had the opportunity to proffer its own interpretation, stare decisis controlled. An agency could only re-interpret if a court had never passed on the original interpretation, or if the agency could convince the court that the court had erred in its original interpretation, without reference to Chevron.

In 2005, the Supreme Court eliminated this final impediment. While deciding an otherwise mundane issue of statutory [\*1027] interpretation in National Cable & Telecommunications Ass'n v. Brand X Internet Services, the Court announced that Chevron henceforth would trump stare decisis: an interpretation of an ambiguous statute that ordinarily would be entitled to deference under Chevron would still receive that deference - and an agency would be permitted to revise a prior statutory interpretation - irrespective of anything that a court had ever said on the subject. Ambiguous statutes had become forever ambiguous; no court could settle their meaning. n11

A. Temporal Flexibility

Congress delegates power to agencies for a wide variety of reasons. Congress may find it politically infeasible to make some necessary decision because of significant negative political ramifications, and as a result it might seek to foist responsibility off on some other actor. Alternatively, there may be a faction within Congress that hopes to accomplish via the executive branch what it cannot achieve legislatively. n12

But Congress may also delegate power in order to harness the superior expertise of an agency actor and to bring to bear on a problem a set of scientific and technological knowledge and a breadth of experience that Congress does not possess. n13 In order for this delegation to be successful - indeed, in order for it to be meaningfully a "delegation" - it must afford the recipient agency some degree of "substantive flexibility": the agency must have the freedom, when analyzing the subject matter at the heart of the delegation, to choose from among a range of acceptable policies the one that it believes is best. Accordingly, the Supreme Court has granted administrative agencies wide substantive leeway to select among competing statutory interpretations - and thus among competing policies - via the familiar two-step process set forth in Chevron, pursuant to which courts must defer to reasonable agency interpretations of ambiguous statutes. n14

Moreover, courts and commentators have long realized that agencies possess comparative institutional advantages over Congress that surpass the mere application of expertise. By shifting policymaking responsibility outside of the legislative branch, Congress is also able to avail itself of the greater agility of administrative agencies in responding to changed circumstances or adapting to new [\*1028] policy concerns. Legislation is costly and time-consuming to enact, and Congress cannot always rapidly change course when confronted with novel problems or the imminent obsolescence of old solutions. n15 Agencies are more willing and able than Congress to tweak their policy agendas. Especially in the high-technology areas, this alacrity is invaluable to agencies' ability to act in the public interest.

In order to act effectively, then, agencies must possess flexibility not only in the substantive sense described above, but also in the "temporal" sense: They must be free to alter policies over time and adapt to changes in relevant technologies and markets. n16 Much like substantive flexibility (deference, really), temporal flexibility (which I will refer to simply as "flexibility") is the lifeblood of successful agency operation. Even minor changes in technology or markets can obsolete pre-existing regulatory regimes, and it likely would be prohibitively costly for Congress to respond to every minor circumstance by amending an agency's authorizing legislation. n17 Agencies need the authority to adjust policies in order to maintain their currency and efficacy, n18 and unwise judicial doctrines that deny agencies all significant policy flexibility would undoubtedly lead to regulatory stagnation. n19

#### Extinction

Tate 15 – Jitendra S. Tate, Associate Professor of Manufacturing Engineering at the Ingram School of Engineering, Texas State University, et al., “Military And National Security Implications Of Nanotechnology”, The Journal of Technology Studies, Volume 41, Number 1, Spring, https://scholar.lib.vt.edu/ejournals/JOTS/v41/v41n1/tate.html

All branches of the U.S. military are currently conducting nanotechnology research, including the Defense Advanced Research Projects Agency (DARPA), Office of Naval Research (ONR), Army Research Office (ARO), and Air Force Office of Scientific Research (AFOSR). The United States is currently the leader of the development of nanotechnologybased applications for military and national defense. Advancements in nanotechnology are intended to revolutionize modern warfare with the development of applications such as nano-sensors, artificial intelligence, nanomanufacturing, and nanorobotics. Capabilities of this technology include providing soldiers with stronger and lighter battle suits, using nano-enabled medicines for curing field wounds, and producing silver-packed foods with decreased spoiling rate ( Tiwari, A., Military Nanotechnology, 2004 ). Although the improvements in nanotechnology hold great promise, this technology has the potential to pose some risks. This article addresses a few of the more recent, rapidly evolving, and cutting edge developments for defense purposes. To prevent irreversible damages, regulatory measures must be taken in the advancement of dangerous technological developments implementing nanotechnology. The article introduces recent efforts in awareness of the societal implications of military and national security nanotechnology as well as recommendations for national leaders.

Keywords: Nanotechnology, Implications, modern warfare

INTRODUCTION

Advances in nano-science and nanotechnology promise to have major implications for advances in the scientific field as well as peace for the upcoming decades. This will lead to dramatic changes in the way that material, medicine, surveillance, and sustainable energy technology are understood and created. Significant breakthroughs are expected in human organ engineering, assembly of atoms and molecules, and the emergence of a new era of physics and chemistry. Tomorrow’s soldiers will have many challenges such as carrying self-guided missiles, jumping over large obstacles, monitoring vital signs, and working longer periods with sleep deprivation. ( Altmann & Gubrud, Anticipating military nanotechnology, 2004 ). This will be achieved by controlling matter at the nanoscale (1-100nm). A nanometer is one-billionth of a meter. This article considers the social impact of nanotechnology (NT) from the point of view of the possible military applications and their implications for national defense and arms control. This technological evolution may become disruptive; meaning that it will come out of mainstream. Ideas that are coming forth through nanotechnology are becoming very popular and the possibilities will in practice have profound implications for military affairs as well as relations between nations and thinking about war and national security ( Altmann J. , Military Uses of Nanotechnology: Perspectives and Concerns, 2004 ). In this article some of the potential applicability uses of recent nanotechnology driven applications within the military are introduced. This article also discusses how the impact of a rapid technological evolution in the military will have implications on society.

POTENTIAL MILITARY TECHNOLOGIES

Magneto rheological Fluid (MR Fluid)

A magneto-rheological-fluid is a fluid where colloidal ferrofluids experience a body force on the entire material that is proportional to the magnetic field strength ( Ashour, Rogers, & Kordonsky, 1996 ). This allows the status of the fluid to change reversibly from a liquid to solid state. Thus, the fluid becomes intelligently controllable using the magnetic field. MR fluid consists of a basic fluid, ferromagnetic particles, and stabilizing additives ( Olabi & Grunwald, 2007 ). The ferromagnetic particles are typically 20-50μm in diameter whereas in the presence of the magnetic field, the particles align and form linear chains parallel to the field ( Ahmadian & Norris, 2008 ). Response times 21 that require impressively low voltages are being developed. Recently, ( Ahmadian & Norris, 2008 ) has shown the ability of MR fluids to handle impulse loads and an adaptable fixing for blast resistant and structural membranes. For military applications, the strength of the armor will depend on the composition of the fluid. Researchers propose wiring the armor with tiny circuits. While current is applied through the wires, the armor would stiffen, and while the current is turned off, the armor would revert to its liquid, flexible state. Depending on the type of particles used, a variety of armor technology can be developed to adapt for soldiers in different types of battle conditions. Nanotechnology could increase the agility of soldiers. This could be accomplished by increasing mechanical properties as well as the flexibility for battle suit technology.

Nano Robotics

Nanorobotics is a new emerging field in which machines and robotic components are created at a scale at or close to that of a nanometer. The term has been heavily publicized through science fiction movies, especially the film industry, and has been growing in popularity. In the movie Spiderman , Peter Parker and Norman Osborn briefly talk about Norman’s research which involves nanotechnology that is later used in the Green Goblin suit. Nanorobotics specifically refers to the nanotechnology engineering discipline or designing and building nano robots that are expected to be used in a military and space applications. The terms nanobots, nanoids, nanites, nanomachines or nanomites have been used to describe these devices but do not accurately represent the discipline. Nanorobotics includes a system at or below the micrometer range and is made of assemblies of nanoscale components with dimensions ranging from 1 to 100nm ( Weir, Sierra, & Jones, 2005 ). Nanorobotics can generally be divided into two fields. The first area deals with the overall design and control of the robots at the nanoscale. Much of the research in this area is theoretical. The second area deals with the manipulation and/or assembly of nanoscale components with macroscale manipulators ( Weir, Sierra, & Jones, 2005 ). Nanomanipulation and nanoassembly may play a critical role in the development and deployment of artificial robots that could be used for combat.

According to Mavroidis et al. ( 2013 ), nanorobots should have the following three characteristic abilities at the nano scale and in presence of a large number in a remote environment. First they should have swarm intelligence. Second the ability to self-assemble and replicate at the nanoscale. Third is the ability to have a nano to macro world interface architecture enabling instant access to the nanorobots with control and maintenance. ( Mavroidis & Ferreira, 2013 ) also states that collaborative efforts between a variety of educational backgrounds will need to work together to achieve this common objective. Autonomous nanorobots for the battlefield will be able to move in all media such as water, air, and ground using propulsion principles known for larger systems. These systems include wheels, tracks, rotor blades, wings, and jets ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ). These robots will also be designed for specific military tasks such as reconnaissance, communication, target destination, and sensing capabilities. Self-assembling nanorobots could possibly act together in high numbers, blocking windows, putting abrasives into motors and other machines, and other unique tasks.

Artificial Intelligence

Artificial intelligence (AI) is a vast emerging field that can be very thought provoking. AI has been seen recently in a number of movies and television shows that have predicted what the possibility of an advanced intelligence could do to our society. This intellect could possibly outperform human capabilities in practically every field from scientific research to social interactions. Aspirations to surpass human capabilities include tennis, baseball, and other daily tasks demanding motion and common sense reasoning (Kurzweil, 2005). Examples where AI could be seen include chess playing, theorem proving, face and speech recognition, and natural language understanding. AI has been an active and dynamic field of research and development since its establishment in 1956 at the Dartmouth Conference in the United States ( Cantu-Ortiz, 2014 ). In past decades, this has led to the development of smart systems, including phones, laptops, medical instruments, and navigation software.

One problem with AI is that people are coming to a conclusion about its capabilities too soon. Thus, people are becoming afraid of the probability that an artificial intelligent system could possibly expand and turn on the human race. True artificial intelligence is still very far from becoming “alive” due to our current technology. Nanotechnology might advance AI research and development. In nanotechnology, there is a combination of physics, chemistry and engineering. AI relies most heavily on biological influence as seen genetic algorithm mutations, rather than chemistry or engineering. Bringing together nanosciences and AI can boost a whole new generation of information and communication technologies that will impact our society. This could be accomplished by successful convergences between technology and biology ( Sacha & P., 2013 ). Computational power could be exponentially increased in current successful AI based military decision behavior models as seen in the following examples.

Expert Systems

Artificial intelligence is currently being used and evolving in expert systems (ES). An ES is an “intelligent computer program that uses knowledge and interference procedures to solve problems that are difficult enough to require significant human expertize to their solution” ( Mellit & Kalogirou, 2008 ). Results early on in its development have shown that this technology can play a significant impact in military applications. Weapon systems, surveillance, and complex information have created numerous complications for military personnel. AI and ES can aid commanders in making decisions faster than before in spite of limitations on manpower and training. The field of expert systems in the military is still a long way from solving the most persistent problems, but early on research demonstrated that this technology could offer great hope and promise ( Franklin, Carmody, Keller, Levitt, & Buteau, 1988 ). Mellit et al. argues that an ES is not a program but a system. This is because the program contains a variety of different components such as a knowledge base, interference mechanisms, and explanation facilities. Therefore they have been built to solve a range of problems that can be beneficial to military applications. This includes the prediction of a given situation, planning which can aid in devising a sequence of actions that will achieve a set goal, and debugging and repair-prescribing remedies for malfunctions.

Genetic Algorithms

Artificial intelligence with genetic algorithms (GA) can tackle complex problems through the process of initialization, selection, crossover, and mutation. A GA repeatedly modifies a population of artificial structures in order to adjust for a specific problem (Prelipcean et al., 2010). In this population, chromosomes evolve over a number of generations through the application of genetic operations. This evolution process of the GA allows for the most elite chromosomes to survive and mate from one generation to the next. Generally, the GA will include three genetic operations of selection, crossover, and mutation. This is currently being applied to solving problems in military vehicle scheduling at logistic distribution centers.

Nanomanufacturing

Nanomanufacturing is the production of materials and components with nanoscale features that can span a wide range of unique capabilities. At the nanoscale, matter is manufactured at lengthscales of 1-100nm with precise size and control. The manufacturing of parts can be done with the “bottom up” from nano sized materials or “top down” process for high precision. Manufacturing at the nanoscale could produce new features, functional capabilities, and multi-functional properties. Nanomanufacturing is distinguished from nanoprocessing, and nanofabrication, whereas nanomanufacturing must address scalability, reliability and cost effectiveness ( Cooper & Ralph, 2011 ). Military applications will need to be very tough and sturdy but at the same time very reliable for use in harsh environments with the extreme temperatures, pressure, humidity, radiation, etc. The use of nano enabled materials and components increase the military’s in-mission success. Eventually, these new nanotechnologies will be transferred for commercial and public use. Cooper et al. makes known how nanomanufacuring is a multi-disciplinary effort that involves synthesis, processing and fabrication. There are however a great number of challenges that as well as opportunities in nanomanufacturing R&D such as;

Predictions from first principles of the progress and kinetics of nanosynthesis and nano-assembly processes.

23 Understand and control the nucleation and growth of nanomaterial and nanostructures and asses the effects of catalysts, crystal orientation, chemistry, etc. on growth rates and morphologies.

R&D IN THE USA

The USA is proving to have a lead in military research and development in nanotechnology. Research spans under umbrella of applications related to defense capabilities. NNI has provided funds in which one quarter to one third goes to the department of defense – in 2003, $ 243 million of $774 million. This is far more than any country and the US expenditure would be five times the sum of all the rest of the world ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ).

INITIATIVES

The National Nanotechnology Initiative

The National Nanotechnology Initiative (NNI) was unveiled by President Clinton in a speech that he gave on science and technology policy in January of 2000 where he called for an initiative with funding levels around 500 million dollars ( Roco & Bainbridge, 2001 ). The initiative had five elements. The first was to increase support for fundamental research. The second was to pursue a set of grand challenges. The third was to support a series of centers of excellence. The fourth was to increase support for research infrastructure. The fifth is to think about the ethical, economic, legal and social implications and to address the education and training of nanotechnology workforce ( Roco & Bainbridge, 2001 ). NNI brings together the expertise needed to advance the potential of nanotechnology across the nation.

ISN at MIT

The Institute for Soldier Nanotechnologies (ISN) initiated at the Massachusetts Institute of Technology in 2002 ( Bennet-Woods, 2008 ). The mission of ISN is to develop battlesuit technology that will increase soldier survivability, protection, and create new methods of detecting toxic agents, enhancing situational awareness, while decreasing battle suit weight and increasing flexibility.

ISN research is organized into five strategic areas (SRA) designed to address broad strategic challenges facing soldiers. The first is developing lightweight, multifunctional nanostructured materials. Here nanotechnology is being used to develop soldier protective capabilities such as sensing, night vision, communication, and visible management. Second is soldier medicine – prevention, diagnostics, and far-forward care. This SRA will focus on research that would enable devices to aid casualty care for soldiers on the battle field. Devices would be activated by qualified personnel, the soldier, or autonomous. Eventually, these devices will find applications in medical hospitals as well. Third is blast and ballistic threats – materials damage, injury mechanisms, and lightweight protection. This research will focus on the development of materials that will provide for better protection against many forms of mechanical energy in the battle field. New protective material design will decrease the soldier’s risk of trauma, casualty, and other related injuries. The fourth SRA is hazardous substances sensing. This research will focus on exploring advanced methods of molecularly complicated hazardous substances that could be dangerous to soldiers. This would include food-borne pathogens, explosives, viruses and bacteria. The fifth and final is nanosystems integration –flexible capabilities in complex environments. This research focuses on the integration of nano-enabled materials and devices into systems that will give the soldier agility to operate in different environments. This will be through capabilities to sense toxic chemicals, pressure, and temperature, and allow groups of soldiers to communicate undetected (Institute for Soldier Nanotechnologies).

SOCIAL IMPLICATIONS

The purpose of country’s armed forces is to provide protection from foreign threats and from internal conflict. On the other hand, they may also harm a society by engaging in counter- productive warfare or serving as an economic burden. Expenditures on science and technology to develop weapons and systems sometimes produces side benefits, such as new medicines, technologies, or materials. Being ahead in military technology provides an important advantage in armed conflict. Thus, all potential opponents have a strong motive for military research and development. From the perspective of international security and arms control it appears that in depth studies of the social science of these implications has hardly begun. Warnings about this emerging technology have been sounded against excessive promises made too soon. The public may be too caught up with a “nanohype” ( Gubrud & Altmann, 2002 ). It is essential to address questions of possible dangers arising from military use of nanotechnology and its impacts on national security. Their consequences need to be analyzed.

NT and Preventative Arms Control

Background

The goal of preventive arms control is to limit how the development of future weapons could create horrific situations, as seen in the past world wars. A qualitative method here is to design boundaries which could limit the creation of new military technologies before they are ever deployed or even thought of. One criterion regards arms control and how the development of military and surveillance technologies could go beyond the limits of international law warfare and control agreements. This could include autonomous fighting war machines failing to define combatants of either side and Biological weapons could possibly give terrorist circumvention over existing treaties ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ). The second criterion is to prevent destabilization of the military situation which emerging technologies could make response times in battle much faster. Who will strike first? The third criterion, according to Altman & Gubrud, is how to consider unintended hazards to humans, the environment, and society. Nanoscience is paving the way for smaller more efficient systems which could leak into civilian sectors that could bring risks to human health and personal data. Concrete data on how this will affect humans or the environment is still uncertain.

Arms Control Agreements

The development of smaller chemical or biological weapons that may contain less to no metal could potentially violate existing international laws of warfare by becoming virtually undetectable. Smaller weapons could fall into categories that would undermine peace treaties. The manipulation of these weapons by terrorist could give a better opportunity to select specific targets for assassination. Anti- satellite attacks by smaller more autonomous satellites could potentially destabilize the space situation. Therefore a comprehensive ban on space weapons should be established ( Altmann & Gubrud, 2002 ). Autonomous robots with a degree of artificial intelligence will potentially bring great problems. The ability to identify a soldiers current situation such as a plea for surrender, a call for medical attention, or illness is a a very complicated tasks that to an extent requires human intelligence. This could potentially violate humanitarian law.

Stability

New weapons could pressure the military to prevent attacks by pursuing the development of new technologies faster. This could lead to an arms race with other nations trying to attain the same goal. Destabilization may occur through faster action, and more available nano systems. Vehicles will become much lighter and will be used for surveillance. This will significantly reduce time to acquire a targets location. Medical devices implanted in soldiers’ bodies will enable the release of drugs that influence mood and response times. For example, an implant that attaches to the brains nervous system could give the possibility to reduce reaction time by processing information much faster than usual ( Altmann & Gubrud, Anticipating military nanotechnology, 2004 ). [AI] Artificial intelligence based genetic algorithms could make tactical decisions much faster through computational power by adapting to a situations decision. Nano robots could eavesdrop, manipulate or even destroy targets while at the same time being undetected ( Altmann J. , Military Uses of Nanotechnology: Perspectives and Concerns, 2004 ).

Environment Society & Humans

Human beings have always been exposed to natural reoccurring nanomaterials in nature. These particles may enter the human body through respiration, and ingestion ( Bennet- Woods, 2008 ). Little been known about how manufactured nanoscale materials will have an impact to the environment. Jerome (2005) argues that nanomaterials used for military uniforms could break of and enter the body and environment. New materials could destroy species of plants and animal. Fumes from fuel additives could be inhaled by military personnel. Contaminant due to weapon blasts could lead to diseases such as cancer or leukemia due to absorption through the skin or inhalation. Improper disposal of batteries using nano particles could also affect a wide variety of species. An increase in nanoparticle release into the environment could be aided by waste streams from military research facilities. Advanced nuclear weapons that are miniaturized may leave large areas of soil contaminated with radioactive materials. There is an increase in toxicity as the particle size decrease which could cause unknown environmental changes. Bennet-woods ( 2008 ) argues that there is great uncertainty in which the way nano materials will degrade under natural conditions and interact with local organisms in the environment.

Danger to society could greatly be affected due to self-replicating, mutating, mechanical or biological plagues. In the event that these intelligent nano systems were to be unleashed, they could potentially attack the physical world. There are a number of applications that will be developed with nanotechnology that could potentially crossover from the military to national security that can harm the civilian sector ( Bennet-Woods, 2008 ). There is a heightened awareness that new technologies will allow for a more efficient access to personal privacy and autonomy ( Roco & Bainbridge, 2005 ). Concerns regarding artificial intelligence acquiring a vast amount of personal data, voice recognition, and financial data will also arise. Implantable brain devices, intended for communication, raise concerns for actually observing and manipulating thoughts. Some of the most feared risks due to nanotechnology in the society are the loss of privacy ( Flagg, 2005 ). Nano sensors developed for the battlefield could be used for eavesdropping and tracking of citizens by state agencies. This could lead to improvised warfare or terrorism. Bennet-Woods ( 2008 ) argues that there should be an outright ban on nanoenabled tracking and surveillance devices for any purpose.

Nanotechnology in combination with biotechnology and medicine raise concerns regarding human safety. This includes nanoscale drugs that may allow for improvements in terrorism alongside more efficient soldiers for combat. Bioterrorism could greatly be improved through nano-engineered drugs and chemicals ( Milleson, 2013 ). Body implants could be used by soldiers to provide for better fighting efficiency but in the society, the extent in which the availability of body manipulation will have to be debated at large ( Altmann J. , Nanotechnology and preventive arms control, 2005 ). Brain implanted stimulates could become addictive and lead to health defects. The availability of body and brain implants could have negative effects during peace time. Milleson ( 2013 ) argues that there is fear that this technology could destabilize the human race, society, and family. Thus, the use in society should be delayed for at least a decade.

CONCLUSIONS

Nanoscience will lead to a revolutionary development of new materials, medicine, surveillance, and sustainable energy. Many applications could arrive in the next decade. The US is currently in the lead in nanoscience research and development. This equates to roughly five times the sum of all the rest of world. It is essential to address the potential risks that cutting edge military applications will have on warfare and civilian sector. There is a potential for mistrust in areas where revolutionary changes are expected. There are many initiatives by federal agencies, industry, and academic institutions pertaining to nanotechnology applications in military and national security. Preventive measures should be coordinated early on among national leaders. Scientists propose for national leaders to follow general guidelines. There shall be no circumvention of existing treaties as well as a ban on space weapons. Autonomous robots should be greatly restricted. Due to rapidly advancing capabilities, a technological arms race should be prevented at all costs. Nanomaterials could greatly harm humans and their environment therefore nations should work together to address safety protocols. The national nanotechnology of different nations should build confidence in addressing the social implications and preventive arms control from this technological revolution.

### FTCA CP

#### Counterplan:

#### The United States federal government should expand the scope of the Federal Trade Commission Act to include regulated industries.

#### Solves case through government suits BUT excludes private suits

Shelanski 10 (Howard Shelanski, Deputy Director for Antitrust in the Bureau of Economics at the Federal Trade Commission, “Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries,” statement of The Federal Trade Commission before the United State House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy, 6-15-2010, <https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-courts-and-competition-policy-committee-judiciary-united/100615antitrusttestimony.pdf>)

III. Why Trinko and Credit Suisse Should Not Apply to Public Enforcement

Both Trinko and Credit Suisse involved private antitrust suits rather than public enforcement actions by the Federal Trade Commission or the Department of Justice. The Supreme Court’s decisions appear, however, to apply to both public and private actions. This is unfortunate because the Court’s core concern in both cases about the costs and potential deterrent effects of antitrust are more relevant to private suits, while the benefits of antitrust law as a complement and substitute for regulation are likely to be greatest through public enforcement. The lower costs and higher benefits of cases brought by public agencies arise because of differences in the incentives and capabilities of public and private antitrust plaintiffs.

Phrased broadly, the Court’s concern is that antitrust litigation is always costly and in the presence of regulation is likely to have little additional benefit for competition. Treble damages and class action litigation could make erroneous antitrust liability particularly costly in private cases. The government, however, has no reason to use antitrust law against regulated firms unless doing so could yield net benefits on top of those the market already achieves through regulation. The FTC does not collect revenue or otherwise materially benefit from successful competition enforcement. Federal antitrust authorities also have greater resources than private plaintiffs to assess the costs and benefits of a particular antitrust enforcement action and to avoid interfering with regulatory objectives. The FTC and DOJ can both investigate private conduct through a variety of tools that can be focused on specific conduct and information.36 These procedures are not costless, but they can be narrowly tailored and they occur in advance of litigation, unlike private discovery which occurs after litigation has been initiated and where plaintiffs have incentives to be much less discriminating in the information they demand from defendants.

Importantly, public antitrust agencies can better coordinate with relevant government regulatory agencies to avoid conflicts and unnecessary administrative costs. This ability to coordinate with regulatory authorities relates directly to the Supreme Court’s concerns in both Credit Suisse and Trinko. Coordination could reduce the risk of the kind of judicial error the Court identified in Credit Suisse and of the costly duplication and deterrent effects that motivated the Court’s decision in Trinko.

The federal antitrust agencies therefore have more incentive and ability than private plaintiffs do—not to mention an obligation to the American public—to assess the potential costs of an antitrust case, to identify the potential benefits that would not be achieved through regulation, and to balance the two in the public interest before deciding to issue a complaint. As a result, public antitrust enforcement is much more likely than private litigation to avoid claims that will be prone to judicial errors, that will interfere with regulation, or that will fail to yield net benefits over regulation.

We are concerned that although the rationales of Credit Suisse and Trinko apply more to private suits than public enforcement actions, the decisions themselves may sweep more broadly. Credit Suisse and Trinko could have negative spillover effects on public enforcement and could impede the FTC from bringing cases that would benefit American consumers and promote economic growth. The Commission believes that its authority to prevent “unfair methods of competition” through Section 5 of the Federal Trade Commission Act37 (“the FTCA”) enables the agency to pursue conduct that it cannot reach under the Sherman Act, and thus avoid the potential strictures of Trinko. 38 There is good reason for the courts applying Trinko to treat FTCA actions differently from private suits under the Sherman Act given, among other things, the absence of treble damages under the FTCA. We nonetheless believe that the better course is for Congress to clarify that neither Credit Suisse nor Trinko prevents public antitrust agencies from acting under any of the antitrust laws when they conclude that anticompetitive conduct would otherwise escape effective regulatory scrutiny.

### FTC DA

Next off is *FTC independence*:

**FTC independence in the US key to *global norms* that support agency independence. Vital for *free trade* and *GLO*.**

* United States’ FTC practices are modeled *by several nations* – including South Korea – and *will continue to be modeled* by nations that are still amid transitions towards industrialization;
* Global attentiveness to the United States’ FTC practices *remains ongoing* and - “*to this day*” - are a *central obstacle* to aspired free trade norms;
* The root of the loss of the global public’s confidence in free trade stems from the success of zero-sum strategies. *The root of that* is an interpretation of the FTCA that permits politicized intervention;
* Ambiguity in the United States’ FTCA permit the Act to be exercised *EITHER with a great deal of agency discretion* – *OR* alternatively, *with the perceived influence of external political branches*;
* Current US FTC practices lean away agency independence – and that’s *a central obstacle* to international agencies countering the growth of protectionist mercantilist norms
* More broadly, this hampers *general support for internationalism/GLO*

**Nam ‘18**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

ABSTRACT:

The Federal Trade Commission Act of 1914 (“**FTC A**ct”), **a model** for **many other countries** that set up their **own** competition agencies, combines the **control** afforded by presidential appointment and removal powers over FTC commissioners with an **exceedingly discretionary** mandate. This Article contends that the FTC Act’s outmoded openness to **strong presidential direction**, **where adapted abroad**, has helped detract from **antitrust regulator independence.** Even advanced players in the liberal international economic order **such as South Korea** have made use of the United States’ original blueprint for unitary **executive-stamped** **antitrust** enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction **in antitrust enforcement** is particularly suited to capitalist economies helmed by administrations with mercantilist policies, **given their belief that the state and big business must coop**erate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces **preventing global convergence** in antitrust enforcement, and of their **roots.**

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. **as a role model** while developing their **competition** regimes.6 It is ironic, **then,** that **to this day** a **central obstacle** to the aspired international “culture of competition” **can be found in none other than the influence of the U.S.’s own FTC A**ct.7

American **antitrust** priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that **would reemerge abroad** in **many** later-developing countries.

The deepening global retreat from **internationalism** ***and*** free market principles in the present day, with the specter of **trade wars looming**, is exacerbated by nationalist competition regimes that **are derivative of a U.S. model** predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

**Globally, independence of antitrust agencies will prove key – checks spiraling economic nationalisms that’ll crush liberal peace.**

**Nam ‘18**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a **creeping** loss of public confidence in open markets—**coupled with** the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, **as illustrated in this Article**—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of **protectionist** silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even **perennial norms** and conventions of **the U.S. competition regime** which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that **carried over abroad** to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent **liberal peace**156 **often taken for granted**. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s **formative influence** is not above scrutiny or reproach. **Still-elusive** realization of the liberal economic international order’s intended form will **require** an expanded constellation of **independent competition regulators** empowered to enforce antitrust laws consistently.

**Global free trade reversals will cause *multiple existential impacts*.**

* Arctic conflict
* Space conflict;
* Global nuclear prolif;
* Structural wars;
* Climate;
* Geo-engineering;

**Langan-Riekhof ‘21**

et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - #E&F - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

With the trade **and financial** connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to **develop nuclear weapons**, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like **the Arctic** and **space**. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, **conflicts became endemic**, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address **climate changes**, little was done to slow greenhouse gas emissions, and some states experimented with **geoengineering with disastrous consequences**.

### Topicality

#### The aff removes a pseudo-exemption --- that doesn’t “expand the scope” --- vote neg --- they explode the topic --- limiting it to actual exemptions provides enough aff flex

**ARENA 11** --- AMEDEO ARENA, Associate Professor of European Union Law at the School of Law of the University of Naples, “Institute for International Law and Justice Emerging Scholars Papers”, IILJ Emerging Scholars Paper 19 (2011) (A Sub series of IILJ Working Papers) Finalized 01/18/2011, https://iilj.org/wp-content/uploads/2016/08/Arena-The-Relationship-Between-Antitrust-and-Regulation-in-the-US-and-in-the-EU-2011.pdf

According to a recent survey, approximately **20 percent** of the US economic activities are to some degree **exempted from antitrust law.**22 Federal statutory antitrust exemptions can be divided into **proper “exemptions**”, which entail immunity from antitrust rules, and “**pseudo-exemptions”,** which merely imply a differential application of antitrust law. The “exemptions” category’ can be split up into two sub-categories: “**full exemptions**”, which exempt a given activity from all antitrust rules, and “**partial exemptions**”, which grant exemption only from certain antitrust rules.

Full exemptions are, for the most part, a creature of their time, a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Indeed, only five of them are still in force.2’ In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.24 In some cases, however, the scope of regulation turned out to be narrower than that of antitrust immunity. For example, the Secretary of Commerce is supposed to police fishermen’s agreements against excessive pricing, yet apparendy it has never engaged in any real regulatory oversight.23

Turning to the **nineteen partial exemptions currently in force**,26 the discrepancy between the scope of the exemption and that of regulator}\* oversight is even greater, possibly because those exemptions authorize only specific conducts otherwise prohibited by antitrust law, thus mitigating the need for comprehensive regulatory oversight. The typical regulator}- scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority. The intensity of the assessment carried out by the relevant authority, however, varies considerably. As per the Need-Based Educational Aid Act, coordination on need-based financial aid programs, for instance, is not subject to regulator}- review at all.2 Under the Defense Production Act, the allocation of markets for military materials in time of national emergency is subject to approval by the Secretary of Defense, which must withdraw the immunity if it establishes that the “action was taken for the purpose of violating antitrust law”.28 Between those extremes, the ICC Termination Act provides for that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a “public interest” standard;29 in addition, the Board can require compliance with “reasonable conditions” to ensure that the agreement furthers transportation policy.30

Unlike **full and partial exemptions**, the eight **pseudo-exemptions** in force **do not** bring economic activities **outside the scope of antitrust provisions** to subject them to sector-specific regulation, but rather modify the substantive standards, the remedies, or the forum of “general” antitrust law, thus creating “special” antitrust rules.3’ While pseudo-exemptions are generally not accompanied by regulatory schemes, in some cases the “special” antitrust rules themselves can be regarded as regulatory lato sensu.

ii) Judge-made Implied Antitrust Immunities and Regulation-Related Defenses

### Error Rates DA

#### Expanding antitrust to new business practices increases the risk of false positives---wrecks economic growth.

Manne 20 (Geoffrey A. Manne, distinguished fellow at Northwestern University Center on Law, Business, and Economics, President and founder of the International Center for Law and Economics, JD and AB degrees from the University of Chicago, Former law professor at Lewis & Clark Law School, Former lecturer in law at the University of Chicago Law School and the University of Virginia School of Law, Worked for FTC, member of the American Law and Economics Association, the Canadian Law and Economics Association, and the Society for Institutional & Organizational Economics; “Error Costs in Digital Markets;” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733662>, TM) [typo modified]

The arguments in favor of the normative error-cost framework are even stronger in the context of the digital economy. The concern with error costs is especially high in dynamic markets in which it is difficult to discern the real competitive effects of a firm’s conduct from observation alone. And for several reasons, antitrust decision-making in the context of innovation tends much more readily toward distrust of novel behavior, thus exacerbating the risk and cost of over-enforcement.

As noted, there is an “uneven history of courts and enforcement officials in enhancing welfare through antitrust,” suggesting reason to be skeptical.163 In the face of innovative business conduct, the concern is compounded by the problematic incentives of antitrust economists. As Manne and Wright note:

Innovation creates a special opportunity for antitrust error in two important ways. The first is that innovation by definition generally involves new business practices or products. Novel business practices or innovative products have historically not been treated kindly by antitrust authorities. From an error-cost perspective, the fundamental problem is that economists have had a longstanding tendency to ascribe anticompetitive explanations to new forms of conduct that are not well understood.164

The two problems are related. Novel practices generally result in monopoly explanations from the economics profession, followed by hostility from the courts. Often a subsequent, more-nuanced economic understanding of the business practice emerges, recognizing its procompetitive virtues, but this also may come too late to influence courts and enforcers in any reasonable amount of time—and it may never tip the balance sufficiently to appreciably alter established case law. Where economists’ career incentives skew in favor of generating models that demonstrate inefficiencies and debunk the Chicago School status quo, this dynamic is not unexpected.

At the same time, however, defendants engaged in innovative business practices that have evolved over time through trial and error regularly have a difficult time articulating a justification that fits either an economist’s limited model or a court’s expectations. Easterbrook ably described the problem:

[E]ntrepreneurs often flounder from one practice to another trying to find one that works. When they do, they may not know why it works, whether because of efficiency or exclusion. They know only that it works. If they know why it works, they may be unable to articulate the reason to their lawyers-because they are not skilled in the legal and economic jargon in which such "business justifications" must be presented in court. . . .

. . . It takes economists years, sometimes decades, to understand why certain business practices work, to determine whether they work because of increased efficiency or exclusion. To award victory to the plaintiff because the defendant has failed to justify the conduct properly is to turn ignorance, of which we have regrettably much, into prohibition. That is a hard transmutation to justify.165

Imposing a burden of proof on entrepreneurs—often to prove a negative in the face of enforcers’ pessimistic assumptions—when that burden can’t plausibly be met can serve only to impede innovation.166

Even economists know very little about the optimal conditions for innovation. As Herbert Simon noted in 1959,

Innovation, [technological] change, and economic development are examples of areas to which a good empirically tested theory of the processes of human adaptation and problem solving could make a major contribution. For instance, we know very little at present about how the rate of innovation depends on the amounts of resources allocated to various kinds of research and development activity. Nor do we understand very well the nature of “know how,” the costs of transferring technology from one firm or economy to another, or the effects of various kinds and amounts of education upon national product. These are difficult questions to answer from aggregative data and gross observation, with the result that our views have been formed more by arm-chair theorizing than by testing hypotheses with solid facts.167

Our understanding has not progressed very far since 1959, at least not insofar as it is applied to antitrust.168 Simon astutely infers that innovation would be a function of “human adaptation and problem solving”; “the amounts of resources allocated to various kinds of research and development activity”; the nature of ‘know how’”; “the costs of transferring technology”; and “the effects of various kinds and amounts of education.” But economists today tend to focus primarily on how market structure affects innovation.

As Teece notes, however:

A less important context for innovation, although one which has received an inordinate amount of attention by economists over the years, is market structure, particularly the degree of market concentration. Indeed, it is not uncommon to find debate about innovation policy among economists collapsing into a rather narrow discussion of the relative virtues of competition and monopoly. . . .

. . . [Yet] reviews of the extensive literature on innovation and market structure generally find that the relationship is weak or holds only when controlling for particular circumstances. The emerging consensus is that market concentration and innovation activity most probably either coevolve or are simultaneously determined.169

Even to the extent that economic science has developed some better theories of innovation and its relationship with market structure and antitrust, the literature has still failed to develop clear and concrete theories or empirics that are readily implementable by courts or enforcers in the face of complex economic conditions.170 Particularly to the extent that contemporary monopolization theorems purport to address novel, often-innovative business practices, they are problematic for antitrust law and policy aiming to maximize welfare (minimize errors), for several reasons.

First, they engender circumstances that increase the likelihood of antitrust complaints, investigations, and enforcement actions.171 In the face of limited evidence, untestable implications, and possibility theorems regarding the consequences of novel, innovative conduct, a proper application of error-cost principles would likely be expected to deter intervention. Yet it is precisely in these situations that intervention may be more likely.

On the one hand, this may be because in the absence of information disproving a presumption of anticompetitive effect, there is an easier case to be made against the conduct—this despite putative burden-shifting rules that would place the onus on the complainant. On the other hand, successful innovations are also more likely to arouse the ire of competitors and/or customers, and thus both their existence and their negative characterization are more likely brought to the attention of courts or enforcers—abetted in private litigation by the lure of treble damages.

Antitrust is skeptical of, and triggered by, various changes in status quo conduct and relationships. This applies not only to economists (as discussed above),172 but also to competitors (who are likely to raise challenges to innovative, even if perfectly procompetitive, conduct that makes competition harder), enforcers (who are inherently on the look-out for cutting-edge cases because clearly infringing conduct is rare and opportunities to expand their authority attractive), and judges (who may be particularly swayed by economists’ possibility theorems to believe that they can make upholdable new law).

Business process and organizational innovations are also more relevant to the sorts of conduct with which antitrust concerns itself. New technological advance is rarely an inherent problem for antitrust; rather, its presence increases the potential cost of over-deterrence, but not necessarily its likelihood.173 But novel technologies are frequently accompanied by novel business arrangements—and these are of particular concern to antitrust.

The problem stemming from both of these is that, to a first approximation (and especially in the digital economy), change (including by incumbents) is the hallmark of competition itself. In these markets competition means innovation and innovation means change. Since Jorde and Teece began writing about antitrust, and especially market definition, in high-tech industries in the late 1980s, we’ve been on notice that traditional, static, price-based antitrust analysis doesn’t work well for understanding these markets. For these industries, performance, not price, is paramount and competition generally unfolds sequentially rather than contemporaneously—which means innovation is key.174

[[BEGIN FOOTNOTE 174]]

174 See, e.g., Thomas M. Jorde & David J. Teece, Competing Through Innovation: Implications for Market Definition, 64 CHI.-KENT L.REV. 741, 742 (1988) (“Moreover, in markets characterized by rapid technological progress, competition often takes place on the basis of performance features and not price.”). See also David S. Evans & Richard Schmalensee, Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries, in 2 INNOVATION POLICY AND THE ECONOMY 1, 3 (Adam B. Jaffe, et al., eds., 2002) (“The defining feature of new-economy industries is a competitive process dominated by efforts to create intellectual property through R&D, which often results in rapid and disruptive technological change.”).

[[END FOOTNOTE 174]]

Second, over-deterring business model and contractual innovations may be even more damaging to dynamic welfare and economic growth than is reducing incentives to engage in technological innovation.175

[[BEGIN FOOTNOTE 175]]

175 See Manne & Wright, Innovation, supra note 1, at 185 (“These innovations are also extremely valuable, in particular because they may be directly extendable to a much wider range of the economy than product innovations, and like product innovations, business innovations can have wide-ranging, dynamic follow-on effects throughout the economy.”).

[[END FOOTNOTE 175]]

#### Plan floods courts with error-prone decisions – unlike counterplan’s agency adjudication

Shelanski 10 (Howard Shelanski, Deputy Director for Antitrust in the Bureau of Economics at the Federal Trade Commission, “Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries,” statement of The Federal Trade Commission before the United State House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy, 6-15-2010, <https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-courts-and-competition-policy-committee-judiciary-united/100615antitrusttestimony.pdf>)

Present in Trinko were three critical factors. First, the duties to deal that the 1996 Act imposed on incumbent telephone carriers were stronger than any such duties under Section 2 of the Sherman Act, the anti-monopoly provision on which the plaintiff had based his claim. Second, the Federal Communications Commission (FCC) had issued a set of rules that directly regulated the conduct about which the plaintiff was complaining. And third, the FCC actively administered its duty-to-deal regulations under the 1996 Act. The Court’s holding can be read to say that where such factors are present, a violation of the agency’s rule does not constitute a separate violation of the antitrust laws. That ruling directly answers the question presented and establishes the principle that when regulatory statutes establish pervasive competition enforcement regimes they do not implicitly enlarge the scope of substantive liability under the antitrust laws.31 As the Court put it, “just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards.”32

Embedded in the Supreme Court’s ruling so interpreted are underlying issues related to the comparative competency of sector-specific regulatory agencies and generalist courts or public antitrust authorities that are beyond the scope of this testimony. The Court speaks explicitly in both Credit Suisse and Trinko about the hazards of diverting claims from expert agencies to non-expert courts. The risk is that the ability of plaintiffs to seek through antitrust what they could not obtain through the regulatory process could lead to a flood of costly litigation that, when multiplied by the likelihood that generalist courts will make errors at both the pleading and merits stages of litigation, could distort firms’ competitive and innovative incentives in a way that will be costly to society.

We do not here address the Court’s institutional presumption favoring the administrative processes of expert regulatory agencies over antitrust litigation where the three factors discussed earlier are present. Where a competent agency actively administers a rule whose standard for the competitive conduct at issue in litigation is more demanding on the defendant than antitrust law, the Court was right to find it relevant whether the marginal gains outweigh the potential costs of antitrust enforcement against the same conduct.

#### Decline cascades---nuclear war.

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals. Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset INTRODUCTION The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA). But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998). The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020). An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity. COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach. METHODOLOGY An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020): • Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006); • Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012); • Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and • Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources. ECONOMY According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity. The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak. The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020). As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007). Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit. According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019): “You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author). President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period. A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016). In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade. ENVIRONMENTAL What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation: The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs. Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated. Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity. Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021). Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications. On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008). The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section. Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade. GEOPOLITICAL The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic. Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

## adv 1

### 1nc – ukraine

#### Ukraine thumps

#### 1. supply chains

Swanson 3-1 (Ana Swanson writes about trade and international economics for the New York Times, March 1st 2022, “Ukrainian Invasion Adds to Chaos for Global Supply Chains” New York Times, https://www.nytimes.com/2022/03/01/business/economy/ukraine-russia-supply-chains.html)MULCH

WASHINGTON — The Russian invasion of Ukraine has rattled global supply chains that are still in disarray from the pandemic, adding to surging costs, prolonged deliveries and other challenges for companies trying to move goods around the world.

The clash in Ukraine, a large country at the nexus of Europe and Asia, has caused some flights to be canceled or rerouted, putting pressure on cargo capacity and raising concerns about further supply chain disruptions. It is putting at risk global supplies of products like platinum, aluminum, sunflower oil and steel, and shuttering factories in Europe, Ukraine and Russia. And it has sent energy prices soaring, further raising shipping costs.

The conflict is also setting off a scramble among global companies as they cut off trade with Russia to comply with the most far-reaching sanctions imposed on a major economic power since the end of the Cold War.

The new challenges follow more than two years of disruptions, delays and higher prices for beleaguered companies that use global supply chains to move products around the world. And while the economic implications of the war and sweeping sanctions on Russia are not yet clear, many industries are bracing for a bad situation to get worse.

#### 2. development

Posen 3-17 [Adam Posen is President of the Peterson Institute for International Economics. 3-17-2022 https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization?utm\_medium=newsletters&utm\_source=fatoday&utm\_campaign=The%20End%20of%20Globalization?&utm\_content=20220317&utm\_term=FA%20Today%20-%20112017]

AN INCONVENIENT TRUTH

Unfortunately, the Russian invasion will prove to be far less kind to the developing world. Food and energy price hikes are already hurting the citizens of poorer states, and the economic impact of corroding globalization will be even worse. If lower-income countries are forced to choose sides when deciding where they get their aid and foreign direct investment, the opportunities for their private sectors will narrow. Companies within these countries will grow more dependent on government gatekeepers at home and abroad. And as the United States and other countries increase their use of sanctions, firms will be less likely be less likely to invest in these economies. Anxious multinational companies want to avoid U.S. opprobrium, and so they will forego investing in places that they see as having undependable transparency.

The saddest part of this is that it comes on top of the world’s unequal response to COVID-19, in which high-income countries did not provide enough vaccines and medical supplies to the developing world. This political disregard for the well-being of low-income populations globally materially changes the economic conditions on the ground. That in turn provides a commercial justification for the private sector not to invest in those economies. The only way out of this cycle is through public investment and enforced, fair treatment. Division among the major economies, however, is likely to make such investment in the developing world insufficient, unreliable, and arbitrarily disbursed.

### 1nc – environment

#### No impact

Kareiva 12 (Peter Kareiva et. al, – Chief Scientist and Vice President of the Nature Conservancy, Michelle Marvier, Robert Lalasz, “Conservation in the Anthropocene Beyond Solitude and Fragility”, The Breakthrough, http://thebreakthrough.org/index.php/journal/past-issues/issue-2/conservation-in-the-anthropocene/)

The trouble for conservation is that the data simply do not support the idea of a fragile nature at risk of collapse. Ecologists now know that the disappearance of one species does not necessarily lead to the extinction of any others, much less all others in the same ecosystem. In many circumstances, the demise of formerly abundant species can be inconsequential to ecosystem function. The American chestnut, once a dominant tree in eastern North America, has been extinguished by a foreign disease, yet the forest ecosystem is surprisingly unaffected. The passenger pigeon, once so abundant that its flocks darkened the sky, went extinct, along with countless other species from the Steller's sea cow to the dodo, with no catastrophic or even measurable effects.

These stories of resilience are not isolated examples -- a thorough review of the scientific literature identified 240 studies of ecosystems following major disturbances such as deforestation, mining, oil spills, and other types  of pollution. The abundance of plant and animal species as well as other measures of ecosystem function recovered, at least partially, in 173 (72 percent) of these studies.25

While global forest cover is continuing to decline, it is rising in the Northern Hemisphere, where "nature" is returning to former agricultural lands.26 Something similar is likely to occur in the Southern Hemisphere, after poor countries achieve a similar level of economic development. A 2010 report concluded that rainforests that have grown back over abandoned agricultural land had 40 to 70 percent of the species of the original forests.27 Even Indonesian orangutans, which were widely thought to be able to survive only in pristine forests, have been found in surprising numbers in oil palm plantations and degraded lands.28

Nature is so resilient that it can recover rapidly from even the most powerful human disturbances. Around the Chernobyl nuclear facility, which melted down in 1986, wildlife is thriving, despite the high levels of radiation.29 In the Bikini Atoll, the site of multiple nuclear bomb tests, including the 1954 hydrogen bomb test that boiled the water in the area, the number of coral species has actually increased relative to before the explosions.30 More recently, the massive 2010 oil spill in the Gulf of Mexico was degraded and consumed by bacteria at a remarkably fast rate.31

### 1nc – csr

**Turn – green antitrust worse**

**Schinkel 21** Maarten Pieter Schinkel is Professor of Economics at the University of Amsterdam and a research fellow of the Tinbergen Institute. Leonard Treuren is a doctoral candidate in economics at the University of Amsterdam and the Tinbergen Institute. “Green antitrust: Friendly fire in the fight against climate change.” July 2021. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3749147 {DK}

Green antitrust is a sympathetic but counterproductive attempt to solve the global climate crisis. Fighting one market failure with another market failure will mostly make matters worse. There is huge potential for welfare improvement by preventing negative externalities and pursuing the positive, public goods. Giving firms market power does not create incentives to tap into that potential, however. On the contrary: growing awareness of the vital importance of a sustainable planet, the rise of civil society, and an increasing willingness to buy from and invest in companies that take a more socially and environmentally responsible stance are ever stronger motivators for firms to offer more sustainable produced goods and services in competition. These hopeful gathering forces for green should be given free rein, rather than be allowed to be suppressed by collaborations that risk collusion. Relaxing the strict competition law enforcement criteria in order to better accommodate generally ineffective sustainability agreements in restriction of competition is not, therefore, a good policy. Such a rule of reason approach invites abuse cartel greenwashing.47 Instead, governments should be held accountable for their failure to adequately address damaging production externalities. The right response of competition authorities to a corporate cartel exemption request for its sustainability initiative is referral to the part of government best placed to assess the idea and possibly implement it through proper regulation – rather than stepping in and become an excuse for government failure. However well-intended, the green antitrust movement risks doing damage to both competition and sustainability.

#### Global alt causes to CSR failures and CSR is a shot in the dark – your ev is aspirational

Posner 19 (Andy, Founder & CEO of Capital Good Fund, a non-profit, certified Community Development Financial Institution that takes a holistic approach to fighting poverty, Treasurer of the Board of Directors of the Credit Builders Alliance, “The Danger of Corporate Social Responsibility,” 10/14/2019, <https://www.andyposner.org/2019/10/14/danger-corporate-social-responsibility/)//NRG>

The popularity of CSR is easy to understand: the notion that one can make money and still contribute to a healthy economy and environment is comforting. But to think that big business and their executives, who have so often contributed to grave injustices, can suddenly turn around and solve them is not only naive, but dangerous. The reason is this: if the solution to climate change, mass incarceration, gun violence, etc. depends on the rich and powerful choosing to strike a balance between their self-interest and the well-being of others, then we are putting our fate in the hands of a small group of elites. Should the future of humanity turn on the whims of several hundred, or perhaps several thousand, plutocrats and the firms they lead?

To see the problem more clearly, let’s look at a recent example. On September 3rd, in response to a spate of mass shootings, including, most importantly, inside its own stores, Walmart announced that it “would stop selling ammunition that can be used” in assault rifles and “call on Congress to increase background checks and consider a new assault rifle ban.”[1] This would appear to be the epitome of CSR—corporate America taking a stand on a weighty issue and considering more than its bottom-line. But it took dozens of bullet-riddled corpses at a Walmart shopping center to do what they could have and should have done decades ago: use their political and commercial leverage to stop enabling an epidemic of slaughter and to call for common-sense gun reform. Whether the policy about-face is due to CSR or pure self-interest, hundreds of thousands of Americans have died while advocates waited for this kind of action.

My aim is not to single out Walmart—of course it is better that they took this stand than not. But we must recognize that Walmart’s moral change of heart, like that of many companies in similar circumstances, came about because the problem it had refused to address had quite literally and bloodily landed on its doorstep. One could even argue that it had finally become more profitable to do the right thing, which is even more dangerous—if ethical corporate behavior only applies to profitable actions, we are doomed to suffer any injustice whose resolution does not happen to benefit the 1%.

Is this how it’s going to be? Is this the best we can do? Are we to wait until the oceans have risen by ten feet and the Amazon rainforest has disappeared before big business (Exxon, Procter & Gamble) [2] stops obstructing urgent action on the climate? [3] Until 100 immigrants die in ICE detention, denied even flu vaccines, [4] before big business (Amazon, Palantir, Microsoft)[5, 6] stops profiting off ICE contracts and calls for an end to the human rights violations? The list goes on.

Humanity can only prosper when it has a say in its own future; that’s the premise and the promise of democracy. The premise and promise of CSR is that government, including democratically elected governments that represent the people, should stay out of the way because the “free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.”[7] But these lofty goals are too important to depend on the goodwill of the powerful. In truth, the only way to achieve a prosperous and just world is for the civil and social sectors—governments and nonprofits—to establish rules and guidelines that make Corporate Social Responsibility unnecessary. Why should a business, any business, ever be allowed to pollute, to underpay workers, to sell weapons of war, to strip the Earth of its resources? It is only because this immorality is possible—that is, legal, excused, or both—that the very concept of CSR has emerged and gained currency.

I, for one, do not believe that the very future of humankind and the planet should depend on voluntary actions. So long as we rely on CSR, we will continue to find ourselves balanced on a razor blade of disaster, never sure if the catastrophe that finally spurs action will come too late for the action to even matter anymore. If big business really wants to foster a “strong and sustainable economy,” they should use their immense power to push Congress to raise their taxes (in 2018, 60 Fortune 500 companies paid no federal income tax whatsoever)[8], raise the minimum wage, restore the power of unions, implement a carbon tax, and eliminate the influence of the wealthy (including themselves) on the political process. Absent that, all the proponents of Corporate Social Responsibility are saying is “Don’t worry. The uber-wealthy and powerful feel your pain. They know how to make it better. And they’ll get to it when they can and if, in their wisdom and munificence, they happen to feel like it.”

### 1nc – warming

#### Not existential AND their models fail.

Piper 19---Kelsey Piper, citing John Halstead climate change mitigation researcher at the Founders Pledge. [Is climate change an "existential threat" — or just a catastrophic one? 6-28-2019, https://www.vox.com/future-perfect/2019/6/13/18660548/climate-change-human-civilization-existential-risk]

I also talked to some researchers who study existential risks, like John Halstead, who studies climate change mitigation at the philanthropic advising group Founders Pledge, and who has a detailed online analysis of all the (strikingly few) climate change papers that address existential risk (his analysis has not been peer-reviewed yet).

Halstead looks into the models of potential temperature increases that Breakthrough’s report highlights. The models show a surprisingly large chance of extreme degrees of warming. Halstead points out that in many papers, this is the result of the simplistic form of statistical modeling used. Other papers have made a convincing case that this form of statistical modeling is an irresponsible way to reason about climate change, and that the dire projections rest on a statistical method that is widely understood to be a bad approach for that question.

Further, “the carbon effects don’t seem to pose an existential risk,” he told me. “People use 10 degrees as an illustrative example” — of a nightmare scenario where climate change goes much, much worse than expected in every respect — “and looking at it, even 10 degrees would not really cause the collapse of industrial civilization,” though the effects would still be pretty horrifying. (On the question of whether an increase of 10 degrees would be survivable, there is much debate.)

Does it matter if climate change is an existential risk or just a really bad one?

That last distinction Halstead draws — of climate change as being awful but not quite an existential threat — is a controversial one.

That’s where a difference in worldviews looms large: Existential risk researchers are extremely concerned with the difference between the annihilation of humanity and mass casualties that humanity can survive. To everyone else, those two outcomes seem pretty similar.

To academics in philosophy and public policy who study the future of humankind, an existential risk is a very specific thing: a disaster that destroys all future human potential and ensures that no generations of humans will ever leave Earth and explore our universe. The death of 7 billion people is, of course, an unimaginable tragedy. But researchers who study existential risks argue that the annihilation of humanity is actually much, much worse than that. Not only do we lose existing people, but we lose all the people who could otherwise have had the chance to exist.

In this worldview, 7 billion humans dying is not just seven times as bad as 1 billion humans dying — it’s much worse. This style of thinking seems plausible enough when you think about past tragedies; the Black Death, which killed at least a tenth of all humans alive at the time, was not one-tenth as bad as a hypothetical plague that wiped us all out.

Most people don’t think about existential risks much. Many analyses of climate change — including the report Vice based its article on — treat the deaths of a billion people and the extinction of humanity as pretty similar outcomes, interchangeably using descriptions of catastrophes that would kill hundreds of millions and catastrophes that’d kill us all. And the existential risk conversation can come across as tone-deaf and off-puttingly academic, as if it’s no big deal if merely hundreds of millions of people will die due to climate change.

Obviously, and this needs to be stressed, climate change is a big deal either way. But there are differences between catastrophe and extinction. If the models tell us that all humans are going to die, then extreme solutions — which might save us, or might have unprecedented, catastrophic negative consequences — might be worth trying. Think of plans to release aerosols into the atmosphere to reflect sunlight and cool the planet back down in the manner that volcanic explosions do. It’d be an enormous endeavor with significant potential downsides (we don’t even yet know all the risks it might pose), but if the alternative is extinction then those risks would be worth taking.

But if the models tell us that climate change is devastating but survivable, as most models show, then those last-ditch solutions should perhaps stay in the toolkit for now.

Then there’s the morale argument. Defenders of overstating the risks of climate change point out that, well, understating them isn’t working. The IPCC may have chosen to maintain optimism about containing warming to 2 degrees Celsius in the hopes that it’d spur people to action, but if so, it hasn’t really worked. Maybe alarmism will achieve what optimism couldn’t.

That’s how Spratt sees it. “Alarmism?” he said to me. “Should we be alarmed about where we’re going? Of course we should be.”

Swedish teenager Greta Thunberg has taken an arguably alarmist bent in her advocacy for climate solutions in the EU, saying, “Our house is on fire. I don’t want your hope. ... I want you to panic.” She’s gotten strong reactions from politicians, suggesting that at least sometimes a relentless focus on the severity of the emergency can get results.

So where does this all leave us? It’s worthwhile to look into the worst-case scenarios, and even to highlight and emphasize them. But it’s important to accurately represent current climate consensus along the way. It’s hard to see how we solve a problem we have widespread misapprehensions about in either direction, and when a warning is overstated or inaccurate, it may sow more confusion than inspiration.

Climate change won’t kill us all. That matters. Yet it’s one of the biggest challenges ahead of us, and the results of our failure to act will be devastating. That message — the most accurate message we’ve got — will have to stand on its own.

### 1nc – warming/ukraine

#### Ukraine spurs warming action

Bokat-Lindell 3-16 [Spencer Bokat-Lindell, a staff editor at NYT, 3-16-2022 https://www.nytimes.com/2022/03/16/opinion/ukraine-climate-change-russia.html]

How the war could spur climate action

In the immediate term, Germany and others could take measures to reduce their consumption of Russian fossil fuels, as the Times columnist Paul Krugman explains. Eliminating their use, though, would incur steep costs to the German people equivalent to those of a moderate recession.

“It’s not so simple to just say, ‘OK, overnight, now we’re going to suddenly switch and no longer going to be dependent on natural gas from Russia,’ or fossil fuels in general,” Pete Ogden, vice president for energy, climate and the environment at the U.N. Foundation, told Yahoo News. “Right now, you’re seeing that vulnerability exposed and there not being easy, short-term fixes to that problem.”

But it’s evident that the fusion of foreign-policy and climate interests has lent more political momentum to decarbonization. Germany, for its part, just earmarked 200 billion euros for investment in renewable energy production between now and 2026. “Many of the strategies to lower dependency on Russia are the same as the policy measures you want to take to lower emissions,” Thijs Van de Graaf, a professor of international politics at Ghent University, told The Financial Times. “At the moments where we have these crises, the [energy] transition can be supercharged.”

The European Union has vowed to slash Russian natural gas imports by two-thirds by next winter and to cut them out entirely by 2027. “That would be an extremely ambitious timetable in peacetime, but if the continent shifts to a war footing — as it must, with a savage conflict playing out on its eastern borders — then it should be achievable,” The Boston Globe editorial board writes.

Key to the transition, the board adds, is increasing American production of minerals and metals required for renewable energy technology. Russia is a key supplier of those materials, so the West needs to ensure it doesn’t become just as reliant on Russia for clean energy production as it is now for fossil fuels.

In The Times, Simone Tagliapietra, Georg Zachmann and Morgan Bazilian call for a pact between North America and Europe to help the continent reduce its short-term dependence on Russian fuel. “Such a pact could also build an important foundation for cooperation in clean energy innovation and deployment and reducing energy demand in the longer term — which would significantly enhance Europe’s energy security,” they write.

#### But makes complete solvency impossible

Bokat-Lindell 3-16 [Spencer Bokat-Lindell, a staff editor at NYT, 3-16-2022 https://www.nytimes.com/2022/03/16/opinion/ukraine-climate-change-russia.html]

Military conflict crowds out cooperation. As my colleague Ezra Klein said on a recent episode of his podcast with the economic historian Adam Tooze, the goal of global decarbonization can be met only if countries work together. But “the hotter conflict gets, the harder cooperation gets,” he noted.

It bodes ill, then, that Russia, as one of the world’s largest producers of fossil fuels, is vital to the international effort to eliminate greenhouse gas emissions, and has so far shown a “critically insufficient” commitment to that, according to Climate Action Tracker. If climate diplomacy was halting during peacetime, what chance is there for it now?

## adv 2

### 1nc – solvency

#### Deterrence theory wrong --- assumes agents are rational actors calculating risks --- Motivations are borne from a corrupted corporate culture

MARKHAM 13 --- JESSE W. MARKHAM, JR, Marshall P. Madison Professor of Law at the University of San Francisco School of Law, “THE FAILURE OF CORPORATE GOVERNANCE STANDARDS AND ANTITRUST COMPLIANCE”, SOUTH DAKOTA UW REVIEW [Vol.58 2013], https://heinonline.org/HOL/LandingPage?handle=hein.journals/sdlr58&div=28&id=&page=

Secondly, the underlying but unexamined assumption in much of the literature is that there is some way for a potential antitrust violator to carry out the deterrence calculation, at least in rough arithmetic terms. That is, ~~he or she~~ [someone] can at least estimate numerically the projected benefits from cartel activity, the percentage likelihood of detection, and the amount of the likely fine. Where are these numbers supposed to come from? Each of the elements of this calculation is buried in obscurity in the real world. The projected benefits from cartel activity are not determinable ex ante. Indeed, scholars have been unable with much confidence to calculate the economic rewards from a cartel even after it has operated, let alone in advance. There is no way of knowing beforehand, for example, how long a cartel will endure, how successful it will be at imposing prices above competitive levels, or (at least sometimes) even what the competitive or cartel prices would be. The percentage likelihood of detection and successful prosecution also is not a number that is ready to hand to the sales person who is invited into a cartel. Again, the literature is rife with confessions that one simply cannot know how many cartels go undetected, so the percentage of all cartels represented by those that get detected is equally unknowable. Furthermore, fines arc meted out in the United States at least by applying a densely complex set of sentencing guidelines. Even if a corporate agent could assess in advance such things as culpability scores, the decision to violate the law frequently will implicate not just U.S. antitrust law but also the laws of other nations. It is the total, not just the U.S. component, of costs that would affect the decision to join or abstain. Additionally, the cost to the agent may include incarceration. While economists might feel confident in equating a year of incarceration with a dollar figure, an actual person deciding how to act might find this absurd or at least lack much confidence in any particular number. The agent deciding how to act needs all three of the elements of the deterrence calculus but is unlikely even to have one of them. One imagines a sales person at his or her desk with a calculator, multiplying a 0.2786% risk of conviction times the likely fine (payable by someone else, of course), plus economic cost of incarceration, subtracted from the dollar amount of economic benefit to him or her of participating in a cartel. There is no reason to believe that calculation or anything like it has ever been made by a single human being (let alone a corporation). Deterrence calculus is theoretically of some value but should not be misunderstood as affecting or describing human behavior.

A third problem with the calculus of antitrust deterrence is that it distracts from what may in fact be the central factor: corrupted corporate culture. It is also well-understood that cartel activity is to some extent motivated by cultural forces and not simply by economic calculus. Even if the calculations imagined in the literature could actually be performed in advance of the violation, the actor’s motivation may not be so simple. In the account of the lysine cartel, Mark Whitaker explained why he had participated in price fixing: “They said that if I’m going to grow with ADM, I gotta be part of the business,” he said. ‘‘I knew what they wanted me to do was illegal, and that weighed on me. When they told me to lie, I had to lie.”32 Nowhere in any account of the lysine cartel was there any mention of an ex ante analysis of economic reward calculated against potential cost. Instead, the cartel seemed to move forward with the actions of people like Whitaker, motivated by pleasing those around (or more precisely, above) them. Apparently, Whitaker’s cartel participation was also influenced by his worries about being caught having embezzled substantial sums from his employer, which he sought to avoid exposing by making no waves in his company. The story told in The Informant also reveals a general arrogance— a tendency to discount the risks of apprehension. The picture of a corrupt corporate culture painted in Eichenwald’s account, while not necessarily accurate as to all of its dialogue and details, is unremarkable: cartels are incubated in corporate cultures. Deterrence theory, however, largely ignores this impetus to violate laws.

#### Turn --- Treble damage crushes market value

Gaughan 05 --- Patrick A. Gaughan, President of Economatrix Research Associates, Inc., an economic and financial consulting firm, “THE ECONOMICS OF PUNITIVE DAMAGES: POST STATE FARM V. CAMPBELL”, Contemporary Studies in Economic and Financial Analysis, Volume 87, 217–266 , 2005, https://www.emerald.com/insight/content/doi/10.1016/S1569-3759(05)87009-3/full/pdf

Litigation costs will lower corporate profitability and reduce the pool of monies available for dividends and, thereby, impede capital gains. This is true for any cost, and litigated-related costs are no different. For this reason, the exposure to potentially large and unpredictable litigation payments can have an adverse effect on stock prices. Research studies have confirmed the impact that litigation can have on stock prices (Bizjak & Coles, 1995). This impact can be very significant. A good example of this was the 42% decline in the stock price of the Halliburton Company in response to a $30 million verdict in December 2001 in favor of five plaintiffs (Banerjee, 2001). This was one of many asbestos cases that were brought against the company.1 Over the prior quarter century, the company had settled almost 200,000 asbestos claims although many of them were settled for relatively modest amounts. The market reacted to the large verdict and what it implied about the potential litigation exposure that would occur if the other cases had a similar result. Another was the declines of Bayer AG’s stock price in response to the first Baycol trials beginning in Texas in 2001 (see Fig. 1). The company’s stock price fell from $43.36 at the end of January 2001 to $20.02 by September 10, 2001, and declined even further to $17.96 by the end of October of that year. Later in 2003, when Bayer AG received a favorable verdict, the stock rebounded. Towards the end of 2004, Pfizer’s market capitalization lost approximately $30 billion over a couple of trading days as a result of concerns that were being expressed about a possible relationship between heart problems and some of its anti-inflammatory drugs. The market fell even though no firm relationship between ailments and those drugs was known at that time and not a single lawsuit had been filed.

For companies with large litigation exposure, such as tobacco and asbestos defendants, the adverse shareholder wealth effects can be quite significant. Securities analysts have attempted to measure the magnitude of the large tobacco liabilities of Philip Morris Companies, Inc., which is now called Altria. Table 3 shows that over the past three years, Philip Morris USA, the tobacco subsidiary of Altria, as well as other divisions of the food/ tobacco company, were the object of many lawsuits, including class actions and multiple plaintiff cases (Altria Annual Report, 2003).

In February 2001, Goldman Sachs issued a report that featured a ‘‘sum of the parts’’ analysis which computed total enterprise value and the value of each of the company’s corporate divisions that composed the total enterprise value. The various parts or business segments were valued using comparable multiples that were relevant to the four industry segments that made up the parent firm – Philip Morris Companies, Inc.2 This comparable multiples analysis is an accepted method of valuing businesses (Gaughan, 2004). The Goldman Sachs analysis measured what has been termed the ‘‘litigation overhang’’ and found it to be equal to $91.5 billion (Goldman Sachs Analyst Report, 2001)! Without the litigation exposure, their analysis showed that the value of the equity of Philip Morris Companies, Inc. would have equaled approximately $200 billion, compared to the market value of the equity as of that time which was $108.7 billion. Goldman Sachs attributed this large difference to the market’s allowance for the uncertain tobacco liabilities.

Litigation-related liabilities are but one form of relevant information that markets consider when determining equity values. Increases in such liabilities due to punitive damages may cause stock prices to decline, adversely affecting shareholders. Markets tend to be somewhat efficient (with exceptions) in processing relevant information.3 Some might argue that the company should reduce dividend payments to shareholders and allocate those monies to litigation payments, thereby making shareholders pay punitive and other damages in this manner. Unfortunately, this method also has farreaching spillover effects that will hurt shareholders in other ways. Announcements of dividend reductions and/or elimination usually cause the announcing company’s stock price to fall. For example, Cigna announced in February 2004 that it was undergoing a major restructuring and would cut its dividend from $.33 per share to $.025. As can be seen from Fig. 2, the market reacted in the expected manner with a sharp falloff in the stock price and market capitalization. Such dividend-cut-related stock collapses can have even more far-reaching effects, as a company can then become a target for a takeover, which, if completed, effectively ends the existence of the company in its prior form. These are spillover effects that need to be considered when contemplating actions that affect dividends and share values.

#### Stock market crash causes economic recession

Miao et al 12 --- Jianjun Miao et al, Assistant Prof of Economics, Department of Economics, Boston University, “Stock Market Bubbles and Unemployment”, March 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2036594

This paper provides a theoretical study that links unemployment to the stock market bubbles and crashes. Our theory is based on three observations from the U.S. labor, credit, and stock markets. First, the U.S. stock market has experienced booms anti busts and these large swings may not be explained entirely by fundamentals. Shiller (2005) documents extensive evidence on the U.S. stock market behavior and argues that many episodes of stock market booms are attributed to speculative bubbles. Second, the stock market booms and busts are often accompanied by the credit market booms and busts. A boom is often driven by a rapid expansion of credit to the private sector accompanied by rising asset prices. Following the boom phase, asset prices collapse and a credit crunch arises. This leads to a large fall in investment and consumption and an economic recession may follow.1 Third, the stock market and unemployment are highly correlated.2 Figure 1. plots the post-war U.S. monthly data of the real Standard anti Poor’s Composite Stock Price Index constructed by Robert Shiller and the unemployment rate downloaded from the Bureau of Labor Statistics (BLS).3 This figure shows that, during recessions, the stock price fell and the unemployment rate rose. In particular, during the recent Great Recession, the unemployment rate rose from 5.0 percent at the onset of the recession to a peak of 10.1 percent in October 2009, while the stock market fell by more than 50 percent from October 2007 to March 2009.

Motivated by the preceding observations, we build a search model with credit constraints, based on Blanchard and Gali (2010). The Blanchard and Gali model is isomorphic to the Diamond-Mortensen-Pissarides (DMP) search and matching model of unemployment (Diamond (1982), Mortensen (1982), and Pissarides (1985)). Our key contribution is to introduce credit constraints in a way similar to Miao and Wang (2011a,b,c, 2012a,b).4 The presence of this type of credit constraints can generate a stock market bubble through a positive feedback loop mechanism. The intuition is the following: When investors have optimistic beliefs about the stock market value of a firm’s assets, the firm wants to borrow more using its assets as collateral. Lenders are willing to lend more in the hope that they can recover more if the firm defaults. Then the firm can finance more investment and hiring spending. This generates higher firm value and justifies investors’ initial optimistic beliefs. Thus, a high stock market value of the firm can sustain in equilibrium.

There is another equilibrium in which no one believes that firm assets have a high value. In this case, the firm cannot borrow more to finance investment and hiring spending. This makes firm value indeed low, justifying initial pessimistic beliefs. We refer to the first type of equilibrium as the bubbly equilibrium and to the second type as the bubbleless equilibrium. Both types can coexist due to self-fulfilling beliefs. In the bubbly equilibrium, firms can hire more workers ami hence the market tightness is higher, compared to the bubbleless equilibrium. In addition, in the bubbly equilibrium, an unemployed worker can find a job more easily (i.e., the job-finding rate is higher) and hence the unemployment rate is lower.

After analyzing these two types of equilibria, we follow Weil (1987), Kocherlakota (2(M)9) and Miao and Wang (2011a,b,c, 2012a,b) and introduce a third type of equilibrium with stochastic bubbles. Agents believe that there is a small probability that the stock market bubble may burst. After the burst of the bubble, it cannot re-emerge by rational expectations. We show that this shift of beliefs can also be self-fulfilling. After the burst of the bubble, the economy enters a recession with a persistent high unemployment rate. The intuition is the following. After the burst of the bubble, the credit constraints tighten, causing firms to reduce investment and hiring. An unemployed worker is then harder to find a job, generating high unemployment.

Our model can help explain the high unemployment during the Great Recession. Figures 2 and 3 plot the hires rate and the job-finding rate using the Job Openings and Labor Turnover Survey (JOLTS) data set.5 These figures reveal that both the jol>-finding rate and the hires rate fell sharply following the stock market crash during the Great Recession. In particular, the hires rate and the job-finding rate fell from 4.4 percent and 0.7, respectively, at the onset of the recession to about 3.1 percent and 0.25, respectively, in the end of the recession.

### 1nc – tech

#### Tech leadership high –

#### 1. investment and education.

NSF ’16 (National Science Foundation; 1/19/2016; “U.S. science and technology leadership increasingly challenged by advances in Asia,” https://www.nsf.gov/news/news\_summ.jsp?cntn\_id=137394; Date Accessed: 12/30/2016)

According to the latest federal data, the U.S. science and engineering (S&E) enterprise still **leads the world**. The United States **invests the most** in research and development (R&D), produces the **most advanced degrees** in science and engineering and high-impact scientific publications, and remains the **largest provider of information**, financial, and business services. However, Southeast, South, and East Asia continue to rapidly ascend in many aspects of S&E. The region now accounts for 40 percent of global R&D, with China as the stand-out as it continues to strengthen its global S&E capacity.

#### 2. 5G leadership

Swaine 21 [Michael D. Swaine, director of the East Asia program at the Quincy Institute. 4-21-2021 https://foreignpolicy.com/2021/04/21/china-existential-threat-america/]

Chinese companies are certainly participating in standard-setting in key areas, including 5G. But this process is highly competitive globally, and U.S., Asian, and European companies all hold major portions of the standards and the standard-essential patents that undergird the global technology ecosystem. There is little if any chance that Chinese companies could come to dominate this process. Many tech experts state that the most likely worst-case outcome of Chinese gains regarding standards and hardware would be a fragmented technology ecosystem that would impoverish all countries, not give China a level of power that would enable it to vanquish the United States.

### 1nc – china ilo

#### No China impact – exaggerated threats are cottage industry that ignore reality

Swaine 21 [Michael D. Swaine, director of the East Asia program at the Quincy Institute. 4-21-2021 https://foreignpolicy.com/2021/04/21/china-existential-threat-america/]

It has become a cottage industry in Washington and in parts of Europe these days to highlight all the many ways in which China threatens U.S., Western, and Asian interests. Politicians, military officers, and pundits take turns describing the dangers posed by Beijing’s “expansionist” and “aggressive” military, “implacably hostile” ideology, “predatory” economic and tech policies, and “insidious” overseas influence operations.

Despite shunning the Trump administration’s habitual use of most of these inflammatory adjectives, U.S. President Joe Biden and Secretary of State Antony Blinken nonetheless depict Beijing as challenging the entire “rules-based order that maintains global stability” and as the major focal point of a global struggle between democracy and authoritarianism, which is now, according to Biden, at an “inflection point.”

Such language echoes the premise of various strategy documents of the Trump administration and the speeches of former Secretary of State Mike Pompeo: that the United States is now locked in a strategic, great-power rivalry with China that overshadows any other foreign (or even domestic) threats or concerns facing the country.

There is no doubt that Beijing’s behavior in many areas challenges existing U.S. and allied interests and democratic values. Particularly under Xi Jinping, China has used its greater economic and military power to intimidate rival claimants in territorial disputes and punish nations that make statements or take what Beijing views as threatening or insulting actions. It has engaged in extensive commercial hacking and theft of technologies and favors military intimidation over dialogue in dealing with Taiwan. And it has employed draconian, repressive policies in Tibet and Xinjiang and suppressed democratic freedoms in Hong Kong.

This deeply troubling behavior certainly requires a strong, concerted response from the United States and other nations. But to be effective, such a response also requires an accurate assessment of China’s future impact on the United States and the world.

And in this regard, it is extremely counterproductive to U.S. interests to assert or even imply, as many now do, that the above Chinese actions constitute an all-of-society, existential threat to the United States, the West, and ultimately the entire world, thereby justifying a Cold War-style, zero-sum containment stance toward Beijing. Such an extreme stance stifles debate and the search for more positive-sum policy outcomes while leading to the usual calls for major increases in defense spending.

In fact, there isn’t much actual evidence to support the notion of China as an existential threat. That does not mean that China is not a threat in some areas, but Washington needs to approach this issue based on the facts, not dangerous rhetoric. Unfortunately, right-sizing the challenges that China poses seems to be an impossible task for Washington.

In the most basic, literal sense, an existential threat means a threat to the physical existence of the nation through the possession of an ability and intent to exterminate the U.S. population, presumably via the use of highly lethal nuclear, chemical, or biological weapons. A less conventional understanding of the term posits the radical erosion or ending of U.S. prosperity and freedoms through economic, political, ideational, and military pressure, thereby in essence destroying the basis for the American way of life. Any threats that fall below these two definitions do not convey what is meant by the word “existential.”

As a military power, China has no ability to destroy the United States without destroying itself. China’s nuclear capabilities are far below those of the United States, and its conventional military, while regionally potentially powerful, has a fraction of the budget of that of the United States.

Some argue that China could militarily push the United States out of Asia and dominate that region, denying the country air and naval access and hence support for critical allies. This would presumably have an existential impact by virtue of the supposedly critical importance of that region to the stability and prosperity of the United States. Yet there are no signs that Washington is losing either the will or the capacity to remain a major military actor in the region and one closely connected to major Asian allies, which are themselves opposed to China dominating the region. In reality, the greater danger in Asia is that Washington could so militarize its response to China that its actions and policies become repugnant even to U.S. allies.

This leaves the unconventional threats. Here they are presumably twofold: economic and technological, and in the realm of ideas and influence operations within the United States and other Western countries, including the export of China’s so-called “model” of authoritarian rule to the rest of the world.

The former threats would presumably consist of China attaining a level of total superiority over both economic and technological levers of influence globally and with regard to the United States (perhaps combined with a successful military blocking of U.S. sea lines of communication) that would so impoverish the country as to threaten its existence as a stable and prosperous democracy and bring it under Chinese control. Presumably, the specific basis of such leverage would consist of near-absolute global Chinese dominance over both trade and investment relations and supply chains with the United States and other countries and over all the key technologies driving future growth and military capabilities.

It is virtually inconceivable that China could achieve such a level of dominance over the United States. The United States possesses abundant energy, human, technological, and other resources; a huge and dynamic domestic market; enormous levels of accumulated wealth and capital stocks; and the globe’s financial reserve currency.

In contrast, while China boasts a highly entrepreneurial and dynamic workforce, it labors under major structural and political constraints such as insufficient arable land, a rapidly aging society, a heavy reliance on energy imports, and stifling ideological and state-centered controls across society.

Beijing has certainly used its economic leverage (such as market access) to pressure foreign companies and governments to support Chinese policies or stop what it regards as unacceptable behavior, e.g., regarding Taiwan. While such economic coercion is by no means unique to China, it certainly can erode freedom of speech, thus threatening one of democracy’s core principles. But this hardly rises to the level of an existential threat to American values, given both the limited reach of Chinese economic power and the countervailing global economic power and political influence of democratic states.

Some observers claim that Beijing could somehow set standards in critical technology areas and install tech hardware around the world, to the extent that China would be able to relegate the United States to a permanently inferior status in both the commercial and military realms, thus threatening the very existence of the country. This is also highly unlikely.

Chinese companies are certainly participating in standard-setting in key areas, including 5G. But this process is highly competitive globally, and U.S., Asian, and European companies all hold major portions of the standards and the standard-essential patents that undergird the global technology ecosystem. There is little if any chance that Chinese companies could come to dominate this process. Many tech experts state that the most likely worst-case outcome of Chinese gains regarding standards and hardware would be a fragmented technology ecosystem that would impoverish all countries, not give China a level of power that would enable it to vanquish the United States.

More realistically, Beijing might over time exclude high-tech companies in the United States and other countries from its market, which might make it difficult for them to continue to grow and innovate. And Chinese financing power and supply chains could conceivably create a kind of “turnkey” solution in some developing countries that lock them into a Chinese tech ecosystem. But such developments would come nowhere near to constituting an existential threat to the United States, given the global reach of non-Chinese high-tech companies and the overall limited reach of any Chinese high-tech ecosystem in the developing world in the face of such competition.

Finally, the latter set of supposedly existential normative or ideological threats consists of many elements, including Beijing’s possible overturning of the so-called global liberal international order, Chinese influence operations aimed at U.S. society, the export of China’s political values and state-directed economic approach, and its sale of surveillance technologies and other items that facilitate the rise or strengthening of authoritarian states. These threats all seem hair-raising at first glance. But while significant, they are greatly exaggerated and do not rise to the level of constituting an existential threat.

Beijing has little interest in exporting its governance system, and where it does, it is almost entirely directed at developing countries, not industrial democracies such as the United States. In addition, there is no evidence to indicate that the Chinese are actually engaged in compelling or actively persuading countries to follow their experience. Rather, they want developing nations to study from and copy China’s approach because doing so would help to legitimize the Chinese system both internationally and more importantly to Beijing’s domestic audience.

In addition, the notion that Beijing is deliberately attempting to control other countries and make them more authoritarian by entrapping them in debt and selling them “Big Brother” hardware such as surveillance systems is unsupported by the facts. Chinese banks show little desire to extend loans that will fail, and the failures that do occur are mostly due to poor feasibility studies and the incompetence and excessive zeal of lenders and/or borrowers. Moreover, in both loan-giving and surveillance equipment sales, China has shown no specific preference for nondemocratic over democratic states.

Even if Beijing were to attempt to export its development approach to other states, the actual attractiveness of that approach would prove to be highly limited. The features undergirding China’s developmental success are not replicable for most (if any) countries. These include a high savings rate; a highly acquisitive and entrepreneurial cultural environment; a state-owned banking system and nonconvertible currency; many massive state-owned industries that exist to provide employment, facilitate party control over key sectors, and drive huge infrastructure construction; and strong controls over virtually all information flows. Moreover, such a model (if you can call it that) is almost certainly not sustainable in its present form, given China’s aging population, extensive corruption, very large levels of income inequality, inadequate social safety net, and the fact that free information flows are required to drive global innovation.

Although China’s combination of economic reform policies and authoritarian political system has been around since the early 1980s, not a single nation has adopted that system either willingly or under Chinese compulsion. There are certainly many authoritarian states and fragile democracies on China’s periphery, but none of them were made that way by China.

China’s challenge to the so-called global liberal international order is also exaggerated. In the first place, it is highly debatable whether in fact a single coherent global order even exists. What observers usually refer to as the “liberal international order” (a relatively recent term) actually consists of an amalgam of disparate regimes with different origins, including international human rights pacts, multilateral economic arrangements, and an international court.

The United States certainly plays an important or leading role in many of these regimes. But it did not create and does not drive all global regimes—and in fact does not support some of them, such as the International Court of Justice, and has not ratified some critical pacts such as the United National Convention on the Law of the Sea. And many very important global regimes (e.g., regarding the proliferation of weapons of mass destruction, trade and investment, climate change, and pandemics) have no deep connection to liberal democratic values per se and are supported by Beijing, albeit sometimes more in letter than in spirit.

### 1nc – ukraine

#### Ukraine thumps tech

Kiblinger 3-25 [Ben Kiblinger, Amtec a professional Direct Hire Recruitment and Contract Staffing company, 3-25-2022 <https://www.einnews.com/pr_news/566577472/the-ukraine-impact-on-american-tech-companies>]

The Ukraine/ Russia conflict puts American Tech companies at risk of contract hires no longer being available. Collaboration on projects is breaking down.

The Ukraine/ Russia conflict puts American Tech companies on notice of contract hires who may no longer be available. While the U.S. is attempting to expand its influence and create greater opportunities by recruiting engineers across borders, Russia’s invasion of Ukraine undermines the opportunities available for people to empower themselves and their families.

The ability to work remotely online extended engineer recruitment for American tech companies, some of who are citizens of the Ukraine and Russia. As Amtec noted in its article about "How to Hire Engineers from Outside Your Area" adding web developers, coders, and other engineers from out-of-town is an effective way to meet a need.

Now the Ukrainian and Russian contract hires have been caught in the crosshairs of the conflict between their countries. Amtec has two engineers located in Belarus who are uncertain if US sanctions will end their long-time work relationship with Amtec.

While most traditional companies have established on-site employees in their markets, many tech companies have embraced contract hires by recruiting engineers from overseas. Unfortunately, this creates a remote workforce that can't necessarily be moved or evacuated quickly.

JustAnswer is a San Francisco tech company with about 250 workers located in Ukraine. The ability of those workers to continue working is fragile at best, and their prospects for resuming remote work for JustAnswer and other tech companies are uncertain. Russia's invasive bombardment destroys infrastructure and leaves some unable to leave due to martial law implemented to defend the country.

Dmytro Grygorenko is one such Ukrainian engineer uncertain about his future. His hometown has been impacted by Russian bombs, sharing photos of the tragedy on his LinkedIn. Even if Russian companies are against the war due to economic ties with the U.S., it’s unlikely they will speak out. With the pillars of Russia’s last free press falling, it leaves little hope for a native boycott of the Kremlin without severe repercussions.

Amtec’s Chief Operating Officer, Barrett Kuethen, says contract hires and engineers from Ukraine are a great example of collaborative projects between workers of different companies. Russia’s invasion of Ukraine is a threat to cultural understanding and economic ties that fosters innovation.

“Many Ukrainian software engineers founded or co-founded companies like PayPal, Whatsapp, and Grammarly. Russia's ongoing military expansionism in the Ukraine and Crimea threatens the foundations of the global information technology industry by displacing Ukrainian software engineers. It also threatens the influence Ukrainian engineers can have on our global economy and development of a better future.” - Barrett Kuethen, Amtec COO

#### Ukraine thumps ILO

Lynch 22 [David J. Lynch joined The Washington Post in November 2017 from the Financial Times, where he covered white-collar crime 3-5-2022 https://www.washingtonpost.com/business/2022/03/05/global-economy-russia-ukraine/]

Russia’s invasion of Ukraine and the financial reckoning imposed on Moscow in response are proof that the triumphant globalization campaign that began more than 30 years ago has reached a dead end.

Fallout from the fighting in Ukraine will take a meaningful bite out of the global economic recovery this year, with the greatest impact in Europe, economists said. A spike in oil prices to more than $110 per barrel and renewed supply chain disruptions — including fresh headaches for the auto industry — also are likely to aggravate U.S. inflation, already at a 40-year high.

But the war’s long-term consequences could be more profound. Even before Russian President Vladimir Putin sent tanks and missiles hurtling toward Ukraine, years of deteriorating U.S.-China relations and failed global trade talks had stalled the tighter integration of finance and trade flows that had been anticipated during globalization’s heyday.

What comes next is unlikely to mirror the Cold War’s distinct blocs. Even as the global economic order fractures, no rival ideologies compete for supremacy. And China’s harsh authoritarian turn under President Xi Jinping co-exists with extensive commercial ties to the United States, Europe and Japan. But governments, corporations and investors all are adjusting to a new reality.

“It’s the end of one era and the beginning of another, which is a less complete form of globalization than we had ambitions for in the immediate post-Cold War era,” said Michael Smart, managing director of Rock Creek Global Advisors. “We have to think differently about what we mean by the global trading system. There are certain requirements that, if you don’t meet them, you’re not part of it. You can’t be in the club.”

With the United States, Europe, Canada, Britain and Japan uniting to punish Russia with unprecedented financial sanctions, the war has triggered a “major geopolitical realignment” akin to the aftershocks from the 9/11 terrorist attacks, according to Citibank analysts.

Virtually overnight, most major Russian banks were blocked from moving money across borders. Moscow’s stock market has been closed for a week. Russian customers are cut off from much of the world’s most advanced technologies.

On Friday, Russia’s isolation deepened as the country’s communications regulator blocked access to Facebook, one of the few sources of information that the government already did not control, saying it had discriminated against Russia media.

End of carousel

In Washington, top Democrats and Republicans have begun demanding that the United States stop importing oil from Russia, a move that would intensify Moscow’s financial plight if European nations followed suit. Meanwhile, the International Monetary Fund warned Saturday that the war and rapidly accumulating sanctions on Russia would “have a severe impact on the global economy.”

“This event does seem to be one that is a game changer and will be with us for a very long time,” Federal Reserve Chair Jerome H. Powell told Congress last week.

Russia’s financial exile caps more than a decade of erosion in globalization, beginning with the 2008 financial crisis and continuing through the rise of Xi in 2012, the U.S.-China trade war that began in 2018, and diplomats’ repeated failures to agree on trade liberalization. The coronavirus pandemic, which highlighted the risk of ocean-spanning supply lines and restricted international travel, further thinned cross-border links.

### 1nc – circumvention

**The plan gets circumvented**

1. **Courts**

**Crane 21** – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital. Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that. Inquiring into the nature and implications of antitrust antitextualism is particularly salient at the present when, for the first time in a generation, there is widespread dissatisfaction with antitrust enforcement and impetus for potential reform legislation.7 As was true at each of the prior moments of reformist sentiment, the call is for statutory reforms to curb the power of big business.8 We have seen this play before, and also its sequel. In the play, Congress announces that the antitrust laws are too weak and that reforms are necessary to protect the nation from the power of big capital. In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant. Will anything be different this time around, or are the legislative reforms currently on the table predestined to a similar fate?

#### Erroneous enforcement

Geoffrey A. Manne 20, president and founder of the International Center for Law and Economics, “Error Costs in Digital Markets,” November 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3733662

Legal decision-making and enforcement under uncertainty are always difficult and always potentially costly. The risk of error is always present given the limits of knowledge, but it is magnified by the precedential nature of judicial decisions: an erroneous outcome affects not only the parties to a particular case, but also all subsequent economic actors operating in “the shadow of the law.”2 The inherent uncertainty in judicial decision-making is further exacerbated in the antitrust context where liability turns on the difficult-to-discern economic effects of challenged conduct. And this difficulty is still further magnified when antitrust decisions are made in innovative, fastmoving, poorly-understood, or novel market settings—attributes that aptly describe today’s digital economy.

Rational decision-makers will undertake enforcement and adjudication decisions with an eye toward maximizing social welfare (or, at the very least, ensuring that nominal benefits outweigh costs).3 But “[i]n many contexts, we simply do not know what the consequences of our choices will be. Smart people can make guesses based on the best science, data, and models, but they cannot eliminate the uncertainty.”4 Because uncertainty is pervasive, we have developed certain heuristics to help mitigate both the direct and indirect costs of decision-making under uncertainty, in order to increase the likelihood of reaching enforcement and judicial decisions that are on net beneficial for society. One of these is the error-cost framework.

In simple terms, the objective of the error-cost framework is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct (“false positives,” or “Type I errors”); (2) erroneous allowance and under-deterrence of harmful conduct (“false negatives,” or “Type II errors”); and (3) the costs of administering the system (including the cost of making and enforcing rules and judicial decisions, the costs of obtaining and evaluating information and evidence relevant to decision-making, and the costs of compliance).

In the antitrust context, a further premise of the error-cost approach is commonly (although not uncontroversially5 ) identified: the assumption that, all else equal, Type I errors are relatively more costly than Type II errors. “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”6 Thus the error-cost approach in antitrust typically takes on a more normative objective: a heightened concern with avoiding the over-deterrence of procompetitive activity through the erroneous condemnation of beneficial conduct in precedent-setting judicial decisions. Various aspects of antitrust doctrine—ranging from antitrust pleading standards to the market definition exercise to the assignment of evidentiary burdens—have evolved in significant part to constrain the discretion of judges (and thus to limit the incentives of antitrust enforcers) to condemn uncertain, unfamiliar, or nonstandard conduct, lest “uncertain” be erroneously identified as “anticompetitive.”

The concern with avoiding Type I errors is even more significant in the enforcement of antitrust in the digital economy because the “twin problems of likelihood and costs of erroneous antitrust enforcement are magnified in the face of innovation.”7 Because erroneous interventions against innovation and the business models used to deploy it threaten to deter subsequent innovation and the deployment of innovation in novel settings, both the likelihood and social cost of false positives are increased in digital and other innovative markets. Thus the avoidance of error costs in these markets also raises the related question of the proper implementation of dynamic analysis in antitrust.8

#### Multiple standards

LOPEZ-GALDOS 17 --- MARIANELA LOPEZ-GALDOS, Global Competition Counsel at the Computer & Communications Industry Association (CCIA), where she represents and advises the association on competition policy issues as well as domestic and international regulatory policy matters, “Antitrust in 60 Seconds: Is the Consumer Welfare Standard Appropriate?”, NOVEMBER 17, 2017, https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/

In 2003 the OECD recognized that the inclusion of conflicting objectives, including public interest considerations beyond consumer welfare, would undermine the public good. It stated that rooting antitrust in multiple competing policy rationales:

“increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and in a relatively minor way, compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency.”

In the United States, the increasing uncertainty created by antitrust enforcement actions and decisions empowered the voices in favor of limiting and eventually eliminating the political dimension to the enforcement of antitrust norms. In fact, some argue that the exclusion of political factors from antitrust enforcement restored intellectual coherence to the antitrust framework.

# Block

## FTCA CP

### 2NC – Perm do both links to error rates

#### Perm: do both – CANNOT shield error rates – perceived risks are inseverable and counterplan alone’s key – prefer ev explicitly comparative to their advocate (Shelanski 11)

Dunne 15 (Niamh Dunne, lecturer in Law at King’s College London, *Competition Law and Economic Regulation: Making and Managing Markets*, Cambridge University Press, 2015, ISBN: 978-1-107-07056-1, pp.243-246)

a. Private enforcement

The European Commission’s antitrust enforcement activities in regulated markets demonstrate a distinct ‘market-making’ potential if deployed within a regulatory setting. The use of competition law to correct ineffective or inefficient regulation permits competition authorities to oversee sector-specific regulation, while quasi-regulatory case theories enable de facto extension of regulation to markets or remedial powers beyond those contemplated by the original regulatory framework. Whether this effective extension of public powers is considered legitimate may depend upon one’s views regarding the permissible role for the State within the market; what is clear, however, is that this market-making vision of competition enforcement fits more readily within a public-enforcement framework than the private-enforcement model. As a general proposition, public enforcement is undertaken in the public interest, whereas private interests motivate private enforcers.295 Public enforcers also have greater technical knowledge, including in respect of potential adverse consequences for regulated markets, and are more likely to coordinate enforcement with sector-specific regulators.296 The risk of false positives, inefficient outcomes and interference with regulation is, accordingly, much lower in the public context.297

**[FOOTNOTES]**

296 Shelanski (2011:713–4).

297 Shelanski (2011:714).

**[/FOOTNOTES]**

Moreover, these distinctions persist even though public enforcement can have an indirect impact on private interests, and vice versa.298 A rule permitting concurrency is therefore more defensible if subsequent antitrust enforcement is undertaken by public agencies rather than private plaintiffs.

Substantive competition law comprises a generic body of law, however, which involves standards that are equally applicable for both public and private enforcement. This includes rules governing concurrency where this is perceived as a substantive competition rule.299 To the extent that concurrency is permitted it may, equally, be applied by private plaintiffs seeking damages. Where concurrency is prohibited, this inhibits, inter alia, public enforcement in regulated markets undertaken presumptively in the public interest to remedy market failures. A universally applicable rule governing concurrency, which covers both public and private enforcement, may therefore risk over- or under-inclusiveness.

Scepticism of private enforcement is a central element of Chicago School antitrust,300 and such scepticism is reflected in Trinko and Credit Suisse. US private enforcement has certain unique characteristics that make it particularly attractive for plaintiffs, yet also vulnerable to inefficiencies and abuse.301 The apparent volte-face regarding concurrency discernible in recent US jurisprudence has been attributed, largely, to concerns that arise directly (and perhaps exclusively) from private enforcement.302 In Credit Suisse, the Supreme Court opined that, if generalist courts are required to decide private actions premised on antitrust violations in highly technical regulated markets, there is an increased risk of false positives.303 Moreover, it identified the risk that private plaintiffs might use antitrust to avoid heightened procedural requirements imposed to eliminate unmeritorious securities lawsuits, holding that ‘[t]o permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing’.304 In order to avoid the presumed inefficiencies and abuses of private enforcement,305 the Court restricted general liability norms, therefore barring concurrency in both public and private cases.306 This de facto deference to regulatory supervision is also reconcilable with public-choice scepticism regarding the limited benefits of regulation: it merely reflects an even greater scepticism regarding the utility of private antitrust litigation.307

Of course, restricting standard liability norms is not the only possible response to problems of private enforcement. Alternatively, more closely tailored reforms of private antitrust litigation generally could be introduced. As noted, three Justices concurring in Trinko would have resolved the issue at the standing stage, by holding that customers of disadvantaged competitors of the monopolist have no right to claim damages for harms suffered by their provider.308 In Twombly, another antitrust case on the Telecommunications Act of 1996 (albeit one in which concurrency was not addressed specifically), the Court raised pleading requirements for private litigation, making such cases more difficult to initiate.309 Another approach is to apply the Trinko/Credit Suisse principles asymmetrically, to prohibit concurrency in private but not public antitrust actions, although, as US law currently stands, this would require legislative intervention or judicial clarification.310 Nonetheless, even public enforcement in regulated markets should not be unbounded; as the discussion in sections IV(i)–(ii) illustrates, the presence of regulation may negate any finding of substantive antitrust liability. In view of this qualification and the US experience more generally, an interesting unresolved issue is whether the anticipated emergence of private enforcement within the EU may impact upon its strongly permissive rules governing concurrency, as considered earlier.

### 2NC – Public litigation best

#### Public antitrust litigation has a better deterrent effect

Crane 10 --- Daniel A. Crane , Professor of Law, University of Michigan Law School., “Optimizing Private Antitrust Enforcement”, 63 Vand. L. Rev. 675 (2010), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1421&context=vlr

Yet the story is not so simple. One must consider the possibility that private antitrust litigation forces managers and shareholders to internalize the costs of an antitrust violation long before any judgment day. Efficient capital markets may punish the firm and, by extension, its managers as soon as a lawsuit is threatened or filed. According to one study, the filing of a securities class action lawsuit by investors more than doubled the likelihood of CEO turnover.97

It is unlikely, however, that the mere filing of a private antitrust suit brings about severe consequences for a defendant firm’s managers. Unlike securities lawsuits, which may impair shareholder confidence in the integrity of insiders, antitrust lawsuits may instead communicate that company managers are acting aggressively to expand market share and increase profitability. This is especially true in the case of private antitrust lawsuits, which many shareholders may rightly regard as signaling that rival firms are merely disaffected by aggressive, but ultimately lawful, competition. While empirical work suggests that the filing of an antitrust action by the Department of Justice or Federal Trade Commission has an immediate and significant negative effect on a defendant firm’s share price, the filing of a private antitrust lawsuit has only about a tenth of the effect of a public suit. Empirical studies have found that defendants lost, on average, 6 percent of their share value upon the filing of a government antitrust lawsuit,98 but only about 0.6 percent of their share value upon the filing of a private lawsuit.99 A half-percent drop in market capitalization is unlikely to engender ruinous consequences to most managers, particularly if the gains from the challenged behavior were large.

### 2NC – Treble Damages fail – executives leave

#### Executives reap the rewards and leave before the corporation has to pay

Crane 10 --- Daniel A. Crane , Professor of Law, University of Michigan Law School., “Optimizing Private Antitrust Enforcement”, 63 Vand. L. Rev. 675 (2010), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1421&context=vlr

Those who believe that antitrust law exists primarily to promote economic efficiency argue that deterrence, and not compensation, should be the primary purpose of private antitrust enforcement."7 In their view, antitrust damages supplement criminal fines by removing any expected profitability from antitrust violations.78 Decisionmakers in dominant firms will perceive that they are better off by not violating antitrust law, given the likelihood of detection multiplied by the penalty. Unlike other fields of law in which the deterrent value of private enforcement has been questioned, 79 the deterrent success of private antitrust enforcement is largely taken for granted.80

In order to evaluate this deterrence claim, one must ascertain who is being deterred. The primary class of relevant decisionmakers is corporate managers, although one must also consider the possibility that vigilant shareholders will rein in managers who fail to respond to antitrust incentives. With respect to these managers, the argument that private antitrust litigation provides effective deterrence is increasingly undermined. Two converging trends-the increasing length of antitrust proceedings and the increasing shortness of managerial tenure-make it likely that corporate managers severely discount the threat of future litigation damages.

First, the time gap between the planning of antitrust violation (which is presumably the moment at which deterrence should take root) and antitrust judgment day is growing longer. While current statistics on the duration of antitrust litigation are not readily available, it is possible to make reasonable assumptions based on the available data. For the last decade, the average disposition time for all civil cases in the federal system has been steady at between eight and nine months. The average time from filing of the case to trial has steadily increased from around 18.5 months in 199681 to 24.6 months in 2007.82 This suggests that early disposition of cases, whether due to motions to dismiss or early settlement practice, has declined somewhat but that cases going all the way to trial take much longer than before because of the increasing complexity of modern litigation and the increasing burden of discovery.83 The Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.84 While this ratio has likely not remained constant-the average private antitrust lawsuit today takes over six years to disposition-the average antitrust suit almost certainly lasts several years. In 2007, there were 378 federal antitrust cases that had been pending for over three years, an immense number considering that there were only a thousand new antitrust filings and that many cases are quickly disposed of on motions to dismiss.85

The time from filing to trial tells only part of the story. The average interval from the filing of a notice of appeal to final disposition is now over a year for all federal cases. 86 The average interval for antitrust cases is likely even longer due to their monetary significance and complexity. Certiorari petitions to the Supreme Court typically add another year to the delay, during which the appellate court's mandate and the corresponding obligation to pay the judgment are stayed.87 Moreover, the misconduct at issue usually begins at least a year or two-and often many years-before the complaint is even filed. Hence, in the average private antitrust case, the time from the beginning of an anticompetitive scheme until judgment day is at least five years and may be closer to ten years or more.

The relevant time intervals in two recent private antitrust cases, in which the plaintiffs won substantial damages awards at trial and had them affirmed on appeal, are instructive. In LePage's Inc. v. 3M, the allegedly anticompetitive bundled rebates were put in place in 1992; LePage's filed suit in 1997 but did not prevail until 2004, when the Supreme Court denied certiorari.88 In Conwood Co. v. U.S. Tobacco Co., the plan to eliminate Conwood was hatched in 1990, Conwood sued in 1998, and the Supreme Court denied certiorari in 2003.89 In both cases, the time between the decision to engage in the challenged conduct and the end of the legal process was well over a decade.

This time lag should be paired with the fact that the managers who put into place anticompetitive schemes are increasingly unlikely to be around to internalize their effects at judgment day. During the 1980s, the turnover rate among senior managers in large corporations was just above ten percent. 90 By all accounts, the turnover rate increased significantly-perhaps even doubling-in the 1990s and 2000s as various capital market factors accentuated shareholder demand for short-term performance. 91 Today, the average CEO holds her job for about six years. 92 Mid-level executives, such as divisional managers, typically hold their jobs for an even shorter period, perhaps less than four years. 93 Thus, most of the executives responsible for an antitrust violation will no longer be with the firm by the time a damages award is entered against the company.

### 2NC – No risk of Rollback

**No rollback---empirics and legislative history prove.**

**Anker 22** (Kimberly H. Anker, BA from Colby College, J.D. Candidate at Boston College Law School; “Best Frenemies: Evaluating the Dual Jurisdiction of the Federal Antitrust Agencies;” 01-27-22, Boston College Law Review, Vol. 63, Issue 1, <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=4038&context=bclr>, TM)

In most civil matters, however, the DOJ and FTC must contend with having dual jurisdiction to enforce antitrust law.61 For example, both the DOJ and FTC have concurrent statutory authority to enforce the Clayton Act.62 Likewise, both agencies may prosecute violations of the Sherman Act, albeit through different means.63 Although Congress expressly authorized the DOJ to enforce the Sherman Act, it did not provide the FTC with the same direct authority.64 Rather, **FTC Commissioners** and **courts** have **broadly construed** **section 5** of the **FTC A**ct to **allow** the **FTC** to **challenge** **any conduct** that **violates**, or **would violate**, the **Sherman** Act or **Clayton** Act, or that **might otherwise** “**contravene** the **spirit** of the **antitrust law**s.”65

[[BEGIN FOOTNOTE 65]]

65 DONALD S.CLARK, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING “UNFAIR METHODS OF COMPETITION” UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/ files/documents/public\_statements/735201/150813section5enforcement.pdf [https://perma.cc/HQ7WUBFQ]; see also **F**ed. **T**rade **C**omm’n **v. Cement** Inst., 333 U.S. 683, 690 (1948) (asserting that the FTC has the authority to decide that conduct that violates the Sherman Act may also violate section 5 of the FTC Act); Averitt, supra note 31, at 239–40 (discussing the Supreme Court’s **broad interpretation** of **section 5** of the FTC Act as **permitting** the **FTC** to **prosecute** **Sherman Act violations**).

[[END FOOTNOTE 65]]

Moreover, Congress intended for the DOJ to prosecute anticompetitive activity under the Sherman Act and for the FTC to subject the same activity to administrative proceedings.66

[[BEGIN FOOTNOTE 66]]

66 See Averitt, supra note 31, at 239 (noting that there is **strong support** for the **proposition** that **Congress intended** the **FTC A**ct to **supplement** the **enforcement powers** of the **Sherman** Act); Hansen, supra note 4, at 21 (examining the **legislative history** of the **FTC A**ct and asserting that Congress intended for the DOJ and FTC to have dual jurisdiction because Congress wanted the FTC Act to enhance the remedies available for conduct that violates the Sherman Act). The Sherman Act, which prohibits unreasonable restraints on trade and improper monopolization, was Congress’s earliest effort at addressing anticompetitive practices in the economy. Averitt, supra note 31, at 230; see 15 U.S.C. §§ 1–7 (outlawing monopolization efforts and conduct that restrains commerce). Prior to the creation of the FTC, the Department of Justice had sole responsibility for enforcing the Sherman Act, and the Act limited enforcement to legislative action in federal court. Averitt, supra note 31, at 230; see also 15 U.S.C. § 4 (providing U.S. attorneys with the responsibility to prosecute violations of the Sherman Act in court). Although implementation through court action alone streamlined the administration of the Act, it also had the inadvertent effect of subjecting the Act to judicial scrutiny and statutory interpretation. Averitt, supra note 31, at 230. Shortly after its inception, the courts construed the Act as a prohibition against unreasonable restraints on trade rather than as a total proscription on all restraints on trade. Id. at 230–31; see, e.g., Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (holding that the Sherman Act only outlaws activities that would unreasonably harm commerce). In 1911, in Standard Oil Company of New Jersey, the Supreme Court formally embraced the “Rule of Reason” and its role in evaluating an alleged violation of the Sherman Act. 221 U.S. at 60; Averitt, supra note 31, at 230. In response to the Court’s decision, Senator Newlands of Nevada immediately proposed instituting corrective legislation that would establish an administrative agency “with powers of recommendation, with powers of condemnation, [and] with powers of correction.” 47 CONG.REC. 1225 (1911) (statement of Sen. Francis Newlands). In the following years, Congress worked to enact new antitrust legislation and held hearings studying the same. Averitt, supra note 31, at 231. In 1913, its efforts culminated in an extensive report that asserted, among other things, that when a court applies the Rule of Reason, it is creating new law rather than merely interpreting and deciding existing law. Id. The report also criticized the Supreme Court for failing to establish predictable or consistent standards regarding what types of practices are anticompetitive. Id. at 232. The congressional committee overseeing the studies determined that (1) there were weaknesses in the Sherman Act that necessitated remedial action; and (2) the Act should be supplemented with a new commission to more efficiently implement and discharge antitrust laws. Id. One year later, in 1914, members of the legislature presented the bill, which would later become the FTC Act, to Congress. Id. With a new antitrust administrative agency, actions for antitrust violations had an additional place to be heard. Id. at 236. The new commission could **opine on** and **offer its own interpretation** of how **courts** and the **various administrative bodies** should employ the **R**ule **o**f **R**eason. Id.

[[END FOOTNOTE 66]

**Courts would apply deference and uphold the rule.**

Justin (Gus) **Hurwitz 14**, Assistant Professor of Law, University of Nebraska College of Law, “Chevron and the Limits of Administrative Antitrust,” University of Pittsburgh Law Review, vol. 76, no. 2, 2, 2014, lawreview.law.pitt.edu, doi:10.5195/lawreview.2014.324

A. Section 5 is Precisely the Sort of Statute to Which Chevron Applies

As a **threshold** matter, Section 5 is **precisely the sort of statute to which Chevron** deference **is meant to apply**.167 At a **mechanical** level, Chevron instructs courts to first ask whether the meaning of the statute is clear.168 Both “**u**nfair **m**ethods of **c**ompetition” and “unfair or deceptive acts or practices” are **inherently ambiguous**; courts need not turn to historical documents to determine whether a specific meaning was intended by Congress or whether Congress clearly intended to delegate interpretive authority to the FTC. Nearly **every word** of the statute is rife with ambiguity: What is **unfair?** Unfair to **whom?** What is deceptive? What is a **method?** An act? A **practice?** What is **competition?** As the **Court has noted**, the standard is “**by necessity**, an **elusive** one.”169

**Absent clarifying language** in the **statute itself**, or in some cases references outside the statute that indicate contrary congressional intent,170 the ambiguity **inherent** in the language of Section 5 is **sufficient to trigger Chevron** deference. The sole task of the **courts** is—or should be—to ensure that, whatever construction the FTC gives to Section 5, that construction is **permissible** within the boundaries of the statute.171

The argument for deference is even stronger when we consider outside references. The **statutory history** has **consistently demonstrated a congressional intent to grant the FTC broad discretion** to define the scope of Section 5 and, in particular, that the scope of Section 5 is broader than that of the antitrust laws.172 Section 5 was enacted in **response** to concerns that the **courts** had interpreted the antitrust laws **too narrowly**;173 it was deliberately drafted with language that had not previously been considered by the courts.174 When the Court imposed an overly narrow construction on the statute in the 1950s, Congress **amended** the statute to **overcome** that narrowing interpretation.175

Section 5 is, thus, a **case study in each of the four rationales for Chevron deference**:176 **congressional intent; agency expertise; concern about** the **courts’ limited political accountability** as compared to Congress and its agencies; and the **s**eparation **o**f **p**owers—all of which urge deference to the FTC’s interpretation of Section 5. It is **hard to imagine a statute better suited to Chevron deference** than Section 5.

## FTC Independence

### 1NR – Turns warming

**turns adv 1 via geoengineering**

**Baum ‘13**

Et al; Dr. Seth Baum is an American researcher involved in the field of risk research. He is the executive director of the Global Catastrophic Risk Institute (GCRI), a think tank focused on existential risk. He is also affiliated with the Blue Marble Space Institute of Science and the Columbia University Center for Research on Environmental Decisions. He holds a PhD in Geography and authored his dissertation on climate change policy: “Double catastrophe: intermittent stratospheric geoengineering induced by societal collapse” - Source: Environment Systems & Decisions - vol.33, no.1 pp. 168-180 - #E&F – available via: https://pubag.nal.usda.gov/catalog/122717

Perceived failure to reduce greenhouse gas emissions has prompted interest in avoiding the harms of climate change via geoengineering, that is, **the intentional manipulation of Earth system processes**. Perhaps the most promising geoengineering technique is **stratospheric aerosol injection** (**SAI**), which reflects incoming solar radiation, thereby lowering surface temperatures. This paper analyzes a scenario in which SAI brings great harm on its own. The scenario is based on the issue of SAI intermittency, in which aerosol injection is halted, sending temperatures rapidly back toward where they would have been without SAI. The rapid temperature increase could be quite damaging, which in turn creates a strong incentive to avoid intermittency. In the scenario, a catastrophic societal collapse eliminates society’s ability to continue SAI, **despite the incentive**. The collapse could be caused by a pandemic, nuclear war, or other global catastrophe. The ensuing intermittency hits a population that is already vulnerable from the initial collapse, making for a **double catastrophe**. While the outcomes of the double catastrophe are difficult to predict, **plausible** worst-case scenarios include **human extinction.** The decision to implement SAI is found to depend on whether global catastrophe is more likely from double catastrophe or from climate change alone. The SAI double catastrophe scenario also strengthens arguments for greenhouse gas emissions reductions and against SAI, as well as for building communities that could be self-sufficient during global catastrophes. Finally, the paper demonstrates the value of integrative, systems-based global catastrophic risk analysis.

**1NR – Link**

**The perm need not fiat FTC coordination with outside agencies. Involvement of outside parties diminishes *the perception* of FTC legitimacy.**

**Kovacic ‘15**

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

These considerations require a more cautious answer to the question of how much independence is appropriate. Implicit or explicit in many discussions **of independence** are **conditions** that we believe represent a sensible **core domain** of decisions that are **shielded from political interference.** The most important of these is the exercise of law enforcement authority, which can lead to the imposition of significant sanctions upon juridical persons and natural persons. The political branches of government ought not to be able to (a) determine whether the agency will prosecute particular parties; or (b) influence how specific disputes will be resolved, including the choice of punishments for alleged wrongdoers. It can also be problematic if government officials outside the agency seek to micromanage pre-complaint investigations and, to a lesser extent, there are potential risks when such outside officials can demand that the agency open pre-complaint investigations. These conditions assume greater importance as the severity of the agency’s power to punish increases. As noted earlier, by this approach we would not preclude guidance by legislators about which sectors or types of commercial phenomena deserve the agency’s attention.

We have focused on law enforcement because the power to gather information, to prosecute cases, and to impose sanctions often is perceived to be the most formidable of the agency’s policymaking tools. The same observations would apply, however, to other exercises of the agency’s authority, such as the issuance of rules that implement statutory commands and the preparation of reports. A **basic test** is whether the form of attempted intervention from external bodies diminishes, **in fact** or **in appearance**, the capacity of the agency to exercise **independent** professional judgment in the administration of its responsibilities.

## Error Rates

**2NC---O/V**

**1. Magnitude---recovery caps numerous geopolitical crises – turns adv 2**

**Baird ’20** [Zoe; October 2020; C.E.O. and President of the Markle Foundation, Member of the Aspen Strategy Group and former Trustee at the Council on Foreign Relations, J.D. and A.B. from the University of California at Berkeley; Domestic and International (Dis)order: A Strategic Response, “Equitable Economic Recovery is a National Security Imperative,” Ch. 13]

A strong and inclusive economy is **essential** for American **national security** and **global leadership**. As the nation seeks to return from a historic economic crisis, the national security community should support an equitable recovery that helps every worker adapt to the **seismic shifts** underway in our economy.

Broadly shared economic prosperity is a **bedrock** of America’s **economic** and **political strength**—both **domestically** and in the **international** arena. A **strong** and **equitable** recovery from the economic crisis created by COVID-19 would be a **powerful testament** to the **resilience** of the American system and its **ability to create prosperity** at a time of **seismic change** and persistent **global crisis**. Such a recovery could attack the profound economic inequities that have developed over the past several decades. Without **bold action** to help all workers access good jobs as the economy returns, the **U**nited **S**tates risks **undermining** the **legitimacy of its institutions** and its **international standing**. The **outcome** will be a **key determinant** of America’s **national security** for years to come.

An equitable recovery requires a national commitment to help all workers obtain good jobs—particularly the two-thirds of adults without a bachelor’s degree and people of color who have been most affected by the crisis and were denied opportunity before it. As the nation engages in a historic debate about how to accelerate economic recovery, ambitious public investment is necessary to put Americans back to work with dignity and opportunity. We need an intentional effort to make sure that the jobs that come back are good jobs with decent wages, benefits, and mobility and to empower workers to access these opportunities in a profoundly changed labor market.

To achieve these goals, **America**n policy makers need to establish **job growth strategies** that address **urgent public needs** through **major programs** in green energy, infrastructure, and health. Alongside these job growth strategies, we need to recognize and develop the talents of workers by creating an adult learning system that meets workers’ needs and develops skills for the digital economy. The national security community must lend its support to this cause. And as it does so, it can bring home the lessons from the advances made in these areas in other countries, particularly our European allies, and consider this a realm of international cooperation and international engagement.

Shared Economic Prosperity Is a National Security Asset

A **strong economy** is **essential** to America’s **security and diplomatic strategy**. Economic strength increases our **influence** on the global stage, **expands markets**, and **funds** a **strong and agile military** and **national defense**. Yet it is not enough for America’s economy to be strong for some—prosperity must be broadly shared. **Widespread belief** in the ability of the American **economic system** to create economic security and mobility for all—the American Dream— creates **credibility** and **legitimacy** for America’s **values**, **governance**, and **alliances** around the world.

After World War II, the **U**nited **S**tates grew the middle class to historic size and strength. This achievement made America the **model** of the free world—**setting the stage** for decades of American political and economic **leadership**. Domestically, broad participation in the economy is **core** to the **legitimacy** of our democracy and the strength of our political institutions. A belief that the economic system works for millions is an important part of creating trust in a democratic government’s ability to meet the needs of the people.

The COVID-19 Crisis Puts Millions of American Workers at Risk

For the last several decades, the American Dream has been on the wane. Opportunity has been increasingly concentrated in the hands of a small share of workers able to access the knowledge economy. Too many Americans, particularly those without four-year degrees, experienced stagnant wages, less stability, and fewer opportunities for advancement.

Since COVID-19 hit, millions have lost their jobs or income and are struggling to meet their basic needs—including food, housing, and medical care.1 The crisis has impacted sectors like hospitality, leisure, and retail, which employ a large share of America’s most economically vulnerable workers, resulting in alarming disparities in unemployment rates along education and racial lines. In August, the unemployment rate for those with a high school degree or less was more than double the rate for those with a bachelor’s degree.2 Black and Hispanic Americans are experiencing disproportionately high unemployment, with the gulf widening as the crisis continues.3

The experience of the Great Recession shows that without intentional effort to drive an inclusive recovery, inequality may get worse: while workers with a high school education or less experienced the majority of job losses, nearly all new jobs went to workers with postsecondary education. Inequalities across racial lines also increased as workers of color worked in the hardest-hit sectors and were slower to recover earnings and income than White workers.4

The Case for an Inclusive Recovery

A recovery that promotes broad economic participation, renewed opportunity, and equity will strengthen American moral and political authority **around the world**. It will **send a strong message** about the strength and **resilience** of **democratic government** and the American people’s **ability to adapt** to a changing global economic landscape. An inclusive recovery will reaffirm American leadership as core to the success of our most critical international alliances, which are rooted in the notion of shared destiny and interdependence. For example, NATO, which has been a cornerstone of U.S. foreign policy and a force of global stability for decades, has suffered from American disengagement in recent years. A strong American recovery—coupled with a renewed openness to international collaboration—is core to **NATO’s ability** to solve **shared geopolitical and security challenges**. A renewed partnership with our European allies from a **position of economic strength** will enable us to address **global crises** such as **climate change**, **global pandemics**, and **refugees**. Together, the United States and Europe can pursue a commitment to investing in workers for shared economic competitiveness, innovation, and long-term prosperity.

The U.S. has **unique advantages** that give it the **tools** to emerge from the crisis with **tremendous economic strength**— including an entrepreneurial spirit and the technological and scientific infrastructure to lead global efforts in developing industries like green energy and biosciences that will shape the international economy for decades to come.

**2. The link alone turns case---alternative frameworks are unenforceable and vague, but breadth produces false positives that distort marketplace effects – turns adv 1**

**Newman ’19** [John; 2019; Assistant Professor at the University of Memphis Cecil C. Humphreys School of Law; Indiana Law Journal, “Procompetitive Justifications in Antitrust Law,” vol. 94]

B. Competitive Process

The competitive-process approach purports to distinguish between **pro**-and **anticompetitive** restraints via their effects not on welfare or efficiency, but on "competition itself' or on the "**competitive process**." In other words, if a challenged restraint somehow benefits the competitive process, the defendant may avoid antitrust liability. Multiple antitrust scholars argue that "competitive process" is the prevailing and appropriate approach. 97 Others, while conceding that it has fallen out of favor, nonetheless call for its resurrection. 98

Footnote 97:

97. E.g., Werden, supra note 9; see also Barak Orbach, How Antitrust Lost Its Goal, 81 FORDHAM L. REv. 2253, 2256 (2013). Here and elsewhere, Orbach offers a convincing argument to the effect that the "consumer welfare" standard does not offer as much clarity as its proponents generally assume. While that may be so, it does not follow that the "competitive process" (or "competition") standard fares any better. In fact, the latter standard appears to offer **even less clarity**—unless it means simply that defendants **always lose**, in which case it offers a **great deal** of clarity but also (likely) an **overly high** likelihood of **false positives**. Orbach's historical account concludes that "competition" was the sole standard for the roughly seven decades between the passage of the Sherman Act and the release of Bork's The Antitrust Paradox. Orbach, supra, at 2277. This account does not, however, discuss Chicago Board of Trade.

End of Footnote 97.

But the **actual content** of the competitive-process approach remains **mercurial**, a cipher. The scholarly arguments in favor of it **never** seem to identify **what**, exactly, **constitutes** the "competitive process." More than a half-century has passed since the Court first clearly invoked the competitive process approach to condemn a restraint of trade, yet terms like "competition" and "competitive process" are still "wonderfully **ill-defined**." 99

Whatever the competitive process may be, it apparently can be harmed. A plaintiff carries its initial burden by showing such harm.100 If (or, perhaps more accurately, when) the plaintiff succeeds, the burden then shifts to the defendant to demonstrate some offsetting benefit.1 " 101 If it is **unclear** what **constitutes harm** to the competitive process, it is **even less clear** what might qualify as a benefit. But, at least in theory, a defendant who succeeds in proving such a benefit may escape liability. 102

A permissible reading of the relevant precedent suggests that the **overriding concern** does **not lie** with **marketplace** effects, placing this approach at **loggerheads** with the rest of modem antitrust law. 103 Instead, the competitive-process approach derives from a group of rather vaguely defined rights. These include, but are not limited to, the right of a "single merchant" to compel a "group of powerful businessmen" to supply him with "the goods he needs to compete effectively," 10 4 the "right" of traders to be "free" from various nonstandard contractual provisions,105 and a more general right of "freedom of action."106

Given the **lack of clarity** in the area, one is left free (or, less charitably, forced) to **speculate** as to the source and content of these rights. Perhaps they derive from Lochnerian freedom of contract. Certain early U.S. Supreme Court antitrust decisions-which happen to lie squarely in the heart of the Lochner Era-do speak of antitrust-related "rights." Thus, for example, the Court in 1914 identified a single retailer's "unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself."10 But by 1945, after the end of the Lochner Era,10 8 the Court was retreating from that hardline stance, referring to it as "true" only "in a very general sense." 109

**2NC---Link Wall (for reference)**

**a) stare decisis, which prevents error correction. Any future firm that attempts business practices condemned by the plan will face sanctions.**

**Hovenkamp 22** (Herbert Hovenkamp, James G. Dinan University Professor, Univ. of Pennsylvania Carey Law School and the Wharton School; “ANTITRUST ERROR COSTS;” 01-31-22, U of Penn, Inst for Law & Econ Research Paper No. 21-32, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282>, TM)

[[BEGIN FOOTNOTE 13]]

13. Id., the statement continued:

In the **common law regime** of **antitrust** law, **stare decisis** **inhibits courts** from routinely **correcting errors** or **updating** the **law** to **reflect** the latest **advances** in **economic thinking**. Some believe that the persistence of errors can be particularly harmful to competition in the case of false positives because “[i]f the court errs by **condemning** a **beneficial practice**, the benefits may be **lost for good**. Any other firm that uses the **condemned practice** faces **sanctions** in the name of **stare decisis**, no matter the benefits.” In contrast, over time “monopoly is self-destructive. Monopoly prices eventually attract entry. . . . [Thus] judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.” This self-correcting tendency, however, may take substantial time. As a result, courts and enforcers should be sensitive to the potential that, once created, some monopolies may prove quite durable, especially if allowed to erect entry barriers and engage in other exclusionary conduct aimed at artificially prolonging their existence. (citations omitted).

[[END FOOTNOTE 13]]

**b) judicial decisions mechanism magnifies the link.**

**Manne 20** (Geoffrey A. Manne, distinguished fellow at Northwestern University Center on Law, Business, and Economics, President and founder of the International Center for Law and Economics, JD and AB degrees from the University of Chicago, Former law professor at Lewis & Clark Law School, Former lecturer in law at the University of Chicago Law School and the University of Virginia School of Law, Worked for FTC, member of the American Law and Economics Association, the Canadian Law and Economics Association, and the Society for Institutional & Organizational Economics; “Error Costs in Digital Markets;” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733662>, TM)

Legal decision-making and **enforcement** under **uncertainty** are always difficult and always potentially **costly**. The risk of error is always present given the limits of knowledge, but it is **magnified** by the **precedential nature** of **judicial decisions**: an erroneous outcome affects not only the parties to a particular case, but also all **subsequent** **economic actors** operating in “the shadow of the law.”2 The inherent uncertainty in judicial decision-making is further exacerbated in the antitrust context where liability turns on the difficult-to-discern economic effects of challenged conduct. And this difficulty is still further **magnified** when **antitrust decisions** are made in **innovative**, fast-moving, poorly-understood, or **novel** **market settings**—attributes that aptly describe today’s **digital economy**.

**c) Private antitrust action causes errors and chilling effects.**

**Crane 10** (Daniel A. Crane, Professor of Law, University of Michigan Law School; “Reflections on Section 5 of the FTC Act and the FTC’s Case Against Intel;” February 2010, The CPI Antitrust Journal, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles>, recut TM)

There are compelling reasons to allow the FTC an independent norm-creation role in antitrust.8 Over the past several decades, the courts have sharply constricted antitrust liability norms under the Sherman Act largely out of a reaction to the dangers and abuses of **private antitrust litigation**, which **outnumbers** **public** antitrust enforcement (at both the **FTC** and **D**epartment **o**f **J**ustice) by a **10-1 ratio**.9 Among these real or perceived dangers and abuses are the **chilling effects** of automatic **treble damages** and one-way fee-shifting, the **damages-compounding** **effects** of easy **class certification**, strategically-minded competitor **plaintiffs**, discovery run amok, and **generalist judges** and **unsophisticated juries** who create **inconsistent** and **incoherent** **industrial policy**.10 Reacting to these perceived infirmities in the institutional structure of private antitrust litigation, the federal courts (led by the Supreme Court) have contracted the Sherman Act’s substantive liability norms. While such contraction may be justified to mitigate the systemic risks of private litigation, to the extent that the government sues under the same statute a perhaps **unintended side effect** has been to **stymie** **public litigation**.

**2. APPLICATION---antitrust law is economy-wide by nature, and even if not applied to other sectors, firms and lawyers are risk-averse AND think it’ll be applied, chilling investment in other industries.**

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

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

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

**Especially in tech industries – Antitrust has domino effects across sectors.**

**McGinnis 21** (John O. McGinnis, George C. Dix Professor @ Northwestern University; and Linda Sun, J.D., Associate, Wilmer Pickering Hale & Dorr LLP; “Unifying Antitrust Enforcement for the Digital Age;” 2021, Washington & Lee Law Review, Vol. 78, Accessed through HeinOnline, TM)

**Antitrust regulation** of technology is **vital** to the **economy**.42 It has the power to change the **future** of the **tech industry**, and those changes in turn have **domino effects** on **sectors** from **healthcare** and **manufacturing** to **transportation** and **energy**.43 While the application of antitrust law to the technology sector is a hot topic among scholars, regulators, and politicians, the path forward is complex. 44 It is **unclear** how **competition law** will be **applied** to **emerging tech**nology, because **traditional antitrust** tests must be **adapted** to **new markets**, **products**, and methods of **competition** introduced by the **digital revolution**.45

**3. ABRUPTNESS---the surprise nature of the plan generates uncertainty and new liabilities that disrupts business planning.**

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

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [[12](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb12)] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [[13](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb13)] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [[14](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb14)] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [[15](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb15)] **Rushing** into rulemakings on platforms (especially without a clear showing of market failure) poses **major risks**, however, including, in particular, the creation of **disincentives** to **invest** in platform-specific innovation; and the **interference** with potential **efficiency-seeking** transactions by platform operators and suppliers of complements (in light of inevitable government **second-guessing** of platform-related business **decision-making**). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “**toughen**” the **core antitrust statutes**, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [[16](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb16)] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached **cautiously**, with a jaundiced eye. In our **common-law**-based antitrust system, a **major disruption** to **long-familiar** statutory schemes would generate **major uncertainty** regarding antitrust enforcement principles and substantially disrupt **business planning** for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

**Adv 2 proves abruptness – spontaneously modelling the EU’s antitrust approach requires abandoning concerns over false positives. Link alone turns the case because false positives are the root of divergence.**

**Keyte 19** (James Keyte, adjunct professor of Comparative Antitrust Law at Fordham Law School, Director of the Fordham Competition Law Institute; “Why the Atlantic Divide on Monopoly/ Dominance Law and Enforcement Is So Difficult to Bridge;” 2018-2019, Antitrust Journal, Issue 1, Accessed through HeinOnline, TM)

Yet, in broad terms, there has been **significant convergence** over the past decade and a half. Since the early 2000s, the EU has been committed to using much more economic analyses in its assessment of dominant firm behavior, which to a significant degree is consistent with the **use** of **economic analyses** in the U.S. courts since the late 1970s. For example, last year’s Intel decision3 solidified a move away from non-rebuttable to rebuttable presumptions for certain dominant firm practices (there, loyalty discounts), which also aligns more with Sherman Act principles insofar as the focus is on actual effects rather than formalistic categories. And both the EU and the U.S. are committed to a “consumer welfare” focus, even if, as I discuss below, the adopted flavors are a bit different.

**Where, then, is the divide?** The **key differences can be summarized** as follows:

- The EU’s view of “**dominance**” is **broader** than “**monopoly**” in the U.S.

- The EU places a “**special responsibility**” on **dominant firms** **not** to “**distort competition**” in any market; the U.S. does not.

- At least in the context of alleged foreclosure through exclusivity arrangements, the EU places the **burden** on the **dominant firm** to prove that its conduct **did not foreclose** (and was not “capable of” foreclosing) **competition** or, alternatively, that the conduct was “objectively necessary” to achieve customer-related efficiencies. In the U.S., both the government and private plaintiffs carry a relatively heavier burden of proof throughout a Section 2 case.

- The EU does not require likely “recoupment” for price-related predation (predatory pricing, margin squeezes). In the U.S. it is a prerequisite.

- The EU wishes to create or protect rivalrous market structures and readily accepts raising rivals’ costs (RRC) theories as a basis for proving a “distortion of competition” in the dominant firm’s market. The U.S. is more tolerant of dominant market structures (especially resulting from innovation or efficiencies) and looks more to consumer welfare metrics to assess overall market harm, including after considering efficiencies and other justifications.

- The EU accepts “leveraging” into a separate market as an overarching Article 2 concern. In the U.S. that theory died with Trinko. 4

- The EU allows (though cautiously) for a duty to deal under an “essential facilities”-type doctrine. In the U.S. that notion, too, is all but dead.

Much of this **divergence** stems from the U.S. courts’ concern with “**false positives**”—**erroneously condemning** **pro-competitive** or **neutral** conduct—as well as a reluctance to undertake judicial intervention (and, effectively, oversight) of complex, unilateral business practices. Given these **procedural** and **substantive** differences, it is fair to observe that, absent a unifying process and analytical framework, the Atlantic divide on **monopoly**/**dominance** policy and law will **persist**.

**1nr – no link turn T/L**

**Error rates categorically outweigh – has a ripple effect across industries.**

**Baker 16** (Jonathan B. Baker, Professor of Law, American University Washington College of Law; “Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right;” 06-21-16, WCL Research Paper, American University, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2333736)

The error cost perspective evaluates antitrust rules—whether considered individually or as a whole—based on whether they minimize total social costs. The relevant costs include costs of “**false positives**” (finding violations when the conduct did **not harm** **competition**), costs of “**false negatives**” (**not finding violations** when the conduct harmed competition), and **transaction costs** associated with use of legal process.17

[[BEGIN FOOTNOTE 17]]

17 These transaction costs go beyond the costs of litigation. They also include, for example, costs associated with information gathering by potential litigants and the institution specifying decision rules. See C. Frederick Beckner III & Steven C. Salop, Decision Theory and Antitrust Rules, 67 ANTITRUST L.J. 41, 43–52 (1999); Baker, supra note 7, at 574 & n.226. To the extent that **uncertainty** about **legal rules** **chills** **beneficial conduct** or **means** that those **rules** **fail to deter** **harmful conduct**, the error cost analysis should account for both of those consequences. Cf. Harry First & Spencer Weber Waller, Antitrust’s Democracy Deficit, 81 FORDHAM L. REV. 2543, 2571 (2013) (“If one seeks to minimize error costs . . . without considering the accuracy benefits [predicted benefits of ‘getting it right’], one inevitably gets less enforcement activity than should otherwise be the case.”). Yet a recent call to restrict the enforcement of FTC Act Section 5 discusses the possible **chill** to **beneficial conduct** resulting from **legal uncertainty** without considering the possibility that **uncertainty** also **reduces deterrence benefits**. Joshua Wright, Comm’r, Fed. Trade Comm’n, Remarks at the Executive Committee Meeting of the New York State Bar Association’s Antitrust Section: Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority 7–8 (June 19, 2013) (transcript available at [www.ftc.gov/speeches/wright/130619section5recast.pdf](http://www.ftc.gov/speeches/wright/130619section5recast.pdf)).

[[END FOOTNOTE 17]]

**False positives** and false **negatives** are **harmful to the economy** as a **whole** for reasons that **go beyond** the **conduct** in the **case under review**:18

[[BEGIN FOOTNOTE 18]]

18 From an economic perspective, antitrust **rules** benefit society primarily by **deterring** **harmful conduct**. See generally Jonathan B. Baker, The Case for Antitrust Enforcement, J. ECON. PERSP., Autumn 2003, at 27; cf. Louis Kaplow, Burden of Proof, 121 YALE L.J. 738 (2012) (highlighting a tradeoff between the **benefits** of **deterrence** and **costs** of **chilling beneficial conduct** that arises when the burden of proof in adjudication is set to maximize social welfare). Accordingly, the evaluation of error costs must look to the consequences of the decision or legal rule for conduct by other firms, not simply to the incidence of the decision on the parties to the case. For example, restricting analysis to the parties before the court would yield the misimpression that draconian punishments for parking in front of a fire hydrant will eliminate error costs. The prospect of such punishments would lead to 100% compliance with the no-parking rule, so there would be no court cases, no possibility for a court erroneously to convict or acquit a defendant, and no litigation expenditures. Yet such punishments would also chill parking in front of a hydrant when its social benefits (e.g., allowing a doctor to arrive in time to save a life) would outweigh its social costs. Such punishments would also discourage socially beneficial parking near hydrants (by drivers who fear that an aggressive parking enforcer would wrongly conclude that the hydrant is blocked and that a court would uphold the ticket). **Restricting analysis** to the parties before the court would yield the same misimpression with respect to an enforcement policy taken to the opposite extreme: A complete absence of enforcement of the rule prohibiting parking in front of hydrants would also lead to no court cases, and so would generate no judicial errors and no transaction costs of litigation. Yet such a rule would not deter parking in front of hydrants when the social cost (the cost of impeding fire department access in the event of a fire discounted by the probability that a need for access would arise) would exceed the social benefit.

[[END FOOTNOTE 18]]

False positives and false negatives may chill beneficial conduct by **other economic actors** (potentially in **other industries**) that must comply with the rule; these errors may also **fail to deter** **harmful conduct** by **other economic actors** to which the **same rule** would **apply**. False positives and false negatives **do not** neatly **map** to **overdeterrence** and **underdeterrence**, respectively, however, because the deterrence consequences of legal errors depend in part on the way that those errors affect the marginal costs and benefits of conduct undertaken in the shadow of the law.19

**1nr – no clarity/dereg turn**

**Clarity turns are irrelevant---our argument is not a business confidence argument, it’s an over-deterrence argument---companies fear liability for similar business practices, which wrecks innovation that is essential for continued economic growth---that’s Manne.**

**Changes in law decimate predictability – disrupts business planning and spending.**

**Finch ’17** [Andrew; September 12; Acting Assistant Attorney General Antitrust Division U.S. Department of Justice; 11th Annual Global Antitrust Enforcement Symposium, “Antitrust Enforcement and the Rule of Law,” https://www.justice.gov/opa/speech/file/996151/download; KP]

In the 25 years between the first and second editions of the book, a debate arose as to whether the **antitrust laws** were “**up to the task**” in the “new economy.” Judge Posner concluded “that **antitrust** doctrine is **sufficiently supple**, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents.”2

He also wrote that “[t]he antitrust laws are **here to stay**,” but said “the practical question is how to administer them better—more rationally, more accurately, more expeditiously, [and] more efficiently.”3

But how do we administer the **antitrust** laws more rationally, accurately, expeditiously, and efficiently? There are many answers to that question. Today I would like to talk about one important answer for any law enforcement regime, not just antitrust: Law enforcement requires **stability** and **continuity** both in **rules** and in their **application** to specific cases.

Indeed, stability and continuity in enforcement are **fundamental** to the rule of law. The rule of law is about **notice** and **reliance**. When it is **impossible** to make reasonable **predictions** about how a law will be applied, or what the legal consequences of conduct will be, these important values are **diminished**. To call our antitrust regime a “rule of law” regime, we must enforce the law as written and as interpreted by the courts and advance change with **careful thought**.

The reliance fostered by stability and continuity has obvious **economic benefits**. Businesses invest, not only in **innovation** but in **facilities**, **marketing**, and **personnel**, and they do so **based** on the economic and legal environment they **expect to face**.

Of course, we want businesses to make those investments—and shape their overall conduct—in accordance with the **antitrust laws**. But to do so, they need to be able to rely on future application of those laws being largely **consistent** with their **expectations**. An antitrust enforcement regime with **frequent changes** is one that businesses **cannot plan for**, or one that they will plan for by **avoiding** certain kinds of **investments**.

**1nr – no investors turn**

**Expansion of law is key---false positives only arise from changes in application of antitrust like new criteria for measuring what is anti-competitive** (i.e. shifts away from the CWS) **or creating liability for formerly competitive business practices.**

**Manne 19** (Geoffrey A. Manne, distinguished fellow at Northwestern University Center on Law, Business, and Economics, President and founder of the International Center for Law and Economics, JD and AB degrees from the University of Chicago, Former law professor at Lewis & Clark Law School, Former lecturer in law at the University of Chicago Law School and the University of Virginia School of Law, Worked for FTC, member of the American Law and Economics Association, the Canadian Law and Economics Association, and the Society for Institutional & Organizational Economics; Julian Morris, Justin (Gus) Hurwitz, Kristian Stout; “FTC Hearings on Competition & Consumer Protection in the 21st Century;” 08-20-18, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3384794>, TM) [language modified]

Before **contorting antitrust** into a **policy cure-all**, it is important to remember that the competition-focused **c**onsumer **w**elfare **s**tandard evolved out of sometimes good (price fixing bans) and sometimes questionable (prohibitions on output contracts) doctrines that were subject to legal **trial and error**. This **evolution** was marked by “increasing **economic sophistication**”46 and a “high level of **careful analysis** and insight being displayed by government agencies charged with enforcing the antitrust laws.”47 And the **vector** of that **evolution** was toward the use of antitrust as a reliable, testable, and clear set of legal principles that are ultimately **subject** to **economic analysis**, and away from **politically-oriented antitrust**.

When the populists ask us, for instance, to return to a time when judges could “prevent the conversion of concentrated economic power into concentrated political power”48 via antitrust law, they are asking for **much more** than just adding a **new gloss** to **existing doctrine**. They are asking for us to **unlearn the lessons** of the **twentieth century** that ultimately led toward the maturation of antitrust law.

What’s more, constraining firm size — the antitrust populists’ catch-all, cure-all to virtually all alleged social problems — in order, ostensibly, to promote consumer political and economic power, may actually have the opposite effect.

**1nr – no securities turn**

**Turn --- Treble damage crushes market value**

**Gaughan 05** --- Patrick A. Gaughan, President of Economatrix Research Associates, Inc., an economic and financial consulting firm, “THE ECONOMICS OF PUNITIVE DAMAGES: POST STATE FARM V. CAMPBELL”, Contemporary Studies in Economic and Financial Analysis, Volume 87, 217–266 , 2005, https://www.emerald.com/insight/content/doi/10.1016/S1569-3759(05)87009-3/full/pdf

Litigation costs will **lower corporate profitability** and **reduce the pool of monies available for dividends** and, thereby, **impede capital gains**. This is true for any cost, and litigated-related costs are no different. For this reason, the exposure to **potentially large** and unpredictable litigation payments can have **an adverse effect on stock prices**. Research studies have **confirmed the impact** that litigation can have on stock prices (Bizjak & Coles, 1995). **This impact can be very significant**. A good example of this was the **42% decline in the stock price** of the Halliburton Company in response to a $30 million verdict in December 2001 in favor of five plaintiffs (Banerjee, 2001). This was one of many asbestos cases that were brought against the company.1 Over the prior quarter century, the company had settled almost 200,000 asbestos claims although many of them were settled for relatively modest amounts. The market reacted to the large verdict and what it implied about the **potential litigation exposure** that would occur **if the other cases had a similar result**. Another was the declines of Bayer AG’s stock price in response to the first Baycol trials beginning in Texas in 2001 (see Fig. 1). The company’s stock price fell from $43.36 at the end of January 2001 to $20.02 by September 10, 2001, and declined even further to $17.96 by the end of October of that year. Later in 2003, when Bayer AG received a favorable verdict, the stock rebounded. Towards the end of 2004, Pfizer’s market capitalization lost approximately $30 billion over a couple of trading days as a result of concerns that were being expressed about a possible relationship between heart problems and some of its anti-inflammatory drugs. The market fell even though no firm relationship between ailments and those drugs was known at that time and not a single lawsuit had been filed.

For companies with large litigation exposure, such as tobacco and asbestos defendants, the adverse shareholder wealth effects can be **quite significant**. Securities analysts have attempted to measure the magnitude of the large tobacco liabilities of Philip Morris Companies, Inc., which is now called Altria. Table 3 shows that over the past three years, Philip Morris USA, the tobacco subsidiary of Altria, as well as other divisions of the food/ tobacco company, were the object of many lawsuits, including class actions and multiple plaintiff cases (Altria Annual Report, 2003).

In February 2001, Goldman Sachs issued a report that featured a ‘‘sum of the parts’’ analysis which computed total enterprise value and the value of each of the company’s corporate divisions that composed the total enterprise value. The various parts or business segments were valued using comparable multiples that were relevant to the four industry segments that made up the parent firm – Philip Morris Companies, Inc.2 This comparable multiples analysis is an accepted method of valuing businesses (Gaughan, 2004). The Goldman Sachs analysis measured what has been termed the ‘‘litigation overhang’’ and found it to be equal to $91.5 billion (Goldman Sachs Analyst Report, 2001)! Without the litigation exposure, their analysis showed that the value of the equity of Philip Morris Companies, Inc. would have equaled approximately $200 billion, compared to the market value of the equity as of that time which was $108.7 billion. Goldman Sachs attributed this large difference to the market’s allowance for the uncertain tobacco liabilities.

Litigation-related liabilities are but one form of relevant information that markets consider when determining equity values. Increases in such liabilities due to **punitive damages** may cause **stock prices to decline, adversely affecting shareholders**. Markets tend to be somewhat **efficient** (with exceptions) **in processing relevant information**.3 Some might argue that the company should reduce dividend payments to shareholders and allocate those monies to litigation payments, thereby making shareholders pay punitive and other damages in this manner. Unfortunately, this method also **has farreaching spillover effects that will hurt shareholders** in other ways. Announcements of dividend reductions and/or elimination usually cause the announcing company’s stock price to fall. For example, Cigna announced in February 2004 that it was undergoing a major restructuring and would cut its dividend from $.33 per share to $.025. As can be seen from Fig. 2, the market reacted in the expected manner with a sharp falloff in the stock price and market capitalization. Such dividend-cut-related stock collapses **can have even more far-reaching effects,** as a company can then become a target for a takeover, which, if completed, **effectively ends the existence of the company in its prior form**. These are spillover effects that need to be considered when contemplating actions that affect dividends and share values.

**Private action collapses stock market**

**Ready 18** --- John Fitzgerald Ready, Cornell Law School, J.D., 2018, “SHOULD WE USE A CLASS ACTION’S IMPACT ON STOCK PRICE TO GAUGE THE REASONABLENESS OF CLASS COUNSEL’S FEE”, CORNELL JOURNAL OF LAW AND PUBLIC POLICY [Vol. 28:365 , 2018], https://ww3.lawschool.cornell.edu/research/JLPP/upload/Ready-note-final.pdf

Class actions hurt.84 **A lot**.85 Perhaps, then, it makes sense to focus on deterrence and to correlate the worth of a class action with how much it hurts a defendant. Because a “stock price can often be a barometer of [a company’s] health,”86 we can thus **measure the damage** a defendant suffers by looking at the magnitude of a class action’s impact on a company’s stock price.87 It is fair to say that most class actions are filed against public companies88—companies whose shares are traded on a stock exchange.89 In theory, then, a large amount of class action filings, adverse orders and judgments, and settlements90 will result in a **drop in the defendant’s stock price**.91 It stands to reason that the degree to which this drop occurs therefore correlates to the degree of harm felt by the defendant.

**The empirical evidence backs this up:** bad news for a company results in a decrease in the company’s stock price, and the effect is felt once the news is made public.92 Our legal system, specifically in securities actions, recognizes this phenomenon. This idea underlies the Basic Inc. v. Levinson “fraud-on-the-market” presumption.93 The Basic presumption follows from an efficient market’s contemporaneous incorporation of all publicly-available information into a corporation’s share price.94 The stock market is one such efficient market.95 Any of a defendant’s publicly-made material misstatements that fraudulently inflate a stock price will therefore inevitably result in a stock price decline once the truth is made public through a corrective disclosure. Investors trading at the inflated-price are thereby harmed by the decline: they operated on a false set of facts, and thus can be presumed to have relied on the material misstatements.96 The necessary link to the proposal herein, then, is whether adverse class action news is a type of bad news. It is.97

**The data supports this link**. Class action filings have been observed to negatively impact a defendant’s stock price.98 The filing of a class actions cause share prices to **drop**.99 One hypothesis is to extend that principle to judgment and settlement news.100 Another is to say that the magnitude of a stock price drop reflects the weight of the information entering the market, and given that—in legal terms—an adverse judgment or settlement sets forth a future, likely unforeseen-with-appreciable-specificity expense that the company will have to pay out, the stock price drop at that time would reflect the merits of the claim.101 The greater the drop, the better the plaintiff attorney did.102 The better the plaintiff attorney did, the more the attorney deserves to be paid, and the more reasonable his or her higher fee looks.

## Case

### 2NC – No warming

#### Models wrong --- climate change is slow and adaptable

Green 22 --- Kenneth P. Green, doctoral degree in environmental science and engineering from UCLA, “Doomsday predictions rely on flawed climate models”, Frasier Institute, Feb 15th 2022, https://www.fraserinstitute.org/blogs/doomsday-predictions-rely-on-flawed-climate-models

Much of the debate around ~~manmade~~ climate change, and the timing and stringency of government policies meant to manage the risk of climate change, is based on the perception that the descent into catastrophic climate degradation seems to always be about 10 years away. Over the last 30 years, the media has made this clear. “A senior U.N. environmental official says entire nations could be wiped off the face of the Earth if the global warming trend is not reversed by the year 2000,” wrote Peter James Spielmann of the Associated Press in 1989. “UN scientists warn time is running out to tackle global warming. Scientists say eight years left to avoid worst effects,” wrote David Adam in the Guardian in 2007. “We have 10 years left to save the world, says climate expert,” wrote HuffPost’s Laura Paddison in 2020. It all sounds terribly worrying. But where does this idea originate—that the climate catastrophe (or an irretrievable tipping point into one) is 10 years away? The answer may surprise you. It does not come from simple extrapolating what we’ve seen regarding the rates of temperature change and greenhouse gas emissions since 1950 (when humans started putting significant amounts of greenhouse gases into the atmosphere). Instead, the 10-years-to-catastrophe idea stems from a set of speculative forward-looking computer models generated across the research network of climate change modellers, as summarized by the United Nations Intergovernmental Panel on Climate Change (IPCC), considered by many to be the authoritative body on all things climate. Three broad types of prospective models underpin the 10-year tipping point paradigm: Models of greenhouse gas (GHG) emissions based on future estimates of population, economic growth, technology development, etc. Models of atmospheric warming caused by those GHG emissions expected to manifest in the future Ecological impact models that estimate what impact a warmer climate will have on a variety of ecosystems in the future. The outputs of these three types of modelling have varied since they first took the stage in the Second Assessment Report of the IPCC published in 1995, but it was not until the Third Assessment Report of the IPCC in 2001 that the triad of models would be assembled to create the new “tipping point” paradigm. In the Third Assessment Report, three figures show the evolution of the separate model components. These figures show the 2001 estimated range of outputs for the three sets of models. One set of models (j) measures “radiative forcing,” (a surrogate term for the heat-retaining impact of the GHGs). The second graph (k) shows how much the global atmosphere would be expected to warm under a variety of futuristic scenarios. The spaghetti lines will be explained shortly. The chart on the right shows how impacts to the Earth’s various biologic, ecologic and social systems could increase as the climate warms. Chart 1 [omitted] The chart on the right is basically the origin of the maximum allowable warming targets defining the goals for global policies to control GHG emissions after 2000. The fourth bar from the left shows the point at which impacts from climate warming become “Net negative in all metrics,” which in 2001, was not predicted to be reached until the increase in global average temperature reached about 3.5°Celsius. That temperature point according to chart (k) was not predicted to be locked in by projected increases in greenhouse gas concentrations, as you can also see, until around the year 2100, and even then, only under extreme scenarios of future greenhouse gas emission levels. However, in chart (k), the IPCC has given us a drop-line at the intersection of the magic number of 2°C (the point where mid-range models of accumulated greenhouse gases assess that we’ll reach the tipping point into climate catastrophe). That point was scheduled to arrive in 2050. This is how the “we have X years to avert Y disaster” scenarios evolved in subsequent IPCC reports. In the IPCC Fourth Assessment Report (2007), the net-harm threshold drops to a range of from 1.5 to 2.5°C, locked in by greenhouse gas emission trends in 2020; In the IPCC Fifth Assessment Report (2014), the net-harm threshold drops to about 1.6°C, to become unavoidable in 2030; and in the IPCC Special Report Global Warming of 1.5C (2018), the net-harm threshold drops to 1.5°C, still estimated to be unavoidable by 2030. This carries through to the most recent draft report of the IPCC, the Sixth Assessment Report (2021). But about those scenarios. As mentioned above, IPCC future scenarios are not based on actual real-world data for the last 20 years. They are speculative scenarios of the future, envisioned by special research groups within the IPCC research community. The full explication of this exercise in predicting the future can be found here. Critical caveats that often go undiscussed are important in understanding the scenarios and their utility. In the introduction to the IPCC Special Report on Emission Scenarios (2000) (SRES), for example, the IPCC explains that: “Future greenhouse gas (GHG) emissions are the product of very complex dynamic systems, determined by driving forces such as demographic development, socio-economic development, and technological change. Their future evolution is highly uncertain.” The IPCC further explains that a “set of scenarios was developed to represent the range of driving forces and emissions in the scenario literature… No judgment is offered in this report as to the preference for any of the scenarios and they are not assigned probabilities of occurrence, neither must they be interpreted as policy recommendations” But there’s one glaring problem with these prognostications. They do not mesh with reality. In a research letter published in the journal Earth and Space Science, climate researchers Ross McKitrick and John Christy show that most of the models used to project climate warming as a result of increasing GHG concentrations exceed observations of the actual climate response of the last 35 years. The charts below represent different modelled estimates of warming that were expected to occur from 1980 to 2015, with the heavy black line representing the average of the estimated model warming. The blue line, however, shows the actual empirically measured temperature trend in the Earth’s troposphere. The discrepancy between predicted and observed temperatures post 2000 are plain to see. Chart 2 [omitted] Chart 3 [omitted] The prevailing wisdom that underpins the sense of climate urgency in today’s policy debates—10 years to save the world!—stems from three sets of speculative models developed over the last 30 years by scientists working under the umbrella of the IPCC. But empirical evidence taken from the real world suggests that the IPCC’s estimates of future warming are overstated, and what scientists have seen from looking at actual measurements of increased GHGs in the environment, and the recent rise in global average temperatures makes it clear that these “10 years to save the planet” invocations are based more on science fiction models and less on scientifically determined facts. Overreliance on these flawed models results in policy recommendations and decisions that miss more effective and actionable solutions, particularly those related to adapting to a changing climate whether that change is natural or manmade. Examples of such actions might include strengthening coastal protections against rising tide levels, strengthening the capabilities and protection of water distribution systems to account for potential drought or flood-prone periods, improving flood control systems and snow-management capabilities in Canada’s cities, improving forest management techniques to adapt to potential changes in fire seasons or pest distributions, strengthening power systems needed to deliver sufficient affordable energy for heating and cooling of homes and businesses in the event of climate fluctuations, and more.

### 2NC – Ukraine prove squo solves warming

**Ukraine spurs warming action**

**Bokat-Lindell 3-16** [Spencer Bokat-Lindell, a staff editor at NYT, 3-16-2022 https://www.nytimes.com/2022/03/16/opinion/ukraine-climate-change-russia.html]

How the war could spur climate action In the immediate term, Germany and others could take measures to reduce their consumption of Russian fossil fuels, as the Times columnist Paul Krugman explains. Eliminating their use, though, would incur steep costs to the German people equivalent to those of a moderate recession. “It’s not so simple to just say, ‘OK, overnight, now we’re going to suddenly switch and no longer going to be dependent on natural gas from Russia,’ or fossil fuels in general,” Pete Ogden, vice president for energy, climate and the environment at the U.N. Foundation, told Yahoo News. “Right now, you’re seeing that vulnerability exposed and there not being easy, short-term fixes to that problem.” But it’s evident that the fusion of foreign-policy and climate interests has lent more **political momentum** to decarbonization. Germany, for its part, just earmarked 200 billion euros for investment in renewable energy production between now and 2026. “Many of the strategies to lower dependency on Russia are the same as the policy measures you want to take to lower emissions,” Thijs Van de Graaf, a professor of international politics at Ghent University, told The Financial Times. “At the moments where we have these crises, the [energy] **transition can be supercharged**.” The European Union has vowed to slash Russian natural gas imports by two-thirds by next winter and to cut them out entirely by 2027. “That would be an extremely ambitious timetable in peacetime, but if the continent shifts to a war footing — as it must, with a savage conflict playing out on its eastern borders — then it should be achievable,” The Boston Globe editorial board writes. Key to the transition, the board adds, is increasing American production of minerals and metals required for renewable energy technology. Russia is a key supplier of those materials, so the West needs to ensure it doesn’t become just as reliant on Russia for clean energy production as it is now for fossil fuels. In The Times, Simone Tagliapietra, Georg Zachmann and Morgan Bazilian call for a pact between North America and Europe to help the continent reduce its short-term dependence on Russian fuel. “Such a pact could also **build** an important foundation for **cooperation** in clean energy innovation and deployment and reducing energy demand in the longer term — which would significantly enhance Europe’s energy security,” they write.