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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.

#### Key to break the political power of Big Ag broadly – spills over to deconsolidate farming

Gustin 19 (Georgina Gustin, covers agriculture for Inside Climate News, won numerous awards, including the John B. Oakes Award for Distinguished Environmental Journalism and the Glenn Cunningham Agricultural Journalist of the Year, formerly reported for the St. Louis Post-Dispatch and CQ Roll Call, graduate of the Columbia University Graduate School of Journalism, “Industrial Agriculture, an Extraction Industry Like Fossil Fuels, a Growing Driver of Climate Change,” Inside Climate News, 1-25-2019, https://insideclimatenews.org/news/25012019/climate-change-agriculture-farming-consolidation-corn-soybeans-meat-crop-subsidies/)

Meat and Mergers

Critics say that lax enforcement of antitrust laws has enabled even more concentration in the hands of fewer companies.

That concentration has occurred not just at the farm level but throughout the food system, including in fertilizer and pesticide manufacturing, grain distribution, food processing and grocery retailing. Four companies or fewer control each of these sectors of the food industry.

Recent mega-mergers of agricultural chemical and seed companies—Monsanto and Bayer, ChinaChem and Syngenta, Dow Chemical and DuPont—have further concentrated seed technology in the hands of a few companies. Critics worry that could leave farmers with fewer choices over what to plant and how.

Nowhere has the consolidation been more pronounced than in the meat industry, a hugely profitable and influential force in American agriculture. Today, a handful of companies, led by Brazil-based JBS Holdings, dominate the global meat industry, wielding enormous economic and political might.

“It’s JBS and Smithfield,” said Joe Maxwell, a hog farmer from Missouri and executive director of the antitrust watchdog Organization for Competitive Markets. “They want the U.S. to be the cheapest place to raise meat. They drive the political power in D.C. The result is that farmers are locked into farming for government programs that are not sustainable, economically and environmentally.”

The consolidation in meat production is also what’s driving the consolidation of crop farming, Maxwell said.

Livestock is now commonly raised or fattened in confinement on a diet of soybeans and corn instead of grass or other forage.

“The decades-long removal of livestock from diversified farms and moving into industrial facilities has certainly increased corn and soybean acreage. Those two things go hand in hand,” Hoefner said. “I think it’s a very open question whether that kind of transition back to a more integrated crop and livestock system is even possible. We’ve made such major landscape changes.”

#### Key to regenerative farming

Tam 21—(writer at UCLA Undergraduate Law Journal, won the UCLA Prize for Undergraduate Research, supervised by William Boyd, Professor of Law at UCLA School of Law and Institute of the Environment and Sustainability). Kristen Tam & Olivia Bielskis. April 1, 2021. “Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement”. UCLA Library. <https://escholarship.org/uc/item/0m16g2r5#main>.

INTRODUCTION

The failures of the federal courts and agencies to adequately enact antitrust enforcement has resulted in extensive consolidation of the agricultural marketplace creating conditions in which few distributors, meatpacking firms, and farms hold disproportionate percentages of the market power. Such instances of consolidation in the market are intended to be regulated through federal policies such as the Clayton Antitrust Act. However, the influence of Robert Bork and the Chicago School, which both argue to prioritize efficiency through consolidation over small businesses and competition in the market, resulted in an era from the 1980s to the present where the federal courts and agencies have adopted a less precautionary philosophy in interpreting antitrust laws, allowing large firms to merge, and leaving the marketplace largely unregulated.

The first gatekeepers that regulate corporation consolidation are the Department of Justice’s (DOJ) Antitrust Division and the Federal Trade Commission (FTC), which are responsible for reviewing new and existing mergers. To supplement, the Courts evaluate cases that involve mergers that seek to persist despite the DOJ or FTC preventing the merge. The Courts can also hear cases in which other firms on the market claim they will be substantially threatened by a potential merger. Often, mergers are brought up to the Courts under the Clayton Act, which requires proof of antitrust injury to sue. Suffering “antitrust injury” can include acts that “may substantially lessen competition,” as stated in Section 7 of the Act.

The impacts of large mergers are especially staggering when examining the dominance of the agriculture industry’s distributors, largest meat packing firms, and largest farms, which can all be referred to as agriculture firms in this paper. In 2017, four beef packaging firms owned 83 percent of the market.1 With only four firms holding a substantial percentage of market power, smaller firms and farms were obligated to decrease their selling price in order to compete with larger firms maintaining high economies of scale. This hinders the profitability of small farms, ultimately resulting in market failure because these farms are eventually driven out by their untouchable competitors, allowing the largest agriculture firms to hold monopolistic power. In the 1980s, farmers profited 37 cents per dollar spent in production,2 while in 2018, farmers made less than 15 cents per dollar.3 Decreasing profit margins are being perpetuated by the few gargantuan distributors that control the marketplace, allowing them to pay farmers or ranchers the price they want to set, often below market rate.

Decreasing competition and profit margins threatens the existence of small farmers and poses a substantial threat to essential climate change mitigation by hindering the growth of regenerative farming. Large industrial agriculture firms mostly utilize destructive farming practices including applying toxic synthetic fertilizers, planting monoculture fields, and tilling their soil. Tilling, the practice of overturning soil for the purpose of reducing soil compaction4 and mixing nutrients, decreases water retention, destroys vital soil microbes, and results in the release of carbon dioxide, a harmful greenhouse gas contributing to climate change.5 Every year, 44.02 billion tons of chemical fertilizer are applied onto U.S. soil,6 while every minute thirty soccer fields worth of soil are lost due to tilling practices.7 This is threatening food security, ecosystems, and the climate.8 The Intergovernmental Panel on Climate Change (IPCC) prescribes that the world needs to limit global temperature rise to 1.5 degrees Celsius by 2050. Agriculture contributes to 10.5 percent of the United States’ emissions, therefore we have a significant capacity to instead decrease emissions by implementing more sustainable farming practices.9

Conversely, a majority of smaller farms avoid these harmful practices and work to combat climate change by implementing regenerative techniques such as practicing no till, applying compost as fertilizer, and planting cover crops. In addition to building soil health, increasing soil water retention, and sequestering carbon dioxide from the atmosphere, small farms are able to implement farming practices that fit the local environment and adapt quickly with flexibility to maintain production during changing environmental conditions.10 Although small farms are more likely and willing to implement regenerative practices, their ability to switch to regenerative practices is dampened because they have limited money, time, or resources to do so with low profit margins. Failure to regulate the market is hindering a transition that would benefit the industry and planet in the long run. Although there are no laws in place that limit soil degrading practices, antitrust laws were created to prevent monopolies and undue concentration of market power in the hands of a few corporations, such as the beef packing conglomerates, from forming on the marketplace. If implemented properly, these laws have the potential to protect competition in the agriculture industry, keep small farms alive, and decrease the amount of soil being destructively farmed.

The federal government’s lackluster antitrust enforcement is born from a history of jurisprudential doctrines that favor large corporations and efficiency and subsequently discourage federal agencies from striking down harmful mergers. This paper first discusses the impact of lackluster enforcement of antitrust laws on the agriculture industry, focusing specifically on the hindrance of regenerative farming practices. Antitrust laws were created to prevent and correct such consolidation, thus, I enlist a two-pronged approach that identifies the main avenues through which consolidation has increased, and recommend remedies. The first prong addresses how the merge permitted between two meat packing corporations in Cargill v. Monfort contradicts the purpose of the Clayton Act and has set substantial precedent for the court's non precautionary interpretation of antitrust laws and what constitutes as “antitrust harm” under the Clayton Act. I argue that the Courts should set a new judicial standard that allows the “threat of loss of profits due to possible price competition” to constitute “antitrust injury,” and that they must default to precautionary measures and strike down mergers that have the capacity to acquire an undue percentage of the market share. The second prong addresses how the negligence of the DOJ and FTC has yielded a significant increase in consolidation of agriculture firms in the United States. To do so, I argue that these agencies must increase the number of agriculture and meatpacking merger acquisitions they block by holistically analyzing the scope of the mergers market power. Additionally, the reinvestigation of current corporations in the market holding unruly market power is essential in remedying the adverse impacts of market consolidation in agriculture.

I. The Current Market: As Farms Consolidate, the Growth of Regenerative Farming is Hindered

A. Increased Consolidation in the Agriculture Industry as Deregulation Heightens on Farms, Meat Packing, and Other Food Corporations

As defined by the United States Department of Agriculture (USDA), a “farm” is any place from which $1,000 or more of agricultural products were produced or sold during the year.11 This section discusses the historical and current consolidation trends in the agriculture marketplace for farms, meatpacking firms, and many other food corporations. I find that the overall number of farms has decreased while the size of each farm or firm has increased, and the number of farms in higher sales classes have increased along with their subsequent share of farmland.12

Farm numbers have decreased since the onset of the 20th century, however, due to Robert Bork and the Chicago School’s influence that prioritized economic efficiency and consumer prices over small businesses,13 the number of farms in the United States started decreasing at faster rates. In 1975, there were 2.5 million farms across the country,14 which declined by an average of 2.41 percent per year.1516 Comparatively, from 1980 to 1985, the number of farms decreased by an average of 6.15 percent per year,17 alluding to increased rates of consolidation.

While farm numbers continue to decrease, output production size and the Gross Cash Farm Income (GCFI) of large farms has increased. From 2012 to 2018, the number of farms decreased from 2.11 to 2.03 million farms, while the average farm size increased from 429 to 443 acres.18 Specifically, the growth in land holdings has increased the greatest in the largest farms. In 1987, 57 percent of the United States cropland was operated by midsize farms with 100 to 999 acres of cropland while only 15 percent was operated by large farms over 2,000 acres.19 In 2012, cropland operated by midsize farms drastically decreased to 36 percent while cropland operated by large farms increased to 36 percent, more than doubling the figure from 1987.20 In addition to holding control of more land and market power, and decreasing competition in the marketplace, these larger farms hold a disproportionate majority of agricultural commodity profits. In 1991, small farms, defined as farms whose income is less than $350,000, took in 46 percent of agricultural profit, while in 2015, small farms took in only 25 percent of agricultural profit.21 Large farms, who make more than $1,000,000 held 31 percent of the GFCI in 1991, while in 2015, their share increased to 51 percent.22

The trend towards consolidation is also prevalent in the livestock, poultry and meat packing industries, seeing as the number of farms and packaging plants decrease while the number of animals raised per farm increases. From 1987 to 2017, there was a 28.50 percent decrease in the number of cow, pig and chicken farms.23 While the number of farms decreased, the midpoint numbers for the number of livestock per farm increased; where half of the livestock are above, and half are below it. In 1987, the midpoint number of cows for each livestock feeding industry was 80, while in 2012, this increased to 900, an increase of 1,025 percent.24 The number of meatpacking plants, where farmers sell their animals to be slaughtered, packaged, and distributed, also decreased which allows meatpackers to run roughshod over farmers by giving them power to pay their desired lower prices, disadvantaging farmers.

Consolidation in other food industries is increasing as well, seeing as in 2012 four firms owned 89 percent of the peanut butter industry, a staggering figure which increased to 92 percent in 2017.25 In 2015 the two largest corn seed firms owned 78 percent of the market share,26 in 2017 the four largest jelly firms owned 85 percent of the industry,27 and in 2018, two firms owned 87 percent of the mayonnaise market share, a $1.6 billion dollar industry.28 These figures showing monopolization exemplify the formidable proportions to which the agriculture and food industry is consolidated. These trends underscore how the regulation mechanisms in place to promote competition and prevent monopolization are not working.

B. Consolidation Threatens Democratic Systems

The consolidation and existence of merged corporations harms farmers and consumers and contradicts the democratic spirit of objective policy creation for the good of the people, not the corporation. Limited choices in the marketplace increases reliance on those select businesses, allowing them to have a significant influence on the government to make decisions in their favor. If any of those firms becomes economically endangered, the government is more inclined to to bail them out because they rely on their product or service. For instance, Tyson is one of America’s largest meat processing companies.29 Because they control a sizable majority of the market, when problems hindering production arise, including when multiple plants shut down during the onset of the coronavirus pandemic in 2020, a large decrease in the nation’s slaughtering capacity comes about, resulting in food shortages. Because of their essential position in the food supply, these meatpacking businesses can use their large market power to put pressure on the government to provide subsidies and bail them out of lawsuits and business failures. This dynamic harms farmers who have few or no other choices to sell their livestock to for slaughter in order to go to the market. These firms can extract these advantages even when problems such as COVID-19 outbreaks in the plants resulted from deliberate neglect to implement adequate safeguards by company heads.30 In addition to providing an unwavering safety net regardless of firm malpractice, the government often bends to the firm’s demands if they seek subsidies or exemptions from prosecution.31 In effect, when firms become so large that they cannot be allowed to fail, they begin to have disproportionate power over the political process.32

C. Consolidation Threatens the Growth of Regenerative Farming

I. Regenerative Farming is Reducing Emissions, Bolstering Biodiversity, and Increasing Food Security, a Critical Practice to create a Climate Resilient Future

The United Nations IPCC report calls for a rapid greenhouse gas reduction to limit temperature rise to 1.5 degrees celsius by 2050.33 Given that agriculture and forestry accounted for 10.5 percent of greenhouse gas emissions in 2018,34 farming practices can play a crucial role in meeting these goals. Farming the land in ways that build healthy soil, maintain biodiversity, and sequester carbon dioxide are critical measures that will help America cultivate a sustainable food system, protect the land for generations to come, and meet greenhouse gas emission reduction goals.

Currently, the practices that dominate the American agricultural landscape often till the soil, plant only one to two crops at a time, and input large sums of fertilizer, herbicides, pesticides, and other chemicals to streamline production. Industrialized agriculture values efficiency, maximizing yield, and decreasing labor input. In contrast, regenerative agriculture practices maintain soil health for long term benefit by applying compost as fertilizer, planting cover crops, implementing diverse crop rotation, rotating livestock grazing, limiting fertilizer and pesticide use, and eliminating tillage practices.35 Although opponents highlight that regenerative practices yield less products per acre and require more labor input, they neglect the significance of their energy input being 30-60 percent less than traditional methods because they do not use machines, fertilizer, and herbicides.36 This practice ultimately increases the long term productivity and stability of food production because it doesn’t rely on the continuous purchasing and application of chemicals into the soil. Instead, it builds soil health by increasing nutrient and water retention, both of which increases land productivity.37

II. Small Farms are More Likely to Implement Regenerative Fertilization Practices

One of the defining regenerative agriculture practices is applying compost and manure as fertilizer. There are three different types of fertilization methods that the USDA measures every few years, manure, organic, and commercial that help replenish soil nutrients. Manure is the application of animal bio excretions,38 organic fertilizer is the use of organic matter, compost, animal manures or green manures and does not include any chemical fertilizers,39 and commercial fertilizer is the application of chemically derived fertilizers such as nitrogen, phosphate and potash.40 For these figures, manure and organic fertilizers are categorized as “regenerative fertilizers” because they represent methods that replenish soils with naturally derived as opposed to chemically manufactured nutrients.

Small farms, 10.0 to 49.9 acres, are more likely to implement regenerative fertilizer methods than medium sized, 260 to 499 acres, and large sized, 1,000 to 1,999 acre farms. In 2017, 32.74 percent of small farms used regenerative fertilizer, compared to 27.27 percent of medium and 21.63 percent of large farms.41 Small farms are also transitioning away from commercial fertilizer to regenerative fertilizer methods at a faster rate than medium and large farms. From 2012 to 2017, small farms had the greatest percent decrease in number of farms using commercial fertilizers, 6.50 percent, and the largest percent increase for regenerative practices, 6.47 percent. Medium farms experienced a 2.28 percent decrease in the number of farms implementing commercial fertilizers, while a 2.57 percent increase in regenerative fertilizers. Large farms experienced a 2.31 percent decrease in the number of farming implementing commercial fertilizers, while a 2.32 percent increase in regenerative fertilizers.42 This demonstrates that smaller farms are more willing and better suited to implement regenerative practices.

Industrial agriculture firms, on the other hand, highly prioritize efficiencies and maximizing profit, thus, are less likely to invest the time and money into learning about and switching to regenerative fertilization practices. While small farms are making the most rapid transition to regenerative fertilization practices that would benefit the market and planet in the long run, the increased market and resource dominance of the largest farms, which have the slowest rates of transition to regenerative fertilization practices, is ultimately hindering the growth of regenerative agriculture in the United States.

#### Extinction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### t-private

**The ‘private sector’ is not controlled by the state**

Thomas **Brock 20**, Investopedia, “Private Sector,” 12/25/20, https://www.investopedia.com/terms/p/private-sector.asp

What is the Private Sector?

The private sector is the part of the economy that is run by **individuals** and **companies** for **profit** and is **not state controlled**. Therefore, it encompasses all **for-profit businesses** that are not owned or operated by the government. Companies and corporations that are **government run** are part of what is known as the **public sector**, while charities and other nonprofit organizations are part of the voluntary sector.

**Violation---Parker immunizes state anti-competitive practices**

Adam G. **Hester 16**, attorney at the law firm Perkins Coie, “State Action Immunity and Section 5 of the FTC Act”, <https://www.perkinscoie.com/en/news-insights/state-action-immunity-and-section-5-of-the-ftc-act.html>, 2016

The state-action immunity doctrine of Parker v. Brown immunizes anticompetitive **state regulations** from preemption by federal antitrust law so long as the state takes conspicuous **ownership** of its anticompetitive policy. In its 1943 Parker decision, the Supreme Court justified this doctrine, observing that no evidence of a congressional will to preempt state law appears in the Sherman Act’s legislative history or context. In addition, commentators generally assume that the New Deal court was anxious to avoid re-entangling the federal judiciary in Lochner-style substantive due process analysis. The Supreme Court has observed, without deciding, that the Federal Trade Commission might not be bound by the Parker doctrine but instead enjoys “superior preemption” authority under Section 5 of the FTC Act. Drawing on the FTC Act’s legislative history and its institutional distinctiveness from Sherman Act enforcement, this Article makes an affirmative case for FTC super-preemption power over anticompetitive state laws.

**Ground---core DAs are about market-interaction of regulating business.**

**Limits---the explode into huge new areas like military procurement, university patents, public health.**

### concon cp

#### At least 3/4th state legislatures should call for a limited constitutional convention and ratify an amendment to PLAN

#### Solves and avoids politics

Elving 18 Ron Elving is Senior Editor and Correspondent on the Washington Desk for NPR News Repeal The Second Amendment? That's Not So Simple. Here's What It Would Take March 1, 20185:00 AM ET https://www.npr.org/2018/03/01/589397317/repeal-the-second-amendment-thats-not-so-simple-here-s-what-it-would-take

A new Constitutional Convention? If all this seems daunting, as it should, there is one alternative for changing the Constitution. That is the calling of a Constitutional Convention. This, too, is found in Article V of the Constitution and allows for a new convention to bypass Congress and address issues of amendment on its own. To exist with this authority, the new convention would need to be called for by two-thirds of the state legislatures. So if 34 states saw fit, they could convene their delegations and start writing amendments. Some believe such a convention would have the power to rewrite the entire 1787 Constitution, if it saw fit. Others say it would and should be limited to specific issues or targets, such as term limits or balancing the budget — or changing the campaign-finance system or restricting the individual rights of gun owners. There have been calls for an "Article V convention" from prominent figures on the left as well as the right. But there are those on both sides of the partisan divide who regard the entire proposition as suspect, if not frightening. One way or another, any changes made by such a powerful convention would need to be ratified by three-fourths of the states — just like amendments that might come from Congress.

**t-core**

**Core antitrust laws are economy wide**

Gerber 20 --- David J Gerber, Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust”, Ch. 1, page 15, 2020, https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198727477.001.0001/oso-9780198727477-chapter-2

C. **A Core Definition**

The Guide uses the **term**s “competition law” and “antitrust law” to refer to **a general domain of law** whose object is to deter **private restraints** on **competitive conduct**. We look more closely at the terms:

1**. “General”—**The laws included are those that are **applicable throughout an economy** and thereby provide a framework for **all market operations** (there are always some exempted sectors). Laws dealing only with **specific markets** (e.g., telecommunication) **do not play that role.**

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

**Vote neg for limits and ground --- sectors are boundless and create uniqueness and link unpredictability for topic specific disads**

**estados**

**The fifty states and territories should relax occupational licensing requirements for nurse practitioners.**

**State-level regulation solves.**

**1AC Smith 21** (Laura Barrie Smith, Health Policy Center, Urban Institute, Washington, District of Columbia, “The effect of nurse practitioner scope of practice laws on primary care delivery,” October 8th, 2021, <https://doi.org/10.1002/hec.4438)//NRG>

Like all health care providers, **NPs are subject** to considerable **state-level regulation**, and a key aspect of this regulation is their SOP. Most broadly, SOP dictates the **range of procedures** and services that NPs are **legally allowed** to perform. **SOP laws** also specify the degree of practice and prescriptive authority for NPs and outline requirements for collaborative practice agreements between NPs and physicians. Most collaborative practice agreements require physician review of NP patient charts. The agreements can also include practice protocols, require physician supervision, limit the number of NPs with whom each physician can have a collaborative practice agreement, and/or impose restrictions on NP prescriptive authority (Adams & Markowitz, 2018).

The American Academy of Nurse Practitioners considers a state to have “full practice authority” when NPs can legally practice and prescribe without any physician oversight and under the exclusive licensure authority of the state Board of Nursing (American Association of Nurse Practitioners, 2018c). As of 2020, 23 states and the District of Columbia grant NPs full practice authority. All other states maintain reduced or restricted authority (Phillips, 2020).

In 2011, an influential report by the National Academy of Medicine (formerly the Institute of Medicine) urged states to allow NPs to practice to the full extent of their training (Institute of Medicine, 2011). Since then, many research institutions, non-governmental organizations, and government agencies have advocated for states to relax their SOP laws in order to grant NP full practice authority (Adams & Markowitz, 2018; Buerhaus, 2018; Gilman & Koslov, 2014). A recent policy proposal from the Brookings Institution concisely summarized the problems with restrictive SOP laws, calling them “**anticompetitive policy barriers**” that “restrict competition, generate administrative burdens, and contribute to increased health-care costs, all while **having no discoverable health benefits**” (Adams & Markowitz, 2018). Following the **National Academy's report**, **12 states relaxed their NP SOP laws** between 2011 and 2017 to increase NP practice authority (Figure 1). These relaxations of **SOP laws** eliminated requirements for **collaborative agreements** between NPs and physicians (sometimes following a limited, post-graduation period of collaboration/supervision), and abolished requirements for NP practice protocols if there were any.

**Scope of practice is defined by state licensing boards.**

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This example illustrates the importance of access **to healthcare providers** **in addition** to access to health insurance. 5 **And** access to providers is **far from given**, with many areas of the country experiencing **shortages of healthcare providers** that experts **expect to worsen** over the next decade. 6 The New York Times example also highlights both **a viable policy option** to address these shortages - the increased use of NPs to provide care - and **an important obstacle** **to implementing this** policy - **restrictive laws**.

NPs are registered nurses who have undergone additional training to provide healthcare services historically provided by physicians. 7 They represent the principal source of care in many geographic areas 8 and are more likely than physicians to practice in **rural** and **underserved communities**. **9 This** makes the 200,600 practicing NPs a natural option to address **chronic**, **critical**, and **worsening** **physician shortages** across the country. 10 While NPs provide healthcare services across the country, their ability to do so is not equal in all areas. **State scope-of-practice** ("**SOP**") laws - a subset of the **occupational licensing** laws that govern NPs and many other professionals - **determine what services** [\*891] NPs may provide and the conditions under which they may provide those services.

States often justify SOP laws as necessary to ensure patient safety by preventing unqualified individuals from providing care. 11 Though these laws can further this goal, excessively restrictive SOP laws undermine the ability of NPs to care for patients. **Prior work** has shown that eliminating restrictive SOP laws and allowing NPs to practice **independent**ly **of physicians** can facilitate **access to care**, 12 **improve** the **quality** of care, 13 **reduce** the use of intensive medical procedures, **14** and reduce the price of some healthcare services. 15 Based on this evidence, the Obama and Trump administrations along with the National Academy of Medicine and other organizations have urged states to relax their SOP laws. 16 A **minority of states** have responded by **granting NPs** the authority to practice independently, but the ongoing debate and [\*892] political battle over SOP laws has only intensified over the last decade. 17 Physician organizations, in particular, vigorously oppose the relaxation of these laws and have been successful in discouraging states from granting NPs independence. 18

**9** See Peter I. Buerhaus, Catherine M. DesRoches, Robert Dittus & Karen Donelan, Practice Characteristics of Primary Care Nurse Practitioners and Physicians, 63 NURSING OUTLOOK 144, 144-50 (2015) [hereinafter Practice Characteristics] (finding that NPs are more likely to care for Medicaid patients, vulnerable populations, and rural populations); Grant R. Martsolf, Hilary Barnes, Michael R. Richards, Kristin N. Ray, Heather M. Brom & Matthew D. McHugh, Employment of Advanced Practice Clinicians in Physician Practices, 178 JAMA INTERNAL MED. 988, 988-89 (2018) (finding that NPs are likely to be employed in **primary care)**.

**10** Occupational Employment and Wages, May 2019, 29-1171 Nurse Practitioners, U.S. BUREAU LAB STAT., https://www.bls.gov/oes/current/oes291171.htm (last visited Nov. 11, 2020) [https://perma.cc/5A4C-9H7S].

**11** See Morris M. Kleiner, Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers, 5 U. ST. THOMAS J.L. & PUB. POL’Y 1, 3, 8 (2011) (“The general rationale for licensing is the health and safety of consumers. Beyond that, the quality of service delivery . . . [is] sometimes invoked.”).

**12** Benjamin J. McMichael, Beyond Physicians: The Effect of Licensing and Liability Laws on the Supply of Nurse Practitioners and Physician Assistants, 15 J. EMPIRICAL L. STUD. 732, 764-65 (2018) [hereinafter Beyond Physicians]; Jeffrey Traczynski & Victoria Udalova, Nurse Practitioner Independence, Health Care Utilization, and Health Outcomes, 58 J. HEALTH ECON. 90, 103-04 (2018); see also John A. Graves, Pranita Mishra, Robert S. Dittus, Ravi Parikh, Jennifer Perloff & Peter I. Buerhaus, Role of Geography and Nurse Practitioner Scope-of-Practice in Efforts to Expand Primary Care System Capacity, 54 MED. CARE 81, 83-88 (2016).

**13** Traczynski & Udalova, supra note 12, at 97

**14** See, e.g., Sara Markowitz, E. Kathleen Adams, Mary Jane Lewitt & Anne L. Dunlop, Competitive Effects of Scope of Practice Restrictions: Public Health or Public Harm?, 55 J. HEALTH ECON. 201, 209-16 (2017) (showing **a reduced probability** of **intensive procedures** related to pregnancies in states that allow nurse practitioners to practice with no barriers).

When opposing NP independence, physician groups often argue that requiring physician supervision promotes patient safety and the delivery of high-quality care. 19 Although existing clinical evidence undermines these claims, 20 physician groups have recently emphasized the troubling possibility that allowing NPs to practice independently will increase opioid prescriptions. 21 The reasoning offered is straightforward: If NPs can prescribe opioids without physician supervision, then they will inappropriately overprescribe opioids and deepen the ongoing opioid crisis. 22 This Article engages with the debate [\*893] over NP SOP laws by empirically analyzing the impact these laws have on opioid prescriptions. Given the severity of the ongoing opioid crisis, the claim that allowing NP independence will deepen that crisis by increasing opioid prescriptions warrants careful consideration. On one hand, allowing NPs to practice independently can address critical access-to-care issues and improve the healthcare system in other important ways. On the other hand, restricting the practices of NPs may be justified despite these benefits if doing so avoids exacerbating the opioid crisis. This Article provides critical new evidence on the effect that NP SOP laws have on opioid prescriptions. Specifically, I analyze a dataset of approximately 1.5 billion individual opioid prescriptions, which represent approximately 90% of all opioid prescriptions filled at outpatient pharmacies between 2011 and 2018. This dataset provides unprecedented insight into the ongoing opioid epidemic and the role of healthcare providers in that epidemic. Because this dataset covers nearly the universe of opioid prescriptions in the United States over eight years and is organized at the individual-prescription level, I am able to develop more complete and more granular evidence on the role of NP SOP laws in opioid prescriptions than has previously been possible. The analysis reveals that allowing NPs to practice independently reduces the quantity of opioids prescribed across all physicians and NPs by approximately 4.4%. 23 In contrast to physician groups' claims, the evidence developed here suggests that relaxing NP SOP laws reduces opioid prescriptions. Thus, this Article demonstrates that, rather than exacerbating the opioid crisis, granting NPs independence is a valid policy option for addressing that crisis. These results can inform the ongoing debates over both NP SOP laws and the opioid epidemic more generally, and this Article uses this evidence to recontextualize the debate over SOP laws and offer specific policy recommendations. In addition to joining various scholars and [\*894] organizations in urging states to reform their SOP laws, this Article engages with potential federal policy options that can both address the dire healthcare provider shortages across the country while ameliorating the opioid crisis. Federal options, such as the ones discussed below, will become increasingly relevant as state legislation has proven difficult to obtain in certain states. 24 This Article proceeds in four parts. Part I details the contributions that NPs make to the healthcare system and the ways SOP laws impact their ability to do so. 25 Part II provides context for the empirical analysis that is the focus of the Article by detailing the progression of the opioid crisis. 26 Part III discusses the empirical methodology and reports the results of the empirical analysis. 27 Part IV engages with the policy implications stemming from the results of that analysis, 28 and a brief conclusion follows.

I. REGULATING HEALTHCARE PROVIDERS

Historically, physicians have delivered most of the healthcare in the United States. While other providers, such as registered nurses, have always played important roles in healthcare, physicians have been responsible for directing most care delivery. Physician dominance, however, has begun to recede as NPs and other types of healthcare providers are providing "[a] growing share of health care services." 29 And **this trend will likely continue** because the growth rate of NPs outstrips that of physicians, 30 which only **adds urgency** to resolving the debate over NP SOP laws. To provide context to that debate, this Part [\*895] begins by discussing the role of NPs in the healthcare system before outlining the contours of the debate over the SOP laws that regulate NPs.

A. Nurse Practitioners and the Laws that Govern Them

To qualify as an NP, an individual must first become a registered nurse, which often involves completing a bachelor's degree in nursing. 31 Most registered nurses practice for several years before returning to complete a master's or doctoral degree to become an NP. 32 Their training involves clinical and didactic courses that prepare future NPs to diagnose and treat patients, order and interpret tests, and prescribe medication. 33 Following their training, NPs practice in a wide variety of medical settings, but over 60% choose to provide some form of primary care. 34 With this training, NPs provide care alongside physicians across the country, 35 but where they choose to practice and which patients they choose to care for often differs substantially from the choices made by physicians. Relative to physicians, NPs more often choose to practice in primary care and to care for underserved populations, including Medicaid patients. 36 They also provide care in rural or underserved areas to a [\*896] greater extent than physicians. 37 The predilection of NPs to practice in isolated areas and care for patients who have difficulty accessing care is particularly important in an era of worsening physician shortages. For example, the Association of American Medical Colleges estimates that, by 2032, the United States will face a physician shortage of between 46,900 and 121,900. 38 Such a shortage has implications for the country generally, but it will impact rural areas to a greater degree. Recent estimates suggest that the number of physicians practicing in these areas could decline by 23% by 2030. 39 With approximately 200,600 NPs delivering care in 2019 40 NPs can alleviate physician shortages in rural and other areas. Indeed, NPs outnumber primary care physicians, 41 practice in convenient locations like retail and urgent care clinics, 42 and represent the principal source of healthcare in many parts of the country. 43 However, the ability of NPs to function as the principal source of healthcare depends heavily on the SOP laws in place. Prior work has [\*897] classified NP SOP laws in slightly different ways. 44 Each classification system has advantages and disadvantages, but I adopt a classification scheme based on two recent studies that that focus on specific statutory and regulatory language. 45 Where necessary, I updated the classifications based on more recent statutory and regulatory information. This approach to classification eliminates the risk of mis-classification that can occur by relying on inconsistent secondary sources. It also isolates the specific statutes and regulations that policymakers may change to achieve specific results in their healthcare systems. 46 Using these statutes and regulations, I classify each state in each year as either allowing NPs to practice independently or restricting the practices of NPs. To be classified as allowing "independent practice," a state must (1) have no requirement that physicians supervise NPs and (2) grant NPs full prescriptive authority, i.e., allow NPs to prescribe the same range of medications as physicians. 47 States that either require physician supervision of NPs or restrict their prescriptive authority fall into the "restricted practice" category. [\*898] Figure 1 provides an overview of NP SOP laws during the time period analyzed here. In 2011, fourteen states allowed NPs to practice independently, and thirty-seven states restricted the practices of NPs. 48 Of the thirty-seven states restricting NP practice, fourteen changed their laws prior to the end of 2018 to allow NPs to practice independently. 49 Figure 1 separately highlights each of the states that always allowed NPs to practice independently, always restricted NP practice, and changed from restricted to independent practice. As Figure 1 illustrates, the trend among states decidedly favors NP independence, with half of all states that currently allow independent practice adopting a law to that effect in the last decade. This trend has not emerged without opposition, however, and the debate between opponents of relaxing NP SOP laws and advocates of greater NP autonomy has become quite heated. The next subpart engages with this [\*899] ongoing debating, tracing the contours of each side's arguments and the evidence that supports their arguments.

B. The Scope-of-Practice Debate

As NPs have assumed greater roles in the delivery of care, some groups have objected to liberalizing the SOP laws that govern NPs to allow them to provide more services and practice with greater autonomy. Principal among the opponents of relaxing NP SOP laws are physician groups, with the American Medical Association ("**AMA"**) offering some of the strongest resistance to granting NPs greater independence. 50 Advocates of greater NP autonomy include nursing groups, policy think tanks of various political orientations, the National Academy of Medicine, and the Obama and Trump administrations. 51 Opponents of greater NP autonomy often emphasize the greater education completed by physicians and argue that NPs cannot provide safe or high-quality care without physician supervision. 52 Proponents often respond that NPs deliver care of similar quality as physicians and that allowing greater NP autonomy lowers the cost of care and improves access to care. 53 This Part engages with each of these sets of arguments in turn.

1. Independent Nurse Practitioners and the Quality of Care

Perhaps the most contentious point in the debate over NP SOP laws concerns the ability of NPs to deliver high-quality care without physician oversight. Opponents of NP independence generally argue that, **without physician supervision**, NPs cannot safely care for patients. For example, the California Medical Association has stated that it "opposes any attempts to remove physician oversight over [NPs] and believes that doing so would put the health and safety of patients at risk." 54 Some groups frame their arguments about quality of care in [\*900] terms of the different levels of education completed by NPs and physicians. 55 These arguments require the additional inferential step that more education is required to provide the type of care delivered by NPs, but they are effectively equivalent to statements that unsupervised NPs cannot safely care for patients. 56 Advocates of greater NP autonomy respond to these arguments by pointing to the available evidence that demonstrates NPs generally deliver care of comparable quality to that delivered by physicians. 57 Multiple studies have investigated the ability of NPs to deliver high-quality care, often comparing NP-supplied care to physician-supplied care. 58 A recent comprehensive analysis compared the quality of care delivered to Medicare beneficiaries by NPs and physicians and found that physicians perform better on certain quality measures and NPs perform better on other measures. 59 Related work has found no meaningful differences between NPs and physicians in caring for HIV [\*901] patients, 60 managing diabetes, 61 providing primary care, 62 prescribing medications, 63 or providing critical care. 64 Reviewing the evidence, the National Academy of Medicine concluded "that access to **quality care** can be **greatly expanded** by increasing the use of ... [NPs] in primary, chronic, and transitional care." 65 Opponents of broader NP SOP laws have criticized this evidence as irrelevant because these studies are often "performed in a setting of physician oversight and collaboration." 66 They argue that "using data from studies of nurse practitioners working under physician supervision to demand independent practice is a flawed practice, as there is no proof that nurse practitioner care without physician oversight is either safe or effective." 67 However, studies that have explicitly examined the role of relaxing NP SOP laws - as opposed to the role of NPs generally - in promoting the delivery of high-quality care have concluded that NP independence either improves or has little effect on the quality of care delivered. A 2017 study found that NP "independence had no statistically significant effect on any of the three [clinically verified indicators of [\*902] healthcare quality] studied." 68 In contrast to claims that NP SOP laws are necessary for the protection of patients, 69 this study "did not substantiate the use of [SOP] restrictions for the sole purpose of consumer protection." 70 A separate study "cast[] further doubt on the theory that state regulations limiting NPs practice are associated with quality of care." 71 Examining **patient-reported** quality across **many years** of a nationally **representative dataset**, a recent study found that NP independence increases the probability that patients report being in **excellent health.** 72 Another study found that NP independence had no effect on infant mortality rates, an important indicator of healthcare quality. 73 Overall, existing evidence does not support the contention that unsupervised NPs provide unsafe or low-quality care. To be sure, physician groups are correct in their assertion that NPs are not trained to provide the same range of services as physicians - NPs do not perform surgery, for example. Within the scope of their training, however, the evidence demonstrates that NPs perform similarly to physicians.

72 Traczynski & Udalova, supra note 12, at 98, 99 tbl.7.

2. Scope-of-Practice Laws and the Cost of Healthcare

Though healthcare quality tends to receive the most attention from experts within the SOP law debate, concerns over the cost of care predominate among the patients who are most affected. Indeed, the health policy conversation over the last two decades has focused heavily [\*903] on the ability of patients to obtain affordable care. 74 Advocates of greater NP autonomy have argued that removing restrictive SOP laws will facilitate the use of lower cost providers and ultimately reduce costs within that system. For example, Kathleen Adams and Sara Markowitz have explained that "achieving productivity gains is one way to reduce cost pressures throughout the health-care system" and that such gains can be realized "by using lower-cost sources of labor to achieve the same or better outcomes." 75 The "high payment rates for physicians in the United States" makes the increased use of NPs a particularly appealing strategy for cost-reduction. 76 Recent research has demonstrated that abrogating restrictive SOP laws can reduce costs within the healthcare system to the benefit of patients and the public. A study by Morris Kleiner and others found that granting NPs independence reduces the price of a common medical examination by between 3% and 16%. 77 A separate economic evaluation estimated that liberalizing SOP laws would save approximately $ 543 million annually in emergency department visits alone. 78 Though specific to certified nurse midwives instead of NPs, a recent study found that eliminating restrictive SOP laws for nurse midwives would save $ 101 million by reducing reliance on more intensive forms of care during birth. 79 Other studies have found that payments in connection with Medicare beneficiaries cared for by NPs were between 11% and 29% lower than those cared for by physicians, 80 the savings achieved by using retail health clinics in lieu of emergency departments are higher when NPs have more independence, 81 and Medicaid costs either decrease or remain flat when NPs are granted more autonomy. 82 On the other side of the debate, opponents of NP independence can point to some evidence that NPs and SOP laws allowing them to practice independently may increase healthcare costs. In a recent report, the [\*904] Medicare Payment Advisory Commission ("MedPAC") highlighted several studies finding that NPs tend to increase costs. 83 One study found that NPs utilized more healthcare resources in caring for patients than physicians, suggesting that more extensive use of NPs may increase costs. 84 A separate study found that NPs order more medical imaging services than physicians in primary care settings. 85 Medical imaging, such as magnetic resonance imaging ("MRI") and computed tomography ("CT") scans can be expensive, so this study suggests that NP independence may increase costs over time. More recent work that examines a larger population contradicts these results, however. Examining data on Medicare and commercial insurance claims, a 2017 study found that NP independence does not result in more medical imaging and does not increase healthcare costs. 86 Similarly, research conducted by economists at the Federal Trade Commission ("FTC") revealed no evidence that relaxing NP SOP laws increases healthcare costs or prices. 87 Overall, a growing body of research suggests that allowing NPs to practice independently can reduce costs and the prices patients must pay for care, while only a few studies have found evidence to the contrary. 88

3. Nurse Practitioners and Access to Healthcare

Turning to the debate over the role of SOP laws in access to healthcare, the evidence more heavily favors advocates of greater NP autonomy than it does in either the cost or quality debates. Advocates of greater NP autonomy have argued that "by unnecessarily limiting the tasks that qualified [NPs] can perform, SOP restrictions exacerbate [healthcare provider] shortages and limit access to care." 89 An Obama administration report noted that "easing scope of practice laws for APRNs represents **a viable means** of increasing access to certain primary care services," 90 and the evidence generally supports this conclusion. For example, one study concluded that states with less restrictive SOP laws "overall had more geographically accessible" NPs. 91 Similarly, a 2018 study found that relaxing SOP laws increases access to healthcare generally but has the largest positive effect in counties that have the least access to healthcare. 92 This evidence suggests that "restrictive licensing laws limit the growth in the supply of [NPs] who could deliver care in communities with relatively few practicing physicians." 93 Extending this evidence to more specific measures of healthcare access, a third study concluded that granting NPs more autonomy increases the likelihood that individuals receive a routine check-up, have access to a usual source of care, and can obtain an appointment with a provider. 94 NP independence also reduces the use of emergency departments for conditions that can be addressed in less intensive (and less expensive) settings, as patients can more easily access a healthcare provider when NPs can practice independently. 95 [\*906] The response to the argument that allowing NPs greater autonomy increases access to healthcare by opponents of NP independence often does not focus explicitly on healthcare access. While not every study has found that relaxing SOP laws increases access to healthcare providers, 96 the existing evidence generally supports this conclusion. 97 Opponents, therefore, typically offer only indirect arguments on the access issue. In opposing a bill that would relaxing California's SOP laws, the president of the California Medical Association offered an example of a common argument: "We must ensure that every American, regardless of age or economic status, has access to a trained physician who can provide the highest level of care. Expanding access to care should not come at the expense of patient safety and we will not support unequal standards of care... ." 98 In other words, expanding access to NP-supplied care does not amount to expanding access to care generally because NPs provide inferior care. Though framed as an access-to-care argument, this contention is more accurately characterized as an argument about the quality of care provided by NPs, which as addressed above, appears to be equal in basic practice areas.

4. The State of the Scope-of-Practice Debate

The debate over NP SOP laws is not new, and multiple national organizations - both governmental and non-governmental - have weighed in on this debate after conducting extensive reviews of the available evidence. Perhaps the most relevant organization to opine on SOP laws to date has been the National Academy of Medicine (formerly, the Institute of Medicine). The Academy criticized restrictive SOP laws, noting that "what nurse practitioners are able to do once they graduate varies widely for reasons that are related not to their ability, education or training, or safety concerns, but to the political decisions of the state in which they work." 99 Calling for an end to restrictive SOP laws, the Academy clearly stated that NPs "should practice to the full extent of their education and training." 100

[\*907] Researchers at the FTC reached a similar conclusion, albeit for somewhat different reasons. The FTC has no authority to enforce **federal** antitrust laws against states that restrict the practices of NPs with SOP laws because these laws fit squarely within **the state-action immunity articulated** in **Parker** v. Brown. 101 However, FTC researchers applied the economic principles that underlie those antitrust laws and concluded that restrictive SOP laws "deny[] health care consumers the benefits of greater competition." 102 They further concluded that the harms to healthcare services markets - higher prices and decreased access to care - associated with restrictive SOP laws were not offset by any attendant benefits. 103 Consistent with these conclusions, the FTC has **regularly opposed** state laws that restrict the practices of NPs and supported the passage of bills that relax **the SOP laws**. 104

**California did it.**

**1AC Morgan 21** (Larissa, The Regulatory Review, “Law Reforms Promote Nurse-Managed Care,” September 1st, 2021, <https://www.theregreview.org/2021/09/01/morgan-law-reforms-promote-nurse-managed-care/)//NRG>

Advanced practice registered nurses lead **nurse-managed clinics**, which offer primary care and wellness services through partnerships with federally qualified health centers, academic institutions, nonprofits, and social services agencies. These clinics address the **social determinants** of health by increasing access to care and improving patient satisfaction, health outcomes, and behaviors that affect health. Hailed as “the future of primary care in the United States” by some health policy experts, nurse-led clinics support medically underserved populations, particularly in areas with a shortage of primary care physicians.

Nurse practitioners offer the same—and, on some metrics, **better**—quality of care than primary care physicians, while also providing cost savings to the U.S. health system.

For routine wellness visits, Medicare—the federal health insurance program for elderly U.S. residents and certain younger people—reimburses nurse practitioners at 85 percent the rate of doctors. Primary care from nurse practitioners is also less expensive for private insurers and **patients who pay out-of-pocket**. In addition to lower payments, nurse-managed care may decrease **expensive emergency room visits** by focusing on preventive services.

Nurse-led clinics were federally recognized as a health care delivery model following the passage of the Affordable Care Act (ACA). Although the ACA increased the number of Americans with health insurance, the supply of primary care physicians has remained **insufficient** to match the needs of the insured population.

To address this shortcoming, the ACA established a $50 million grant program to expand the financial capacity of safety net providers, such as nurse-led clinics. The federal government distributes funding under this program based on a number of factors, including the financial need of the safety net provider and other available funding at a state, local, and organizational level. To qualify for funding, nurse-led clinics must meet certain regulatory requirements. First, nurses must serve as the primary providers at such clinics where at least one advanced practice registered nurse works in a management capacity. Second, the nurse-led clinic must offer a full range of primary **care** and wellness services to all patients, regardless of their **socioeconomic** or **insurance status**. Finally, nurse-led clinics must create **community advisory committees composed of patients** to oversee the impact of the clinic and seek civic input.

Although some health policy experts have praised the ACA’s funding for nurse-managed clinics as “the beginning of a new era for nurse-led health care,” variability across **state regulations** in nurse practitioner **practice authority** creates barriers to expanding these clinics.

Specifically, **states differ in the amount of authority they grant nurse-led clinics** to practice without physician oversight. Many states require nurses to enter into collaborative practice agreements with physicians before they can practice independently. To gain full practice authority, some states require nurse practitioners to complete several thousand hours or, in some cases, years of training under the supervision of a physician. Other states extend physician oversight into operations of nurse-led clinics.

For example, in addition to mandating 4,000 hours of supervised practice, Alabama requires supervising physicians to visit nurse-led sites at least twice per year. For nurse practitioners who have yet to complete their mandatory supervised practice, a physician must oversee a minimum of 10 percent of their work at the clinic. Some medical experts argue that collaborative practice regulations are necessary to protect patient safety and quality of care. Other health experts, however, explain that—compounded with a growing insured and aging population—these regulations hinder health care for the **81 million Americans** who lack access to a primary care physician. To keep up with these demands in Alabama, for example, the state would need to increase its number of primary care physicians by 23 percent over the next nine years.

In response to these mounting pressures for access to additional medical professionals, some states have changed their laws to grant nurse practitioners full practice authority. Following 22 other states’ existing laws, **California** recently passed legislation that permits nurse practitioners to practice independently starting in 2023. Currently, nurse practitioners in California are required to work under the direction of a physician, and to collaborate with the physician and the larger health system in which they operate to establish treatment and care practices.

This new state legislation does not completely abandon this partnership, but it does afford nurse practitioners more freedom. Under the new law, nurse practitioners must complete a three-year, supervised “transition to practice” period before they are eligible to operate clinics independently, similar to a regulatory model used in states such as Connecticut, Delaware, and Nebraska. Although the legislation permits nurse practitioners to offer primary care and some diagnostic services, they must refer patients to physicians when medical needs exceed the scope of their practice capacity. This new legislation has sparked debate in the medical community. Proponents of physician-based care argue that easing supervision could compromise patient health. To resolve physician shortages, the state should instead focus on increasing training and education of providers, suggests the California Medical Association. Advocates of full practice authority welcome the legislation as an opportunity to expand care to needy patients while promoting the development of new health care delivery models, such as nurse-managed clinics. As the shortage of medical workers has worsened during the coronavirus pandemic, other states—most recently, **Massachusetts**—have granted full practice authority to nurse practitioners as part of larger health care reform efforts.

States will likely **continue to update their health care laws** to address the systemic inequalities that have intensified amid the pandemic. With heightened awareness of the social determinants of health, disparities in access to care, and rising health care costs, **nurse-led care** appears to serve as one solution to the existing challenges faced by patients across the United States.

**21 states have done it.**

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**N**urse **p**ractitioner**s** (NP) are well-trained health care personnel for primary, acute, and specialty care in the US. However, 32 states have restrictions on their **s**cope **o**f **p**ractice and Illinois is one of them.

In response to the shortage of health care workers during the coronavirus pandemic, **twenty-one states granted NP full practice authority** to cope with the increasing demand for health care services. In the Midwest, **Kansas**, **Indiana,** **Michigan**, **Missouri**, and **Wisconsin**, adopted a more expansive scope of service for NP.

This report evaluates the effect of this policy change on the rate of COVID-related deaths in the Midwest states, which expanded NP authority and sheds light on healthcare policy in Illinois.

**Findings:**

NP in Illinois have full practice authority only if they have had 4,000 hours of clinical experience and completed 250 training hours.

Illinois and Ohio are the only two Midwest states, which did not expand the scope of practice for NP during the pandemic.

In the states that **did expand** the **s**cope **o**f **p**ractice **for NP**, COVID related deaths were potentially reduced by **10** cases **per day**

**If Illinois had** expanded the scope of practice, **8% fewer** COVID-19 **deaths would have occurred** in Cook County, which is the most affected area in the state.

The findings reveal that granting NP full practice authority **is effective** in easing the shortage of health care workers and improves health care quality. Our result echoes the findings by other healthcare researchers that granting NP independent practice authority improves patient outcomes. This report recommends that health care regulators in Illinois grant all NP independent practice authority in order to meet the states’ growing health care demand.

Introduction

The shortage of healthcare professional in the US has been a notable concern among health policy makers. According to the Bureau of Health Workforce, in 2017 only 55 percent of the need for primary care professional was met.1 For Illinois, the Bureau estimated that 468 extra primary care health providers were needed to address the shortage problem, which is roughly 188% of the existing number of primary care providers in the state. The shortage problem is the biggest in the Midwest.

The nationwide healthcare labor force shortage manifests itself **even more during the** COVID-19 **pandemic.** To address the health workforce shortage, a number of states temporarily expanded the scope of practice for nurse practitioners (NP). NP are well-trained health care personnel, typically requiring post-graduate training. According to the American Association of Nurse Practitioners (AANP), NP with full autonomy are authorized to \evaluate patients; diagnose, order and interpret diagnostic tests; and initiate and manage treatments".2 Although they are well-prepared to provide primary, acute, and specialty care, their scope of practice varies by state. According to the classification by AANP, in a state with "restricted/reduced practice," NP need to have a collaborative agreement with, or work under direct supervision of a licensed health professional (e.g. physician, dentist). The limited authority of NP has not only reduced health access in rural areas, but also significantly increased the administrative burden of the supervising personnel. It has also reduced the amount of time dedicated for patient care (Traczynski and Udalova, 2018). Healthcare researchers have claimed that granting NP independent practice authority would have a positive impact on patient outcomes.

This report estimates the impact of expanding the scope of practice for NPs on COVID mortality in the Midwest. In the region, seven states were classified prior to the pandemic as "restricted/reduced NP practice" by the AANP. Among those, **Kansas,** together with **Indiana,** **Michigan**, **Missouri**, and **Wisconsin** granted NPs independence, whereas Illinois and Ohio did **not** implement changes.3 In the empirical exercise, we leverage on this quasi-experimental setting to compare daily COVID mortality in the treated states with that in **Illinois and Ohio** before and after the emergency response. Although the discussion evaluates the recent emergency response under the pandemic, the finding here contributes to the ongoing debate of whether NP should be granted independent authority.

According to our estimates, expanding the **s**cope **o**f **p**ractice for NPs potentially reduced COVID-related deaths by ten per day. To put this figure into context, the number amounts to a reduction of 8% of in those states that implemented the changes the average death toll in Cook County during the sample period. These results add support to granting NP full independent authority to ease the healthcare workforce shortage.

Restriction on NP and State Emergency Response

The scope of practice for nurse practitioners varies by state. According to the American Association of Nurse Practitioners (AANP), five of the Midwest states allow full practice (light blue in Figure 1a), meaning that NP can work independently and are authorized for patient diagnosis and prescription.

Illinois with four other Midwest states (Figure 1a) classify NP under "reduced practice" restrictions. Illinois regulations amended in 2017 do allow a subset of NP full practice authority, but the change only applies to NP who have had at least 4,000 hours of clinical experience and completed 250 training hours.4 In contrast, North Dakota, South Dakota, Nebraska, Minnesota and Iowa permit a full scope of practice for all NP without a minimum threshold of accrued work hours.

In Illinois, NP are required to have a collaborative agreement with a health professional (e.g. licensed physician), listing the types of care, treatment and procedures the NP is allowed to perform. NP in Illinois and five other Midwest states can work quasi-independently because physicians are not required to be physically present with the NP. Prior to the pandemic outbreak, Missouri and Michigan had the most restrictive rules, requiring that NP work under direct supervision of a physician (Figure 1a).

As the pandemic unfolded, states with reduced or restricted practice authority began to expand the scope of practice for NP. The aim of the change was to enlarge the healthcare workforce capable of providing COVID-19 care.

Among the Midwest states shown in Figure 1b, Missouri and Indiana were the first to waive part of the supervision requirements. At the date of this report, Illinois and Ohio were the only two states, which have not taken action to expand the scope of practice for NP.

Policy Effect on COVID-related Mortality

To evaluate the effectiveness of expanded scope of practice, this report looks into the impact on COVID-related mortality. Data on county level daily mortality are retrieved from the New York Times.5

To estimate a cause-and-effect relationship between expanded **s**cope **o**f **p**ractice and COVID-19 mortality, this report employs the **synthetic control method** (Abadie and Gardeazabal, 2003; Abadie, Diamond, and Hainmueller, 2010). The essence of this statistical technique is to construct **a counterfactual** which mirrors the post-policy mortality that would have been observed had the policy not happened. We then obtain the daily policy effect by directly comparing the counterfactual mortality with the observed mortality. To ensure the counter-factual offers a valid comparison, we make use of several important indicators that would predict COVID-related deaths. These include the pre-policy number of COVID death, pre-policy number of confirmed cases (also retrieved from the New York Times database), and county characteristics (number of NPs, population size, percent of 65+ population, percent of black, number of hospital, and number of beds) obtained from the Area Health Resource Files (AHRF, 2020).

An important property of the synthetic control technique is that the pre-policy number of COVID death has to be informative enough to produce reliable post-policy predictions. In other words, we rely on the pre-policy trend to predict the post-policy movement. This limits the start of the sample period to late March because many counties did not record any COVID deaths until then. For this reason, we are not able to produce a dependable counterfactual for the counties in Missouri and Indiana because they granted authority to NP prior to reporting any COVID-19 deaths.

Figure 2, shows the estimation result for Kansas, Wisconsin, and Michigan. The solid line of each graph represents the actual daily mortality of a state (average of all counties), whereas the dotted line shows the predicted counterfactual using the synthetic control technique. The red vertical line in the middle of each graph represents the day before the policy takes place. For example, in the top-left corner, the solid line shows that Kansas counties recorded an increasing number of COVID-related death with a modest decline in magnitude since April 22, which is the date Kansas started to authorize temporary independent practice for NPs. The trend afterward clearly diverges from the predicted no-policy counterfactual, which implies that the policy slowed down the death toll. Until the end of the sample period, the maximum impact by the policy reduces the daily death toll by 10 cases. We also observe a similar pattern in Wisconsin and Michigan, though the magnitude of death reduction in Michigan is smaller.

There is however the possibility that the reduction in deaths was caused by some other concurrent policies and any reduction in fatalities would then be falsely attributed to the expanded scope of practice. This concern is particularly valid because there were many policies adopted in response to the nationwide health risk.

Therefore, to check the robustness of our prediction of reduced deaths associated with NP scope of authority, we tested to see if the social distancing policy, a major attempt by states in response to the pandemic, had the same associated improvement on the cases of COVID-19 deaths.

For Kansas, Wisconsin, and Michigan, social distancing measures were implemented in late March. We therefore implemented the same estimation procedures using the synthetic control method but moving the treatment date in each state to correspond to the start of the state's shelter-in-place order. As shown in Figure 3, in each of the three states, the actual cases of death continues to grow at a higher rate than the predicted counterfactual. This finding suggests that the **lock down policies** did not produce the same reduction in the number of COVID-related fatalities as the expanded **s**cope **o**f **p**ractice

**Conclusion and Policy Implication**

Amid the unprecedented health crisis, it is important that state regulators consider the cost of occupational regulations.

The argument for occupational licensing is that it protects the consumer. In the case of NPs scope of practice, regulators often worry about the quality of service if the scope is widened. This report however suggests there is **empirical ev**idence that granting NPs independent authority has contributed to a reduction in COVID-19 deaths.

**vagueness/t-prohibit**

**Vagueness –**

**The plan’s generic wording is manipulated in implementation – wrecks solvency**

**Baer 20** [Bill Baer former visiting fellow in governance studies at The Brookings Institution and assistant attorney general of the Antitrust Division and as the acting associate attorney general of the U.S. Department of Justice, 11-19-2020 <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true>]

Meaningful antitrust reform should be a priority of the next administration and the 117th U.S. Congress. The challenge of drafting legislation is substantial. On the one hand, the legislation must be written for a judiciary that is both increasingly hostile to antitrust claims in general and increasingly textualist in its statutory interpretation. On the other hand, in the context of the antitrust laws, courts have often “abandoned statutory textualism” to interpret the laws “in favor of big business,”15 explains Daniel Crane, the Fredrick Paul Furth Sr. professor of law at the University of Michigan Law School. If given discretion to interpret new legislation, the current judiciary is likely to fall back on the same **skepticism** of antitrust enforcement that it has advanced over the past 40 years.

Despite those concerns, legislation remains the best option to revitalizing antitrust enforcement. In drafting legislation, Congress can learn from the past. One case in point: The legislative history of the Celler-Kefauver bill, not its text, reveals the bill’s intent, which courts increasingly ignore.16 Congress can reduce that risk by **being explicit** in the text when vacating or rejecting existing precedent and when identifying relevant factors, such as the importance of protecting both actual and potential competition. Congress should identify in statute the elements sufficient to establish an antitrust violation **as precisely as possible**.

**Voting issue---**

**Aff conditionality destroys ground. 2AC clarifications dodge DA links and counterplan competition.**

**It’s also not topical – prohibitions are specific**

**Axtell 3** --- Katie Axtell, J.D. Candidate 2004, Seattle University School of Law, “Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in Locke v. Davey”, Seattle University Law Review , 2003, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1783&context=sulr

Government actions that constitute a prohibition under the First Amendment can be illustrated by analyzing state-instituted **barriers**, as interpreted by the Supreme Court in two seminal free exercise cases, Smith and Sherbert."s First, the classic setting of government prohibition of a religious observer's belief or practice is where an enacted law **specifically outlaws** a **particular practice**. In Smith, for example, state law prohibited the plaintiffs from ingesting peyote, a hallucinogenic drug from the stem of the peyote cactus.8 9 Possession of peyote is a Class B felony under Oregon law.9 " However, members of the Native American Church use peyote for sacramental purposes in a Saturday all-night ritual of prayers and songs.9 The act of eating, smoking, or drinking peyote "brings peace and healing, resists alcoholism, and gives visions of the Peyote Spirit who is regarded either as Jesus or an Indian equivalent."92 By outlawing the use of peyote, Oregon placed an affirmative barrier between the members of the Native American Church and their sacramental ingestion of peyote, which is a central tenet of their religious practice.

**section 5 cp**

***Next off – Section 5:***

**Text:**

The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. . The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

**The cplan solves. It also competes – the FTC interprets current authority, instead of creating new prohibitions.**

**Kahn ‘21**

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

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

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the **F**ederal **T**rade **C**ommission **A**ct to reach beyond the Sherman Act and to provide an alternative institutional framework for **enforcing** the **antitrust** laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 **These concerns spurred the passage of the FTC A**ct, which created an administrative body that could police unlawful business practices with **greater expertise** and **democratic accountability** than courts provided.15

**At the heart of the statute was Section 5,** which declares “unfair methods of competition” **unlawful**.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides **no private right of action**, shielding violators from **private lawsuits** and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to **leave it to the Commission** to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the **various unlawful practices**, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the **agency’s Section 5 authority**, holding that **the statute**, **by its plain text**, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

**Our planks about *policy statements* and *data sets* mean CP avoids politics and rollback.**

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

**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/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. More Transparency, Including Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful **barrier** to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of **complete data sets** that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, **the Commission strengthened external perceptions** (within the business community and **within Congress**) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban **u**nfair **m**ethods of **c**ompetition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, **the FTC**’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use **section 5** of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. **By issuing a policy statement before** commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely **increase confidence** within industry and **within Congress** that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

**Exclusive FTC means *they investigate* AND address t*hrough non-judicial Administrative proceedings*. Avoids risks from *private causes of action*.**

**Rosch ‘10**

Remarks of J. Thomas Rosch - Commissioner, Federal Trade Commission before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA - March 23, 2010 - #E&F – modified for language that may offend - https://www.ftc.gov/sites/default/files/documents/public\_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

More broadly, however, I want to suggest that Section 5 may supply **an optimal vehicle** for challenging conduct that weakens innovation. The common law that has grown up around Section 2 over the last several decades is deeply ingrained in price theory; that static framework, however good it may be for evaluating short-run harm and quantifiable conduct such as price and output restraints, does not easily lend itself to looking at (considering) whether a party’s conduct has or will dampen innovation or prevent product improvement. Compounding matters is the fact that the difficult line drawing and weighing involved in comparing the likelihood of innovation against the likelihood of quantifiable **anticompetitive harm** is not something that generalist **judges and** **lay juries** are well suited for. Indeed, even the metric for measuring innovation itself remains elusive.

If the Commission proceeds under Section 5, these concerns **largely fall away**. Judging harm to competition against a consumer choice standard not only follows from Section 5’s text and the FTC’s unique institutional architecture, but provides a ready**made** vehicle for evaluating anticompetitive harm from a dynamic perspective. Moreover, by proceeding under Section 5 and suing **in our** Part 3 **administrative process**, the FTC (**and only the FTC)** can have the **first crack** at the hard line drawing and balancing that must occur when one weighs price competition against other forms of more dynamic competition. Arguably by leaving this critical task **to the FTC** and its prosecutorial discretion **in the first instance**, Section 5 allows the Commission **to minimize the threat of false positives** and **shake down lawsuits** that have animated many of the Supreme Court’s more recent decisions. For all of these reasons, **I would not be surprised** if the Commission decided to pursue claims based on dynamic concerns under Section 5 in the coming years, provided we can provide clear guidance to parties about when their conduct will trigger Section 5 review.

**Exclusive FTC avoids false positives *AND* false negatives.**

**Salop ‘13**

Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center - “Guiding Section 5: Comments on the Commissioners” -Scholarship @ Georgetown Law - #E&F - https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2284&context=facpub

Commissioner Wright apparently is most concerned with over-deterrence from the FTC’s administrative process, where the FTC acts **as prosecutor and judge** and **is not subject to the constraints from an independent court** deciding motions to dismiss and summary judgment.25 **However,** there also are forces tipping in the other direction. First, the FTC is **an expert body** with **significant economics resources available**, resources that presumably can be used to **avoid false negatives** ***and* overdeterrence**.26 Second, the Commission’s bipartisan nature and the use of majority rule also have provided significant constraints over most of its history. Finally, if this is the main concern, his remedy proposal instead might be that the FTC be forced to all litigate its complaints in

**Error rates are *the worst of both worlds* – false positives and false negatives kill compliance with the Aff.**

* Resolves all Aff offense vs. the CP related to “underdeterrence” bc…
* …under-deterring doesn’t map onto a world with error rates in the investigation and enforcement stages. Those errors can invite “false positive” non-compliance for the Aff.

**Baker ‘15**

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” - 80 Antitrust Law Journal No. 1 (2015) - #E&F – continues to footnotes #18 and #19 – no text removed. 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 **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 **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 law19.

**FN18** - 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~~ (consider) 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.

**FN19** See generally Warren F. Schwartz, Legal Error, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 1029 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). For example, a rule change that increases the frequency or cost (penalty) of **false positives** may increase deterrence, but it **could also do the reverse**. The latter may occur if more false positives mean that firms no longer obtain enough benefit from staying within the line separating legal and illegal behavior to justify being careful. **For this reason**, uncertainty about a **rule** or its **application** can **reduce compliance**. See generally Hendrik Lando, Does Wrongful Conviction Lower Deterrence?, 35 J. LEGAL STUD. 327, 329–30 (2006) (providing a simple technical example); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1483–84 (1999) (greater accuracy in judicial determinations increases the returns to compliance with legal rules); Steven C. Salop, Merger Settlements and Enforcement Policy for Optimal Deterrence and Maximum Welfare, 81 FORDHAM L. REV. 2647, 2668–69 & 2669 n.60 (2013) (a firm’s incentive to comply with a rule may fall **identically** when the probability of either type of error increases).

## case

### 1nc – uniqueness

#### Half the country has already done the aff and they read ev that there’s momentum now – that should prove that states will relax their own laws OR proves that there’s barriers outside of antitrust immunity that are preventing them!

### 1nc – licensing

#### The physician shortages internal is about occupational licensing—that empirically does not cause anticompetitive behavior.

Gray 21—(Of Counsel with Bailey & Dixon LLP, JD from Campbell University School of Law, former Special Assistant to Attorney General Lacy Thornburg). Jeffrey P. Gray. 2021. “In Defense of Occupational Licensing: A Legal Practitioner's Perspective”. Campbell Law Review, Volume 43, Issue 3, Symposium Issue, Article 6. <https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1717&context=clr>. Accessed 12/10/21.

II. THE ANTI-LICENSING ARGUMENT

A. The opponents

“Onerous, arbitrary, unaccountable,”36 “protection racket,”37 “monopolistic,”38 restraints of trade,39 “medieval guild[s],”40 economic protectionism,41 and unions;42 these are just a few of the descriptions of occupational licensing, and particularly of the independent boards, used by writers and commentators.43

The advocates for change, reform, or out-right elimination come from a number of sides: the libertarian law firm Institute for Justice,44 the Goldwater Institute,45 the Mercatus Institute at George Mason University,46 the Brookings Institute,47 and the John Locke Foundation and its North Carolina publication “The Carolina Journal.”48 Their efforts have dated back over a decade. Even the White House got involved and released a seventy-six-page report in 2015 prepared jointly by the Department of Treasury Office of Economic Policy, the Council of Economic Advisors, and the Department of Labor: “Occupational Licensing: A Framework for Policy Makers.”49 While this push began as a libertarian issue, it has morphed into a philosophical one, with Republicans and Democrats joining the cause.

The anti-licensing movement is reflected not only in the scholarly reports of the entities mentioned above, but in hundreds of articles in business journals; magazines devoted to business, economics, and sociology; the American Bar Association’s ABA Journal; and online news sources devoted to politics, such as The Hill. There are too many to list.

But were you to read them all, it would not take you long to realize that it is an echo chamber. The calls for repeal of licensing laws—claiming they block competition; create a privileged class within the workforce; create a wage advantage, labor market inequality, wage inequality, or wage premium; allow “rents” to accrue to a licensee; suppress innovation; prevent job migration; create a guild system; allow for state-sanctioned unions; and a host of other unimaginable ills—all trace their roots back to the research and reports of one academic: Morris M. Kleiner of Michigan State University. Kleiner, alone and in concert with other respected academics, has studied and written about the economic impacts of occupational licensing not only in the United States, but also in foreign countries including the United Kingdom and the Netherlands. 50

To quote a reviewer of his research, “As do all econometric studies, Kleiner’s end up as essays in persuasion.”51

Albeit, as large as Kleiner’s body of work may be—and the even larger body of commentaries parroting his work in support of one or more contentions—the basic premise of those opposed to the licensing52 of occupations and professions can be summarized in a few theories: economic damage; consumer protectionism; health, safety, and welfare; and disparity between states.

The economic damage argument essentially states that a wage inequality exists between licensed and unlicensed individuals, which causes an increase in the cost of goods and services from licensed individuals.53 The consumer protectionism argument is nothing more than an antitrust argument—that licensing lessens competition and restrains free trade.54 The health, safety, and welfare argument takes consumer protectionism one step further to say that the repeal of licensing boards will actually further society’s health, safety, and welfare.55 An argument predicated on the disparity between states in regulating certain industries points to the difficulty in interstate migration for licensed individuals.56 While Kleiner’s works have evolved over time, and others have riffed off of his research with theories of their own, these are the foundational arguments used to oppose a licensing scheme.

Because many have relied on Kleiner as their foundational base, a few interesting observations have presented themselves consistently throughout. First, much of the initial data used is now stale.57 Second, aside from hard numbers, many of the articles rely on pure speculation. But the one truly interesting aspect of the whole, mostly one-sided debate, is the contradictory positions taken by those who have chosen to tackle this topic by way of advocating for reform or elimination.58

B. Debunking the data/statistics

Until recently, it appears little had been done by the “pro-licensing” crowd to counter these attacks.59 However, there is only a smattering of research available. Most notable is a 2017 examination of occupational licensing that contradicts the decades old research. It found that professional licensing does not limit competition, nor does it increase wages.60

Authored by Beth Redbird, Assistant Professor of Sociology in the Weinberg Western College of Arts and Sciences at Northwestern University, the study was based on a new occupational dataset covering thirty years, thereby contradicting decades old research on the impact of occupational licensing. This is the most comprehensive examination of licensing to date. The study relied on more than 4.5 million workers across 500 occupations.61

### 1nc – circumvention

#### Eleventh amendment circumvents

Page & Lopatka 19 --- William H. Page, Marshall M. Criser Eminent Scholar, University of Florida Levin College of Law., John E. Lopatka, A. Robert Noll Distinguished Professor of Law, Penn State Law. , “Parker v. Brown, The Ele own, The Eleventh Amendment, and Anticompetitiv enth Amendment, and Anticompetitive State Regulation”, WILLIAM & MARY LAW REVIEW [Vol. 60:1465 2019], https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3804&context=wmlr

If the Supreme Court’s limits on Parker immunity establish the appropriate scope of antitrust laws, then the Eleventh Amendment is inefficient to the extent that it forecloses a damage remedy that would otherwise deter an actor from implementing an anticompetitive state regulation that reduces economic welfare. In North Carolina State Board, for example, the Court denied state action immunity to a state licensing board controlled by active practitioners because it was not actively supervised by an independent state body.217 If we consider the case from a strictly interest group perspective, the risk of anticompetitive effects is clear.218 As an amicus brief signed by forty-five public choice scholars put it,

When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, should we expect that group to use its power in the service of legitimate governmental interests, or should we instead expect that group to promote its own private interests and those of its friends? One does not need a Ph.D. in economics—or even a particularly keen insight into human nature—to guess the answer to this question.219

If, as this reasoning predicts, the board’s members agreed, in service of their private professional interests, to use the board’s powers to exclude a disfavored form of practice, the board acted essentially as a private entity. As private actors, the board and its members would normally be liable for the social costs they impose.220 The excluded competitors would presumably have antitrust standing, and their lost profits would be antitrust injury’ and therefore compensable in treble damages in a suit against those responsible.221 Moreover, state enforcement of the exclusionary’ action (not available, obviously, to private offenders) could arguably make the harm even more certain, severe, and durable. The absence of a damage remedy might have left an antitrust violation by the board undeterred.

Optimal deterrence not only requires that the sanction imposed be optimal but also that an enforcer seek to impose it.222 The prospect of damages encourages victims to seek relief. Most antitrust suits are motivated by the prospect of a damage recovery’ augmented by a proportional attorney’s fee.223 Indeed, the prospect of a damage recovery may be necessary to motivate the filing of meritorious claims, even if it also motivates strike suits. Large-scale class actions alleging concealable offenses, such as price fixing, can take years to litigate,224 and they carry’ a substantial risk of a defense victory.225 An action that survives a motion to dismiss for failure to state a claim because it alleges a plausible price-fixing conspiracy often fails at the summary judgment stage after lengthy and expensive discovery fails to turn up evidence that the defendants conspired within the meaning of Section I.226 Only the possibility of a damage award would justify bringing an action when the plaintiff faced such a risk.

By foreclosing any damage remedy against the state or its officials for antitrust violations,227 the Eleventh Amendment increases the probability that some meritorious private antitrust suits are never brought and hence some inefficient antitrust violations are not deterred. It removes a significant incentive for regulators to take antitrust concerns into account. Actions that inflict substantial competitive harm, but are then discontinued, cannot support any kind of relief in antitrust suits against either the state agency or its officials.228 For example, one state medical board adopted rules limiting competition from telemedicine providers.229 In doing so, the board was evidently not deterred by the prospect of damage liability or an equitable order. The state legislature overrode the rules,230 making prospective relief irrelevant, but no antitrust remedy was available to competing medical providers for past harms. The costs of anticompetitive regulations such as these may be substantial. A recent study concluded that 85 percent of the 1790 state licensing boards in the United States are composed predominantly of practicing members of their professions and face little supervision.231 If a large share of these boards lack state action immunity under N.C. Dental222 then the risk of anticompetitive conduct that raises prices and excludes rivals in ways that may not immediately provoke an injunction action seems substantial. Eleventh Amendment immunity all but assures that no damage remedy is available.

### 1nc – circumvention

#### Anti-trust won’t work – structural barriers

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Another priority is to rethink the resourcing of the agencies. A major priority should be to increase the expenditures for the FTC and Justice Department Antitrust Division. To my mind, it’s not simply a matter of adding more people; I would rethink the compensation scale.

Q: Can you elaborate on that?

The civil service pay scale that binds the FTC and the DOJ is desperately behind what it should be. The salaries for individuals have to be raised dramatically. I don’t see how the agencies can sustain an adequate level of capability to prevail against the corporate opponents it’s now encountering, or will soon face, in the cases I have mentioned if the government continues to pay the existing civil service scale. This is especially true if we’re going to slam shut the revolving door between government and the private sector.

One approach is to start with an experiment at the FTC. We could raise FTC salaries to what some of the financial services regulators, such as the Consumer Financial Protection Bureau, now pay. The CFPB pays a salary scale about 20 percent more than the civil service scale. That would be a major inducement for key personnel to stay longer at the FTC.

In the proposal that Alison Jones and I made in April to the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, we recommended giving the FTC $1 billion per year for 10 years and dramatically increase the salaries that you’re paying and see how it performs with that level of support.

If Congress is not going to change the compensation scale, the antitrust agencies perennially will be engaged in a desperate, unavailing race to defeat opponents who can bring better resources to bear on these cases.

#### FTC Fails

Matt Stoller June 16, 2021, the Director of Research at the American Economic Liberties Project, also worked for a member of the Financial Services Committee in the U.S. House of Representatives, “The Antitrust Revolution Has Found Its Leader,” https://mattstoller.substack.com/p/the-antitrust-revolution-has-found

While it’s true that researchers are finding that stronger antitrust laws are good for stock prices (which is something I noted in 2019), the far more important point is that Wall Street is having this debate about the Federal Trade Commission at all. It’s been a generation since the FTC was taken seriously as a meaningful player in the organization of our economy and markets. Every so often some official will make noise about a tougher stance on competition, citing Senator John Sherman or Teddy Roosevelt in a fancy speech, only to back down. Getting sanctioned by enforcers is increasingly a joke. As Commissioner Rohit Chopra noted, “it's become a right of passage for Silicon Valley companies to get an FTC consent decree."

This crisis of legitimacy is longstanding, but it became evident antitrust enforcement was irrelevant in 2013, when the FTC, even though it had good evidence of monopolization by Google, dropped its antitrust claims against the search giant, and then kept secret how much evidence it had. The flaccid nature of these enforcement choices was further emphasized when Facebook was fined $5 billion by the FTC over its Cambridge Analytica scandal. It sounds like a lot of money, but upon the announcement of the fine, the firm’s stock price jumped up by tens of billions of dollars. As if a regulator couldn’t get any more deferential to power, the FTC didn’t even make the announcement of the fine. Facebook did, on an earning’s call no less.

In other words, Khan is stepping into a leadership role at a demoralized and insular institution, with a culture of timidity. That can’t last for much longer. Khan’s reputation is such that many are looking to Biden’s appointment of her, and her confirmation with Republican votes, as a signal that politicians want to end the era of concentrated economic power. Either Khan fixes the FTC, or in ten years the FTC will probably not exist in its current form.

The FTC’s New Deal Resurrection

This moment isn’t the first time the FTC has been nearly left for dead as a handmaiden of monopoly, and then resurrected. In fact, a similar scenario occurred at another moment of extreme monopolization, a few decades after the FTC’s birth.

#### Judges thump

Nicolás Rivero ’21, March 11, Tech Reporter, “Biden’s antitrust crusaders can’t crusade without Congress,” QUARTZ, <https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/>

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which is already struggling to pay for its current docket. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

The FTC could also decide to dust off its rarely used rule-making power and declare certain anticompetitive business practices illegal. But any new rule would almost certainly trigger legal challenges, which would spark a long, expensive court battle in front of judges who aren’t likely to be sympathetic. Kovacic estimates the process could take four or five years—and in the end, judges might just strike the rule down.

#### FTC is toothless – prohibitions alone will fail

Mike Davis Is President and Founder Of The Internet Accountability Project. He Is A Former Top Attorney For The United States Senate Committee On The Judiciary And Previously Served In The United States Department Of Justice. Davis Also Clerked For Justice Neil Gorsuch, Both On The Tenth Circuit And On The Supreme Court., 7-29-2021, "Congress must empower the FTC to fight Big Tech's abuses," Newsweek, https://www.newsweek.com/congress-must-empower-ftc-fight-big-techs-abuses-opinion-1614105

In April, the U.S. Supreme Court stripped the Federal Trade Commission of a powerful tool for holding trillion-dollar Big Tech monopolists—Google, Amazon, Facebook and Apple—accountable for their outrageous market abuses. In many respects, the agency's ability to secure hefty equitable relief—such as restitution or disgorgement—in federal court was the one thing preventing these Goliaths from abusing the American people without consequence. Absent new legislation, the public is sure to suffer at the hands of Big Tech. Congress must act to empower the FTC to do its job.

The FTC is the nation's premier consumer-protection agency. Every year, it holds countless bad actors accountable for abuses committed against everyday Americans, ranging from identity theft and fraud to anticompetitive practices in violation of federal antitrust law. The agency has proven to be a particularly effective tool for holding Big Tech accountable for its many misdeeds. While the FTC can, and does, enforce the law through administrative proceedings, it often takes its claims against bad actors directly to court, which can provide quick and effective relief. Many times, the mere threat of FTC action is enough to prevent illegal conduct.

For decades, the FTC has used Section 13(b) of the Federal Trade Commission Act not only to obtain injunctions preventing future unlawful conduct, but also to force companies and individuals to relinquish money they wrongfully obtained from the public. That all changed on April 22, when the Supreme Court issued its long-anticipated decision in AMG Capital Management, LLC v. FTC. In a unanimous opinion authored by Justice Stephen Breyer, the high court ruled that Section 13(b) does not authorize the FTC to seek monetary disgorgement from businesses that engage in abusive practices. While the FTC may still obtain a court order forbidding a company from continuing its bad conduct, the agency must rely on a less efficient—and less effective—administrative process to recoup money taken as a result of that conduct.

It would be an understatement to say that the Court's decision represents a setback for the FTC's efforts to hold Big Tech accountable for abuses against Americans. Over the past five decades, the FTC had used Section 13(b) to return literally billions of dollars to everyday Americans—money that seedy companies wrongfully took from unsuspecting consumers. For example, Google and its subsidiary YouTube agreed to a record $170 million settlement in 2019 after the FTC brought an enforcement action in federal court challenging YouTube's practice of illegally collecting personal information from children without their parents' consent. The Supreme Court's elimination of the FTC's authority to seek disgorgement will make recoupments such as this impossible. In fact, even before the Court rendered its decision, companies under investigation by the FTC began refusing to agree to settlements, predicting (correctly) that the FTC would soon lack the ability to obtain court-ordered equitable relief.

## framing

### 1NC --- Consequentialism / Util Good

**2 - Consequences first:**

#### a) Decision calculus must evaluate the specific consequences of every action---abstract moralizing makes political action impossible

Jones 15 --- David Martin Jones, Visiting Professor in the Department of War Studies, King's College London and Associate Professor, School of Politics and International Studies at the University of Queensland; and M.L.R. Smith, Professor of Strategic Theory in the Department of War Studies, King's College London, September 2015, “Return to reason: reviving political realism in western foreign policy,” International Affairs, Vol. 91, No. 5, p. 933-952

In the aftermath of western interventions in Iraq and Afghanistan, however, this historicist teleology has come up against unanticipated and countervailing consequences. Unforeseen but immovable obstacles have appeared in the path of a normative and emancipatory transformation of the interstate system. The recrudescence of identity politics, Russian irredentism in the Caucasus, the civil war in Ukraine and China's emergence on the world stage as a great but authoritarian power, together with the continued turmoil in the Middle East, including the rise of the so-called ‘Islamic State in Iraq and Syria’ (ISIS), intimate not the end of history, but the ‘revenge of the revisionist powers’ and the ‘return of geopolitics’.17 History, after a brief nap, has reawakened, requiring states to reassess how they conduct themselves in an uncertain, **anarchical international system** where only three verities prevail: **diplomacy, alliances and war**.18

Faced with this changed reality, western powers, and regional institutions, appeared in the second decade of the twenty-first century, commentators bemoaned, ‘distracted [and] weak’.19 They were consistently outmanoeuvred on the international stage by Russia and China, states with an apparent capacity to **assert their national interests without inhibition**.20 In the context of the Ukraine crisis of 2013–2015, European policy-makers clung to the ‘false hope’ that dialogue, law and judicious sanctions could achieve a solution. Yet ‘to be credible strategy requires a full toolbox’; and European ‘diplomacy without arms’, as Frederick the Great observed, ‘is like music without instruments’.21 Consequently, while the EU considered ‘the whole notion of geopolitics old-fashioned and unappealing’, geopolitics happened on its doorstep.22 As Charles Powell, former foreign policy adviser to Prime Minister Margaret Thatcher, argued, the ‘false doctrine of soft power’ and ‘creeping legalism’ made it increasingly ‘hard to galvanise democratic societies to meet new threats’.23

While Russia's violation of the ‘integrity of the Ukraine’ threatened ‘the entire legal order that governed Europe’,24 the fallout from the Iraq and Syrian civil wars raised the problem of the internal and external security of European democracies in a different but equally acute form not evidently amenable to internationally mediated legal solutions. Such new, and not so new, threats to the international order suggest a need not for abstract norms but for a strategy conducted on a **case-by-case evaluation** of the merits of intervention together with a careful assessment of its practical and moral limitations.

In the light of the recent dramatic changes in the character and conduct of international affairs, we would do well to reconsider how the political realist contention that ‘the concept of interest defined in terms of power’ might save us ‘from both … moral excess and political folly’.25 Grand strategy, from this perspective, **requires the systematic pursuit of objectives** that **reconcile economic and military means** with a reasoned appreciation of what is feasible in a dangerous world.26 As Hans Morgenthau claimed: ‘There can be no political morality without prudence; that is, without **consideration of the political consequences** of **seemingly moral action**. Ethics in the abstract judges action by its conformity with the moral law; political ethics judges action by its political consequences.’27 In the following analysis, we shall contend that **state-interested**, historically particularist and **prudentially calculated policy thinking** might serve the western democracies **better than** the prevailing predilection for **abstract, universal, axiomatic norms**.

#### b) Consequentialist impact calc inevitable

**Green 2** – Assistant Professor Department of Psychology Harvard University (Joshua, November 2002 "The Terrible, Horrible, No Good, Very Bad Truth About Morality And What To Do About It", 314)

Some people who talk of balancing rights may think there is an algorithm for deciding which rights take priority over which. If that’s what we mean by 302 “balancing rights,” then we are wise to shun this sort of talk. Attempting to solve moral problems using a complex deontological algorithm is dogmatism at its most esoteric, but dogmatism all the same. However, it’s likely that when some people talk about “balancing competing rights and obligations” they are already thinking like consequentialists in spite of their use of deontological language. Once again, what deontological language does best is express the thoughts of people struck by strong, emotional moral intuitions: “It doesn’t matter that you can save five people by pushing him to his death. To do this would be a violation of his rights!”19 That is why angry protesters say things like, “Animals Have Rights, Too!” rather than, “Animal Testing: The Harms Outweigh the Benefits!” Once again, rights talk captures the apparent clarity of the issue and absoluteness of the answer. But sometimes rights talk persists long after the sense of clarity and absoluteness has faded. One thinks, for example, of the thousands of children whose lives are saved by drugs that were tested on animals and the “rights” of those children. One finds oneself balancing the “rights” on both sides by asking how many rabbit lives one is willing to sacrifice in order to save one human life, and so on, and at the end of the day one’s underlying thought is as thoroughly consequentialist as can be, despite the deontological gloss. And what’s wrong with that? Nothing, except for the fact that the deontological gloss adds nothing and furthers the myth that there really are “rights,” etc. Best to drop it. When deontological talk gets sophisticated, the thought it represents is either dogmatic in an esoteric sort of way or covertly consequentialist.

#### c) Policy making requires utilitarian weighing

Diepenbrock 14 --- George Diepenbrock , interviewing Ben Eggleston, associate professor of philosophy, “PROFESSOR STUDIES HOW UTILITARIANISM PROVIDES FRAMEWORK FOR MAJOR POLICY DECISIONS”, 06/16/2014, https://today.ku.edu/2014/06/02/professor-studies-how-utilitarianism-provides-framework-major-policy-decisions

But a University of Kansas researcher who recently edited The Cambridge Companion to Utilitarianism says the theory based on the maximization of overall well-being is the most well-suited way of thinking in political philosophy to make sound large-scale policy decisions.

"It doesn’t make sense to insist on 'do no harm' when the status quo presents us with problems that need to be addressed," said Ben Eggleston, associate professor of philosophy. "The status quo has real shortcomings, and it is worth looking into whether we can make improvements. All major policy decisions involve tradeoffs, and utilitarianism provides a framework for making those tradeoffs and trying to do so in the way that promotes the common good the most."

Jeremy Bentham in the 18th century and John Stuart Mill in the 19th century pioneered utilitarianism, and it remains influential in contemporary moral philosophy.

Eggleston, who co-edited the book with Dale E. Miller, a professor of philosophy at Old Dominion University, said one argument against using utilitarianism to justify policies, such as increasing the minimum wage or instituting mandatory health insurance coverage under the Affordable Care Act, centers on some unusual hypothetical cases instead of considering broader, more complex policy questions.

N. Gregory Mankiw, a Harvard University economics professor, in a March New York Times column criticized both policies, saying they would have unintended consequences and do harm to business, for example. He argued against using utilitarianism as a public policy framework and mentioned the ethical dilemma of a doctor weighing harvesting the organs of one healthy patient to save four dying patients. "At this point, almost everyone balks," Mankiw wrote. "Sometimes, respecting natural rights trumps maximizing utility."

Eggleston said while that scenario is useful to discuss in introductory-level ethics courses when talking about utilitarianism, it's less applicable when trying to decide large-scale policy decisions.

"You don't have to endorse forcibly removing some people’s organs, such as in that hypothetical example, in order to think that when it comes to large-scale economic planning, we ought to choose the policy that maximizes benefits and minimizes harms," he said.

He said when Congress debates issues like the Affordable Care Act or raising the minimum wage, it's to address existing harm or problems with the status quo, such as people not being able to secure health insurance due to pre-existing conditions or still living below the poverty line despite working a full-time job.

"At that scale it's much more plausible to think in terms of figuring out what's the policy that will maximize the balance of benefits minus harms," Eggleston said. "Acknowledging that any policy you choose is going to have some harm and some benefit, you've just got to try to pick the best one."

### 1NC --- Magnitude Outweighs

#### 3 - Risk of extinction outweighs

Millett 17 --- Piers Millett, PhD, is a Senior Research Fellow, Oxford, and Andrew Snyder-Beattie, MS, is Director of Research, Oxford, Future of Humanity Institute, Oxford, England., “Existential Risk and Cost-Effective Biosecurity”, Health Secur. 2017 Aug 1; 15(4): 373–383. Published online 2017 Aug 1. doi: 10.1089/hs.2017.0028

Why Uncertainty Is **Not Cause for Reassurance**

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

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

How Bad Would Human Extinction Be?

Human extinction would not only end the 7 billion lives in our current generation, **but also cause the loss of all future generations to come**. To calculate the humanitarian cost associated with such a catastrophe, one must therefore include the welfare of these future generations. While some have argued that future generations ought to be excluded or discounted when considering ethical actions,50 most of the in-depth philosophical work around the topic has concluded that future generations should not be given less inherent value.51-55 Therefore, for our calculations, we include future lives in our cost-effectiveness estimate.\*\*\*\*

The large number of future generations at stake mean that **reducing existential risk even by a small amount may have very large expected value**. The Earth is thought to be habitable for roughly another billion years;56 our closest relative, homo erectus, lasted over 1.6 million years,57 and the typical mammalian species also lasts on the order of 1 to 2 million years.58 Following Matheny,29 if we were to assume that humanity would otherwise maintain a global population of 10 billion for the next 1.6 million years, human extinction would jeopardize on the order of 1.6 × 1016 life years.

Cost-Effective Biosecurity

How should we balance speculative risks of human extinction in a biosecurity portfolio? Here we turn to cost-effectiveness analysis, which is one method of prioritizing public projects.29 Cost-effectiveness analysis is helpful if our goal is to maximize the effect of our resources to achieve a measurable aim (such as life-years saved or cases of disease averted). Here we compare the cost-effectiveness of reducing risks in the categories of incidents, events, disasters, and existential risks.

Calculating Costs

The US federal government was projected to spend almost $13 billion on health security–related programs in 2017.59 To our knowledge, there has not been a quantitative assessment of how this spending has reduced the chances of bioterrorism, biowarfare, or even naturally occurring pandemics. However, the World Bank estimates that it would cost $1.9 billion to $3.4 billion per year over 5 years to bring all human and animal health systems up to minimal international standards, and it suggests that these measures would prevent at least 20% of pandemics.60†††† Many countries do not currently have healthcare systems that meet international standards—for example, in 2014 only 33% of countries reported their national arrangements met those required under the International Health Regulations.61

These mitigation measures would be adopted to be effective regardless of whether a disease outbreak originates naturally, accidentally, or deliberately.‡‡‡‡ The ability to rapidly detect and characterize the agent involved helps fast-track public health and R&D responses. Acting promptly enables basic public health measures that might decrease the likelihood of spread (such as social distancing) and track its emerging epidemiology (providing critical input for tailoring the responses). Even if we lack existing or candidate vaccines or therapeutics, having the capacity to treat symptoms can have a dramatic impact on case fatality rates.§§§§

We therefore assume that strengthening healthcare systems to meet international standards would have an impact on mitigating all types of disease risk, ranging from incidents and events to existential risks.\*\*\*\*\* We extend the World Bank's assumptions to include bioterrorism and biowarfare—that is, we assume that the healthcare infrastructure would reduce bioterrorism and biowarfare fatalities by 20%. We conservatively assume that existential risks will be reduced by only 1%, since any potential existential risk would likely be deliberately designed to overcome medical countermeasures.

We calculate that purchasing 1 century's worth of global protection in this form would cost on the order of $250 billion, assuming that subsequent maintenance costs are lower but that the entire system needs intermittent upgrading.††††† To calculate the cost per life-year saved, we use the equation C/(N × L × R), where C is the cost of reducing risk, N is the number of biothreats we expect to occur in 1 century, L is the number of life-years lost in such an event, and R is the reduction in risk achieved by spending a given amount (specified by C). For nonextinction risks, we increase L 50 times over to denote 50 life-years saved per life. The denominator N × L × R denotes the total number of life-years saved.‡‡‡‡‡ In a subsequent model we also apply a discount rate to represent policymakers concerned only about lives in the short term.

Results

Including future generations into our cost-effectiveness calculations demonstrates that reducing existential risks, even if they are improbable, can be incredibly cost-effective in expectation (Table 2). Depending on the model used, we estimate that we can purchase 1 quality adjusted life-year in expectation for 10s of dollars (with outliers suggested around 12 cents to $1,600). Even with the most conservative estimates of existential risk, reducing the risk of human extinction is at least 100 times more cost-effective than standard biosecurity interventions, and possibly up to 1 million times more cost-effective.

It is important to note that this result does not depend on the $250 billion figure—if we found a cheaper intervention that reduced all risks by a similar amount, cost-effectiveness of all the interventions would increase, but the relative merits of reducing existential risk would remain the same.§§§§§ There are certainly cheaper ways to reduce the low-level risks of biocrime and bioterrorism, and so our estimates of cost-effectiveness could be far too pessimistic. Examples of cheaper interventions might include dramatically increasing resources for specialized law enforcement prevention and interdiction, or increased surveillance on potential perpetrators. However, there are likely also far cheaper ways of reducing the more extreme risks that threaten extinction, and there is no reason to think similar efficiency gains could not be made in this area as well. Despite the vast resources spent on counterterrorism, governments may have neglected low-probability, high-impact risks.65,66 This therefore constitutes a critically underdeveloped area of research, for which there is likely low-hanging fruit.

Even if the humanitarian case for reducing existential risk is clear, most policymakers will be responsible primarily for the interests of a more limited constituency comprising only the current generation and near future.\*\*\*\*\*\* It is therefore instructive to evaluate how well these cost-effectiveness results hold up when we largely ignore the benefits to future generations. We therefore repeat the cost-effectiveness estimates with a discount rate imposed on the benefits and costs borne in future years, and we find that the merits of reducing existential risk still hold. If we ignore distant future generations by discounting, the benefits of reducing existential risk fall by between 3 and 5 orders of magnitude (with a 1% to 5% discount rate), which is still far more cost-effective than measures to reduce small-scale casualty events. Under our survey model (Model 1), the cost per life-year varies between $1,300 and $52,000 for a 5% discount rate and between $770 and $30,000 for a 1% discount rate. These costs are even competitive with first-world healthcare spending, where typically anything less than $100,000 per quality adjusted life-year is considered a reasonable purchase.29

This suggests that even if we are concerned about welfare only in the near term, reducing existential risks from biotechnology is still a cost-effective means of saving expected life if the future chance of an existential risk is anything above 0.0001 per year. Our conservative models (with much lower risk) suggest that existential risk prevention is not cost-effective when compared to basic healthcare spending: Model 2 results in a cost per life-year between $330,000 and $16 million for a 5% discount rate and $190,000 and $9.7 million for a 1% discount rate, while Model 3 results in a cost per life-year of between $190,000 and $500,000 for a 5% discount rate and between $110,000 and $310,000 for a 1% discount rate. These conservative numbers would suggest that healthcare spending is a better purchase than marginal biosecurity funding, but even these numbers still support the notion that we are better off focusing on low-probability, high-impact risks **rather than low-casualty** biosecurity **risks**. For a biosecurity portfolio, even policy with limited time horizons is likely better off investing in measures that prevent the worst-case scenarios.

Although the probability of human extinction from bioweapons may be **extremely low**, the expected value of reducing the risk (**even by a small amount**) is still **very large,** since such risks jeopardize the existence of **all future human lives**. An initial attempt to estimate the cost-effectiveness of reducing these risks finds that it takes likely between 10 cents and 10s of dollars to save 1 life-year, assuming we value future human lives. Although **this result is striking**, it is not unprecedented. Similar analysis done by Matheny found that spending $1 billion on an asteroid deflection system would have a similar cost-effectiveness, at about $2.50 per life-year.29

### 1NC --- Predictions Good / Possible

#### 5 - Yes predictions:

#### a) They make linear predictions too --- root cause, solvency chains and deficits all link to their criticism

**b) Predictions are good enough to act on**

**Chernoff 9** (Fred, Prof. IR and Dir. IR – Colgate U., European Journal of International Relations, “Conventionalism as an Adequate Basis for Policy-Relevant IR Theory”, 15:1, Sage)

For these and other reasons, many social theorists and social scientists have come to the conclusion that prediction is impossible. Well-known IR reflexivists like Rick Ashley, Robert Cox, Rob Walker and Alex Wendt have attacked naturalism by emphasizing the interpretive nature of social theory. Ashley is explicit in his critique of prediction, as is Cox, who says quite simply, ‘It is impossible to predict the future’ (Ashley, 1986: 283; Cox, 1987: 139, cf. also 1987: 393). More recently, Heikki Patomäki has argued that ‘qualitative changes and emergence are possible, but predictions are not’ defective and that the latter two presuppose an unjustifiably narrow notion of ‘prediction’.14 A determined prediction sceptic may continue to hold that there is too great a degree of complexity of social relationships (which comprise ‘open systems’) to allow any prediction whatsoever. Two very simple examples may circumscribe and help to refute a radical variety of scepticism. First, we all make reliable social predictions and do so with great frequency. We can predict with high probability that a spouse, child or parent will react to certain well-known stimuli that we might supply, based on extensive past experience. More to the point of IR prediction – scepticism, we can imagine a young child in the UK who (perhaps at the cinema) (1) picks up a bit of 19th-century British imperial lore thus gaining a sense of the power of the crown, without knowing anything of current balances of power, (2) hears some stories about the US–UK invasion of Iraq in the context of the aim of advancing democracy, and (3) hears a bit about communist China and democratic Taiwan. Although the specific term ‘preventative strike’ might not enter into her lexicon, it is possible to imagine the child, whose knowledge is thus limited, thinking that if democratic Taiwan were threatened by China, the UK would (possibly or probably) launch a strike on China to protect it, much as the UK had done to help democracy in Iraq. In contrast to the child, readers of this journal and scholars who study the world more thoroughly have factual information (e.g. about the relative military and economic capabilities of the UK and China) and hold some cause-and-effect principles (such as that states do not usually initiate actions that leaders understand will have an extremely high probability of undercutting their power with almost no chances of success). Anyone who has adequate knowledge of world politics would predict that the UK will not launch a preventive attack against China. In the real world, China knows that for the next decade and well beyond the UK will not intervene militarily in its affairs. While Chinese leaders have to plan for many likely — and even a few somewhat unlikely — future possibilities, they do not have to plan for various implausible contingencies: they do not have to structure forces geared to defend against specifically UK forces and do not have to conduct diplomacy with the UK in a way that would be required if such an attack were a real possibility. Any rational decision-maker in China may use some cause-and-effect (probabilistic) principles along with knowledge of specific facts relating to the Sino-British relationship to predict (P2) that the UK will not land its forces on Chinese territory — even in the event of a war over Taiwan (that is, the probability is very close to zero). The statement P2 qualifies as a prediction based on DEF above and counts as knowledge for Chinese political and military decision-makers. A Chinese diplomat or military planner who would deny that theory-based prediction would have no basis to rule out extremely implausible predictions like P2 and would thus have to prepare for such unlikely contingencies as UK action against China. A reflexivist theorist sceptical of ‘prediction’ in IR might argue that the China example distorts the notion by using a trivial prediction and treating it as a meaningful one. But the critic’s temptation to dismiss its value stems precisely from the fact that it is so obviously true. The value to China of knowing that the UK is not a military threat is significant. The fact that, under current conditions, any plausible cause-and-effect understanding of IR that one might adopt would yield P2, that the ‘UK will not attack China’, does not diminish the value to China of knowing the UK does not pose a military threat. A critic might also argue that DEF and the China example allow non-scientific claims to count as predictions. But we note that while physics and chemistry offer precise ‘point predictions’, other natural sciences, such as seismology, genetics or meteorology, produce predictions that are often much less specific; that is, they describe the predicted ‘events’ in broader time frame and typically in probabilistic terms. We often find predictions about the probability, for example, of a seismic event in the form ‘some time in the next three years’ rather than ‘two years from next Monday at 11:17 am’. DEF includes approximate and probabilistic propositions as predictions and is thus able to catagorize as a prediction the former sort of statement, which is of a type that is often of great value to policy-makers. With the help of these ‘non-point predictions’ coming from the natural and the social sciences, leaders are able to choose the courses of action (e.g. more stringent earthquake-safety building codes, or procuring an additional carrier battle group) that are most likely to accomplish the leaders’ desired ends. So while ‘point predictions’ are not what political leaders require in most decision-making situations, critics of IR predictiveness often attack the predictive capacity of IR theory for its inability to deliver them. The **critics thus commit the straw** ~~man~~ **person fallacy** by requiring a sort of prediction in IR (1) that few, if any, theorists claim to be able to offer, (2) that are not required by policy-makers for theory-based predictions to be valuable, and (3) that are not possible even in some natural sciences.15 The range of theorists included in ‘reflexivists’ here is very wide and it is possible to dissent from some of the general descriptions. From the point of view of the central argument of this article, there are two important features that should be rendered accurately. One is that reflexivists reject explanation–prediction symmetry, which allows them to pursue causal (or constitutive) explanation without any commitment to prediction. The second is that almost all share clear opposition to predictive social science.16 The reflexivist commitment to both of these conclusions should be evident from the foregoing discussion.

**c) The world is knowable and not irredeemably complex**

**Chernoff 5** (Fred, Prof. of Political Science at Colgate The Power of International Theory, p. 215)

Experience does seem to support (non-point) predictions of human behaviour. For example, there seems to be little problem with predictions of the behaviour of individual humans such as: the hungry baby will cry some time during the night; or of states such as: France will not invade China in the coming year. Any theory that prohibits prediction will, like the metaphysics of Parmenides and Zeno, require an extraordinarily high standard of proof, because the alternative appears to be so well confirmed. The *examination* of anti-predictive arguments drawn from a variety of sources (such as **non-linear**ities, social **complexity**, the absence of governing regularities) showed that there is no conclusive argument against the possibility of predictive theory. And prediction indeed seems possible in **i**nternational **r**elations, albeit with certain qualifications. The foregoing has acknowledged qualifications on the predictiveness of social science theory. Predictions are probabilistic and their strength is limited by the value of observed empirical associations and by the future temporal frame (since they are less reliable as the time-frame is extended, which follows from the axioms of the probability calculus). However, the calculations produce better results than randomly chosen policies. And random policies are the alternative if one rejects belief in rational calculation and causation on which it is based. The review of the attacks on prediction showed the arguments **to be fundamentally flawed**. Either they derive their conclusions by means of a straw man (an uncommonly narrow definition of ‘prediction’ that presupposes many unreasonable conditions) or the accounts supposedly inconsistent with prediction in fact allow, on closer inspection, room for prediction.

# 2NC

## T

### OV

**2. Ground – they irredeemably distort the division of ground – that decks core neg ground based on increasing pressure on the private sector – disads like biz con, or even politics are based on private sector backlash – the aff moots it and turns the topic into deregulation**

**Crane 19** (Daniel A, “A Premature Postmortem on the Chicago School of Antitrust”, Business History Review, Vol. 93, Iss. 4) DB

**The Parker doctrine remains in effect today**, albeit with significant modifications that allow some limited uses of federal antitrust law to preempt anticompetitive state regulations. In the push-and-pull over the doctrine’s boundaries, it has largely been **advocates of the Chicago School’s consumer welfare** approach that have **argued for narrowing state-action immunity** on the view that **states systematically distort competitive processes** for the benefit of rent-seekers.41 This use of **federal antitrust law as a deregulatory device** is consistent with the Chicago School’s broader perspective that markets tend to function well when left to their own devices and that distortions occur primarily as the result of governmental intrusion. As of this writing, there are signs that the Trump FTC is looking again at state-action questions, with a possible eye to reinvigorating FTC initiatives against anticompetitive state regulations. **This may be a quite different use of antitrust law than as a device to check purely private market power**, but it points again to the fact that the Chicago School is not synonymous with abdication of antitrust enforcement. Chicago had uses for antitrust.

**Us also reading the aff doesn’t disprove the topical nature – in round debating determines whether the plan you have read is topical**

### A2: W/m

**Granting Parker immunity requires state control over private action**

**Valentine et al 98** (“BRIEF FOR THE UNITED STATES AND THE FTC AS AMICI CURIAE IN SUPPORT OF APPELLANT”, <https://www.justice.gov/atr/case-document/brief-united-states-and-ftc-amici-curiae-support-appellant>) DB

**In finding antitrust immunity**, the Court in **Independent Taxicab** pointed to a **statute** authorizing the city to enter contracts **conveying** the "**privilege**" **of providing services** at the airport and providing for the city to fix the fees for that service. 760 F.2d at 610, citing Tex. Rev. Civ. Stat. Ann. art. 46d-4. Such a statute plainly contemplates precisely the challenged conduct, an exclusive grant of the privilege to provide a particular service subject to regulation; this is merely an aspect of what the Court characterized as "the state's broad allocation of authority to the City to run its own airport." Id. at 611. And if that were not enough to provide antitrust immunity, another state statute "vested extensive regulatory discretion in its cities over the taxicab industry," 760 F.2d at 610, including the power to "'regulate, license and fix the charges and fares,'" id., quoting Tex. Rev. Civ. Stat. Ann. art. 1175(21), and the city had "for years seen fit to exercise this discretion." Id. at 610 n.6. In short, **significant aspects of competition** in the taxicab industry **had been displaced by regulation**, pursuant to state policy. There were, therefore, two bases for **finding a state policy to displace competition by regulation** or monopoly public service in Independent Taxicab: **state policy to control important elements of competition through regulation**, and **state policy to** permit a municipal airport to provide for **control of the provision of services within its boundaries** by contract rather than competition.(8)

**The *Midcal* test is a test of state control – that’s the pre-requisite to applying Parker**

**Lopatka 86** (John E, “The State of "State Action" Antitrust Immunity: A Progress Report”, Louisiana Law Review, Vol. 46, No. 5) DB

**California Retail Liquor Dealers Association v. Midcal Aluminum**, Inc. ,282 considered by the Court two years after City of Lafayette and Orrin Fox, involved California statutes that created a system of vertical price fixing in the sale of wine at wholesale. The statutes required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the state. 23 If a wine producer had not set resale prices through a fair trade contract, wholesalers had to post a price schedule for that producer's brands.2 M A single contract or schedule for each brand set the price for all wholesale transactions in that brand within a trading area.2s3 A wine wholesaler charging less than the stipulated prices was subject to fine, license revocation, and private damage suits. 2 6 **The state had no direct control over the prices established and did not review the reasonableness of the prices set**. 2 8 7 The state charged a wine wholesaler with violating the statute, and the wholesaler sought an injunction from the California Court of Appeals against the state's pricing program. 28 **The court granted the relief, holding that the scheme was invalid under the Sherman Act and that application of the Sherman Act to prevent this state-created system of wine pricing was not prohibited by the Twenty-first Amendment**. 2 9 **The Supreme Court affirmed**. 2 1 9

The Court surveyed Parker, Goldfarb, Cantor, Bates, and Orrin Fox and concluded: "**These decisions establish two standards for antitrust immunity under Parker v. Brown**. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.' '2 1 , The Court held that the wine pricing program satisfied the first standard: "The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. ' 29 However, the Court held, the program did not satisfy the second criterion:

**The State simply authorizes price setting and enforces the prices established by private parties**. **The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts**. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.2 93

### A2: C/i

**They don’t meet the counter-interp – the litmus test between public versus private sector is control over the practice**

**JTP 21** (Java T Point, https://www.javatpoint.com/public-sector-vs-private-sector)

The **public sector** is the sector which includes both **public companies** and **services**. In other words, the public sector is the sector that is under government's control. The public sector includes agencies, enterprises, banks, companies, etc., that are controlled by the government. Some examples of the public sector include infrastructure, sewers, public transit, healthcare, goods, services, etc. The public sector is made of three parts, i.e., the judiciary, legislative, and executive. These three segments combine and make the private sector. One of the major aims of the public sector is to have a balance between economy and wealth. The public sector is under the state control. More or less, the companies and agencies under the public sector are **owned by the state**. Now, let us look at some contrasting points between these sectors.

Private Sector

The **private sector** is defined as the **sector** wherein the **economy** is controlled by **private groups**. In layman's terms, a **private sector** is the sector that is **not under the control of the state**. Private sectors are run by companies yielding profits. The private sector can also be called as the citizen sector. Examples of the private sector are ICICI Bank, ITC Limited, HDFC Bank, etc. Apart from the banks, the proprietors, businessmen, accountants, SMEs, etc., are some other examples of the private sector. The major objective of the private sector is to earn maximum profits and have sole ownership or control. The private banks have better management systems, due to which they are able to yield more profits. Some of the private companies include Vitol, Koch Industries, Huawei, etc.

## CASE

**2---Even if the aff does solve all of Parker, 11th amendment blocks**

**Jordão 11** (Eduardo Ferreira Jordão-Visiting Researcher at Yale Law School; PhD in Public Law candidate at the Universities of Paris (Panthéon-Sorbonne) and Rome (La Sapienza), in a joint degree. Master of Laws (LL.M) at the London School of Economics and Political Science (LSE), University of London; Master in Economic Law at the University of São Paulo (USP); Bachelor of Laws (LL.B) at the Federal University of Bahia (UFBA). “BLAME IT ON THE STATES: A comparative analysis of the American and the European State Action Doctrines” , Revista do Programa de Pós-Graduação em Direito da UFBA, v.21, p. 213- 250, 2011. Accessed online via KU libraries, date accessed 12/17/21)

As we can see from the above, there is a wide scope for anticompetitive regulation in the United States. On the one hand, state regulation cannot be challenged under federal competition law, **given the 11th Amendment and** the Parker v Brown doctrine. On the other hand, the private lobbies promoting the passing of anticompetitive regulation are shielded from competition law, as they are encouraged as a manifestation of democracy. The outcome is that the public way has become the safest and most effective manner to seek restriction of competition in the United States.

**3---Even if 11th amendment doesn’t block, Noerr Pennington and good faith will be utilized by defendants.**

**Jorstad 78** (David W. Jorstad, "The Legal Liability of Medical Peer Review Participant's for Revocation of Hospital Staff Privileges," Drake Law Review 28, no. 3 (1978-1979): 692-717. Hein accessed online via KU libraries, date accessed 12/15/21)

\*language modified in brackets

Finally, for a plaintiff physician to succeed in an antitrust action for wrongful revocation of privileges, ~~he~~ [they] must withstand a number of defenses which the peer review committee members could assert. 77 These include the Parker, 78 Noerr-Pennington,7 1 and "good faith" defenses.80

**4---Even if other exceptions don’t overwhelm, most cases get dismissed for other reasons**

**Lipsky 9** (Abbott B. Lipsky Jr.-Partner, Latham & Watkins LLP, Washington, D.C., "Improving Competitive Analysis," George Mason Law Review 16, no. 4 (Summer 2009): 805-826, Lexis, accessed online via KU libraries, date accessed 12/15/21)

It is a challenge nowadays for antitrust lawyers to keep up with their reading. U.S. courts and agencies alone generate volumes of new material that require substantial effort just to identify and collect, let alone to study and understand. Then there is a daily torrent of developments from the European Union and literally scores of other foreign jurisdictions that entered the global antitrust industry in the past few decades. Despite this gushing hydrant of antitrust, surprisingly little of it involves real "competition analysis"--trying to understand how markets function and to determine whether specific transactions or episodes of conduct represent a genuine threat to productivity and competitiveness. In the **majority** of U.S. cases, at least, full rule of reason analysis is **not** usually **necessary,** because the allegations do not hit on all cylinders. Many cases are dismissed or suffer judgment as a matter of law due to some missing element such as concerted action, market power, standing, causation-in-fact, "antitrust injury," or some other prerequisite to a successful claim. Other cases founder on issues of **jurisdiction**, the application of exemptions such as Noerr-Pennington, or regulatory exceptions exemplified by cases such as Credit Suisse Securities (USA) LLC v. Billing.2 Then there are numerous cartel cases (an increasingly prolific category) in which anticompetitive effect is often only a minor issue (because it is presumed or essentially uncontested).

**5---Even if the plan were well written, judges circumvent**

**Newman 19**, University of Miami School of Law professor and a former attorney with the U.S. Department of Justice Antitrust Division. (John, 4-5-2019, "What Democratic Contenders Are Missing in the Race to Revive Antitrust", *Atlantic*, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/)

But the **federal courts** represent a **massive stumbling block** for **any progressive antitrust movement**. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions. But no matter its content, **enforcing a law** requires **persuading a judge**. When it comes to U.S. antitrust laws, federal judges—**not Congress**, and not regulatory agencies—are the **ultimate arbiters**. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files **all** its cases in **federal courts**. And although the Federal Trade Commission (the other) can decide cases internally, the **inevitable appeals** **eventually end up in court as well**. **No matter how strongly worded a law** may be, **ideological**ly driven **judges can usually find a way around enforcing it**. The **cyclical history** of U.S. antitrust law is **proof** that judges wield nearly **limitless institutional power** in this area. Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to **chip away at its effectiveness**. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades. But starting in the late 1970s, conservative judges began to **erode** the Clayton Act. Today, **megamergers** among competitors such as Bayer and Monsanto **barely raise eyebrows**. So-called vertical mergers, which combine suppliers and their customers, are now **all but immune** from **antitrust enforcement**—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up. Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been **eviscerated**. By the 2000s, the ideas of the conservative Chicago School had become **mainstream** in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a **receptive audience** in the federal judiciary. Among insiders, **Robinson-Patman** is now known as “**zombie law**.” It **remains on the books**, but regulators **no longer bother trying to enforce it**. If Democrats want to change antitrust law, they will **first** **and foremost** need to **change the judges who apply it**. Yet none of the 2020 contenders championing antitrust reform have even **mentioned** the possibility of appointing progressive antitrust thinkers to the bench. Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power. Recognizing the high stakes, the Republican Party has gone to **great lengths** to appoint **conservative antitrust experts** to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing. And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017. Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench. Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the **central role** judges **play in our political system**. There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. **Real antitrust reform** will require more than **regulatory** and **legislative tweaks**; it will require the **right judges**.

#### Here is more ev:

**11th circumvents**

**Standley 18** --- Nathan Standley JD, Journal of Nursing Regulation, 2018-01-01, Volume 8, Issue 4, Pages 56-60, https://www.journalofnursingregulation.com/article/S2155-8256(17)30182-5/fulltext

On several occasions, the Eleventh Amendment has prevented NC Dental fallout cases from advancing. The Eleventh Amendment states “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The Eleventh Amendment is a manifestation of sovereign immunity, which can be waived by the state, or by Congress in certain circumstances.

There are cases which courts ruled in favor of the defendant board based on immunity under the Eleventh Amendment. In Rodgers v. Louisiana State Board of Nursing (2016), the plaintiff sued the board based on its termination of the nursing program accreditation at the university she attended based on a failure of graduates to attain an 80% National Council Licensure Examination “First Time Taker Pass Rate.” In Jemsek v. North Carolina Medical Board (2017) , Jemsek, a licensed physician, was disciplined for violating standards for treating Lyme disease patients and sued the board and current and past board members in their individual and official capacities. He maintained the disciplinary action was a Sherman Act violation, but the court found the defendants were entitled to **immunity under the Eleventh Amendment** ( Jemsek v. North Carolina Medical Board, 2017 ).

**FTC Fails**

Matt **Stoller June 16**, 2021, the Director of Research at the American Economic Liberties Project, also worked for a member of the Financial Services Committee in the U.S. House of Representatives, “The Antitrust Revolution Has Found Its Leader,” https://mattstoller.substack.com/p/the-antitrust-revolution-has-found

While it’s true that researchers are finding that stronger antitrust laws are good for stock prices (which is something I noted in 2019), the far more important point is that Wall Street is having this debate about the Federal Trade Commission at all. It’s been a generation since the FTC was **taken seriously** as a meaningful player in the organization of our economy and markets. Every so often some official will make noise about a tougher stance on competition, **citing** Senator John **Sherman** or Teddy Roosevelt in a fancy speech, only to back down. **Getting sanctioned by enforcers is increasingly a joke**. As Commissioner Rohit Chopra noted, “it's become a right of passage for Silicon Valley companies to get an FTC consent decree."

This crisis of legitimacy is longstanding, but it became evident antitrust enforcement was irrelevant in 2013, when the FTC, even though it had good evidence of monopolization by Google, dropped its antitrust claims against the search giant, and then kept secret how much evidence it had. The flaccid nature of these enforcement choices was further emphasized when Facebook was fined $5 billion by the FTC over its Cambridge Analytica scandal. It sounds like a lot of money, but upon the announcement of the fine, **the firm’s stock price jumped up by tens of billions of dollars**. As if a regulator couldn’t get any more deferential to power, the FTC didn’t even make the announcement of the fine. Facebook did, on an earning’s call no less.

In other words, Khan is stepping into a leadership role at a demoralized and insular institution, with a culture of timidity. That can’t last for much longer. Khan’s reputation is such that many are looking to Biden’s appointment of her, and her confirmation with Republican votes, as a signal that politicians want to end the era of concentrated economic power. Either Khan fixes the FTC, or **in ten years the FTC will probably not exist** in its current form.

The FTC’s New Deal Resurrection

This moment isn’t the first time **the FTC has been nearly left for dead** as a handmaiden of monopoly, and then resurrected. In fact, a similar scenario occurred at another moment of extreme monopolization, a few decades after the FTC’s birth.

**Judges thump**

Nicolás **Rivero ’21**, March 11, Tech Reporter, “Biden’s antitrust crusaders can’t crusade without Congress,” QUARTZ, <https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/>

But there are clear limits to their power. **The most the FTC can do is bring more antitrust cases** that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which **is already struggling to pay for its current docket**. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

The FTC could also decide to dust off its rarely used rule-making power and declare certain **anticompetitive business practices illegal**. But any new rule would **almost certainly** trigger legal challenges, which would spark a **long, expensive court battle** in front of judges who aren’t likely to be sympathetic. Kovacic estimates **the process could take four or five years**—and in the end, judges might just strike the rule down.

**FTC is toothless – prohibitions alone will fail**

Mike **Davis** Is President and Founder Of The Internet Accountability Project. He Is A Former Top Attorney For The United States Senate Committee On The Judiciary And Previously Served In The United States Department Of Justice. Davis Also Clerked For Justice Neil Gorsuch, Both On The Tenth Circuit And On The Supreme Court., **7-29**-2021, "Congress must empower the FTC to fight Big Tech's abuses," Newsweek, https://www.newsweek.com/congress-must-empower-ftc-fight-big-techs-abuses-opinion-1614105

In April, the U.S. Supreme Court stripped the Federal Trade Commission of a powerful tool for holding trillion-dollar Big Tech monopolists—Google, Amazon, Facebook and Apple—accountable for their outrageous market abuses. In many respects, **the agency's ability to secure hefty equitable relief**—**such as** restitution or **disgorgement**—in federal court was **the one thing** preventing these Goliaths from abusing the American people without consequence. Absent new legislation, the public is sure to suffer at the hands of Big Tech. Congress must act to empower the FTC to do its job.

The FTC is the nation's premier consumer-protection agency. Every year, it holds countless bad actors accountable for abuses committed against everyday Americans, ranging from identity theft and fraud to anticompetitive practices in violation of federal antitrust law. The agency has proven to be a particularly effective tool for holding Big Tech accountable for its many misdeeds. While the FTC can, and does, enforce the law through administrative proceedings, it often takes its claims against bad actors directly to court, which can provide quick and effective relief. Many times, the mere threat of FTC action is enough to prevent illegal conduct.

For decades, the FTC has used Section 13(b) of the Federal Trade Commission Act not only to obtain injunctions preventing future unlawful conduct, but also to force companies and individuals to relinquish money they wrongfully obtained from the public. That all changed on April 22, when the Supreme Court issued its long-anticipated decision in AMG Capital Management, LLC v. FTC. In a unanimous opinion authored by Justice Stephen Breyer, the high court ruled that Section 13(b) does not authorize the FTC to seek monetary disgorgement from businesses that engage in abusive practices. While the FTC may still obtain a court order forbidding a company from continuing its bad conduct, the agency must rely on a less efficient—and less effective—administrative process to recoup money taken as a result of that conduct.

**It would be an understatement** **to say** that the Court's decision represents a setback for the FTC's efforts to hold Big Tech accountable for abuses against Americans. Over the past five decades, the FTC had used Section 13(b) to return literally billions of dollars to everyday Americans—money that seedy companies wrongfully took from unsuspecting consumers. For example, Google and its subsidiary YouTube agreed to a record $170 million settlement in 2019 after the FTC brought an enforcement action in federal court challenging YouTube's practice of illegally collecting personal information from children without their parents' consent. The Supreme Court's elimination of the FTC's authority to seek disgorgement will make recoupments such as this impossible. In fact, even before the Court rendered its decision, **companies under investigation by the FTC began refusing to agree to settlements**, predicting (correctly) that the FTC would soon lack the ability to obtain court-ordered equitable relief.

# 1NR

**Ext ---Magnitude --- Top Level**

**Probabilistic thinking inverts the error** – has its own biases, fails to teach about worst case scenarios, ignores trends towards disasters/population concentration, and struggles to be applied to governments

**Clarke 8 ----** Lee, member of a National Academy of Science committee that considered decision-making models, Anschutz Distinguished Scholar at Princeton University, Fellow of AAAS, Professor Sociology (Rutgers), Ph.D. (SUNY), “Possibilistic Thinking: A New Conceptual Tool for Thinking about Extreme Events,” Fall, Social Research 75.3, JSTOR \*\*\*Modified for ableist language

In scholarly work, the subfield of disasters is often seen as narrow. One reason for this is that a lot of scholarship on disasters is practically oriented, for obvious reasons, and the social sciences have a deep-seated suspicion of practical work. This is especially true in sociology. Tierney (2007b) has treated this topic at length, so there is no reason to repeat the point here. There is another, somewhat unappreciated reason that work on disaster is seen as **narrow**, a reason that holds some irony for the main thrust of my argument here: disasters are unusual and the social sciences are generally **biased** toward phenomena that are frequent. Methods textbooks caution against using case stud- ies as representative of anything, and articles in mainstreams journals that are not based on probability samples must issue similar obligatory caveats. The premise, **itself narrow**, is that the only way to be certain that we know something about the social world, and the only way to control for subjective influences in data acquisition, is to follow the tenets of probabilistic sampling. This view is a correlate of the central way of defining rational action and rational policy in academic work of all varieties and also in much practical work, which is to say in terms of probabilities. The irony is that probabilistic thinking **has its own biases**, which, if unacknowledged and uncorrected for, **lead to a conceptual neglect** of extreme events. This leaves us, as scholars, paying attention to disasters only when they happen and doing that makes the accumulation of good ideas about disaster vulnerable to issue-attention cycles (Birkland, 2007). These ~~conceptual blinders~~ [myopic approaches] lead to a neglect of disasters as "strategic research sites" (Merton, 1987), which results in **learning less** about disaster than we could and in missing opportunities to use disaster to learn about society (cf. Sorokin, 1942). **We need new conceptual tools** because of an upward trend in frequency and severity of disaster since 1970 (Perrow, 2007), and because of a growing intellectual attention to the idea of worst cases (Clarke, 2006b; Clarke, in press). For instance, the chief scientist in charge of studying earthquakes for the US Geological Service, Lucile Jones, has worked on the combination of events that could happen in California that would constitute a "give up scenario": a very long-shaking earthquake in southern California just when the Santa Anna winds are making everything dry and likely to burn. In such conditions, meaningful response to the fires would be impossible and recovery would take an extraordinarily long time. There are other similar pockets of scholarly interest in extreme events, some spurred by September 11 and many catalyzed by Katrina. The consequences of disasters are also becoming more severe, both in terms of lives lost and property damaged. People and their places are becoming more vulnerable. The most important reason that vulnerabilities are increasing is population concentration (Clarke, 2006b). This is a general phenomenon and includes, for example, flying in jumbo jets, working in tall buildings, and attending events in large capacity sports arenas. Considering disasters whose origin is a natural hazard, the specific cause of increased vulnerability is that people are moving to where hazards originate, and most especially to where the water is. In some places, this makes them vulnerable to hurricanes that can create devastating storm surges; in others it makes them vulnerable to earthquakes that can create tsunamis. In any case, the general problem is that people concentrate themselves in dangerous places, so when the hazard comes disasters are intensified. More than one-half of Florida's population lives within 20 miles of the sea. Additionally, Florida's population grows every year, along with increasing development along the coasts. The risk of exposure to a devastating hurricane is obviously high in Florida. No one should be surprised if during the next hurricane season Florida becomes the scene of great tragedy. The demographic pressures and attendant development are wide- spread. People are concentrating along the coasts of the United States, and, like Florida, this puts people at risk of water-related hazards. Or consider the Pacific Rim, the coastline down the west coasts of North and South America, south to Oceania, and then up the eastern coast- line of Asia. There the hazards are particularly threatening. Maps of population concentration around the Pacific Rim should be seen as target maps, because along those shorelines are some of the most active tectonic plates in the world. The 2004 Indonesian earthquake and tsunami, which killed at least 250,000 people, demonstrated the kind of damage that issues from the movement of tectonic plates. (Few in the United States recognize that there is a subduction zone just off the coast of Oregon and Washington that is quite similar to the one in Indonesia.) Additionally, volcanoes reside atop the meeting of tectonic plates; the typhoons that originate in the Pacific Ocean generate furiously fatal winds. Perrow (2007) has generalized the point about concentration, arguing not only that we increase vulnerabilities by increasing the breadth and depth of exposure to hazards but also by concentrating industrial facilities with catastrophic potential. Some of Perrow's most important examples concern chemical production facilities. These are facilities that bring together in a single place multiple stages of production used in the production of toxic substances. Key to Perrow's argument is that there is no technically necessary reason for such concentration, although there may be good economic reasons for it. The general point is that we can expect more disasters, whether their origins are "natural" or "technological." We can also expect more death and destruction from them. I predict **we will continue to be poorly prepared to deal with disaster**. People around the world were appalled with the incompetence of America's leaders and orga- nizations in the wake of Hurricanes Katrina and Rita. Day after day we watched people suffering unnecessarily. Leaders were slow to grasp the importance of the event. With a few notable exceptions, organi- zations lumbered to a late rescue. Setting aside our moral reaction to the official neglect, perhaps we ought to ask why **we should have expected a competent response** at all? Are US leaders and organiza- tions particularly attuned to the suffering of people in disasters? Is the political economy of the United States organized so that people, espe- cially poor people, are attended to quickly and effectively in noncri- sis situations? The answers to these questions are obvious. If social systems are not arranged to ensure people's well-being in normal times, there is no good reason to expect them to be so inclined in disastrous times. Still, if we are **ever** going to be reasonably well prepared to avoid or respond to the next Katrina-like event, **we need to identify the barriers** to effective thinking about, and effective response to, disas- ters. **One of those barriers** is that we do not have a set of concepts that would help us think rigorously about out-sized events. The **chief toolkit** of concepts that we have for thinking about important social events comes from probability theory. There are good reasons for this, as probability theory has obviously served social research well. Still, the toolkit is **incomplete** when it comes to extreme events, especially when it is used as a base whence to make normative judgments about what people, organizations, and governments should and should not do. **As a complement** to probabilistic thinking I propose that we need **possibilistic thinking**. In this paper I explicate the notion of possibilistic thinking. I first discuss the equation of probabilism with rationality in scholarly thought, followed by a section that shows the ubiquity of possibilis- tic thinking in everyday life. Demonstrating the latter will provide an opportunity to explore the limits of the probabilistic approach: that possibilistic thinking is widespread suggests it could be used more rigorously in social research. I will then address the most vexing prob- lem with advancing and employing possibilistic thinking: the prob- lem of infinite imagination. I argue that possibilism can be used with discipline, and that we **can be smarter** about responding to disasters by doing so.

**deadlock da**

**AT: !/D – Food Wars – Studies**

**O/V – Link T/C**

**Link alone turns solvency – lack of political capital from overreach makes implementation impossible – courts and Congress will undercut AND companies won’t comply**

**Kovacic 14** (William E. Kovacic, Former FTC Commissioner, Global Competition Professor of Law and Policy, The George Washington University Law School; David A. Hyman, Former FTC Special Counsel, H. Ross & Helen Workman Chair in Law and Professor of Medicine, University of Illinois; “Why Who Does What Matters: Governmental Design and Agency Performance;” October 2014, George Washington Law Review, Vol. 82, No. 5, Accessed through HeinOnline, TM)

2. Branding and Credibility

Like nongovernment institutions such as private firms, **public agencies** have "**brands**."11 6 For a public agency, a brand conveys information about the agency's goals and priorities and serves as a signal of its **rep**utation. The assignment of policy functions affects the clarity and strength of the agency's brand. Excessive diversification or the combination of conflicting duties can confuse or dilute the brand. A confused or diluted brand gives poor guidance to agency personnel about which projects to pursue, what theories to rely upon, and what rules to use to resolve disputes.'17 To outsiders, agencies with diluted or confused brands are more likely to appear unreliable, because they are aimless, disoriented, or erratic.

Poor branding also weakens the agency's credibility in the eyes of important external decisionmakers. An **agency** with a **strong brand** stands a **better chance** of **persuading legislators** and their **staffs** that it is a **worthy recipient** of **additional** funding or **powers**. A brand also reduces an agency's vulnerability to intrusive oversight or other forms of second-guessing or reversal. A good brand also **improves** the **agency's stature** when it appears before the courts. As the agency's brand **improves**, so too **increase its prospects** of **getting deference** when **courts review** its work.118 **[[BEGIN FOOTNOTE 118]]** 118 Erica Teichert, Breyer Gives Antitrust Agencies Top Marks for EU Ties, LAw360 (Apr. 3, 2014, 7:31 PM), http://www.taw360.com/articles/524851 (subscription required) **[[END FOOTNOTE 118]]** Finally, a well-respected agency probably enjoys an advantage in dealing with **regulated firms** and their advisors. For example, parties know that well-branded agencies receive more respect from the courts. Consequently, in negotiations over alleged infringements, a **well-branded** **agency** may be able to obtain better settlement terms and, perhaps, gain **better compliance** with its **policy positions**.119

Combining functions also affects the size of an **agency's** **p**olitical **c**apital. In our experience, regulatory bodies are **always accumulating** or **spending** **p**olitical **c**apital. When agencies **make policy choices** and initiate **specific matters**, they are either spending or accumulating **p**olitical **c**apital. Combining functions that build political capital with functions that run political capital deficits may help an agency to perform functions that are important to the economy but are unpopular. In effect, one function cross-subsidizes the other. Conversely, an agency with policy duties whose **implementation** chronically yields **p**olitical **c**apital **deficits** will find it **difficult** to **establish political allies,** and [**prevent**] blunt **political attacks** that **threaten** its **effectiveness**.120

Branding considerations also help explain why agencies sometimes resist the assignment of new responsibilities, even when the new function would be accompanied by more resources or greater visibility.121 For the same reason, agencies seek to divest responsibilities that are seen to collide with their core responsibilities.122

**Uniqueness – T/L**

**Bedoya’s confirmation is likely now – BUT uncertain – opposition to the existing agenda has already pushed vote counts right to the brink of failure – there’s no margin left for error – that’s Moran**

**AND…**

**Ownbey 2-2**-22 (Austin A.B. Ownbey, counsel in Foley Hoag's Business Department, practice focuses on antitrust defense, JD University of Michigan Law School, “Cybersecurity 2022 – The Year in Preview: Privacy Regulations at the FTC,” JD Supra, 2-2-2022, https://www.jdsupra.com/legalnews/cybersecurity-2022-the-year-in-preview-5608106/)

As we think about what 2022 may hold with regard to privacy and data security regulation by the Federal Trade Commission (FTC), we should first look back at some of the developments from last year that set the stage for this year. Just like 2021, it appears that the **regulatory culture** at the **FTC** this year will be **heavily entangled** with the **political environment**. Recent events suggest that while privacy and data security related reforms previously enjoyed bipartisan support, there are **limits to that bipart**isanship and **not everyone agrees on the FTC’s role** in crafting new privacy and data security regulations. One thing that remains to be seen is will the **partisan disagreements derail the FTC’s efforts** to draft new regulations or will the FTC press ahead anyway.

The Politics of Filling the Fifth Seat

To start the new year, President Biden renewed his nomination of Alvaro **Bedoya**, founding Director of the Center on Privacy & Technology at Georgetown Law School, to fill the vacancy at the **FTC** created by Rohit Chopra’s departure last year to take over as Director of the Consumer Financial Protection Bureau. The nomination had to be renewed because it hit an unexpected delay at the end of last year in the Senate Commerce Committee, when what many expected to be an unremarkable vote, instead turned out to be a party line vote with all of the Republicans voting against Bedoya’s nomination.

Earlier in the year, during Bedoya’s confirmation hearing, only a handful of Republicans expressed concern over his nomination and **most Senators** appeared **content with Bedoya**’s privacy expertise. Among those who expressed concern at the hearing was Sen. Ted Cruz (R-TX) who criticized Bedoya for tweets that Cruz insisted show Bedoya to be “a left-wing activist, a provocateur, a bomb thrower, and an extremist.” Despite these accusations, Bedoya repeatedly expressed his support for collaboration and highlighted his previous bipartisan successes as a Senate staffer, but that was apparently insufficient in assuaging the concerns because no Republicans voted in favor of confirmation and the committee deadlocked at 14-14.

After the vote, the Committee’s ranking member, Sen. Roger Wicker (R-MS), echoed Sen. Cruz’s concerns when he summed up the opposition to Bedoya by stating that there “has been a troubling trend of politicization at the FTC, which is different from how it has been in previous years.” Sen. Wicker went on to express a concern that Bedoya may not bring “the cooperative spirit to the commission” that has historically set the FTC apart from other agencies.

The deadlocked vote is even more remarkable when considering that Chair Khan, who has since become a source of controversy during her tenure at the FTC, was voted out of the same committee and confirmed by the full Senate earlier this year with significant Republican support. (Only four Republicans on the Commerce Committee voted against sending her nomination to the full Senate and 22 Republicans ultimately voted in favor of her confirmation.) However, now that Bedoya’s nomination has been renewed and **despite** a **delay** caused by the need for an extra procedural vote to clear the full Senate, his nomination is **not dead**. Since the Democrats control the Senate, **Bedoya** is **still likely to be confirmed early this year**.

The Winds of Change at the FTC

This shift towards partisanship is another signal that support for **new** federal privacy and data security **regulations**, which once seemed unified and bipartisan, **may become a victim of the partisan divide**. But the deadlocked vote over Bedoya’s nomination was not the first sign of trouble. Instead of a bipartisan Commission unified in its goal “to engage in sound, vigorous privacy and data security enforcement,” Bedoya may be joining a Commission already divided by partisan conflict over the very nature of what privacy and data security enforcement should look like.

**They’ll have the votes when Luján returns – and Reps won’t boycott now – BUT the scope of opposition to the enforcement agenda controls uniqueness**

**Dayen 2-22** (David Dayen, executive editor of The American Prospect, author of Monopolized: Life in the Age of Corporate Power (2020), winner of the 2021 Hillman Prize for excellence in magazine journalism, “The Wilson Phillips Blockade and Republican Obstruction,” The American Prospect, 2-22-2022, https://prospect.org/politics/wilson-phillips-blockade-and-republican-obstruction/)

A **2-2 tie** on the **F**ederal **T**rade **C**ommission empowers Republicans to **block action** into bad actors in the economy—and Senate Republicans are enabling this.

The blockade of President Biden’s nominees for federal agencies that Republicans escalated last week has now had a new side effect: allowing profit-hungry middlemen to keep prescription drug prices high.

Last Thursday, the Federal Trade Commission was blocked from initiating an investigation into the ways pharmacy benefit managers (PBMs) are responsible for higher drug prices. PBMs work on behalf of health plans, ostensibly to secure discounts from drug companies and reimburse pharmacists for medications. However, their information advantage enables PBMs to skim off the top of every prescription, siphoning funds from pharmacists while ensuring that patients, private insurance, and government-run health plans pay more.

In other words, PBMs thrive specifically off of secrecy, having more knowledge about the pharmaceutical supply chain and using that asymmetry to boost their profits at the expense of patients and pharmacists. An investigation into their practices would be the first step to policy changes to prevent that.

The vote at the FTC was 2-to-2, which meant that the investigation, known as a 6(b) order after the section of the Federal Trade Commission Act that authorizes the agency to study markets under its jurisdiction, could not go forward. The two Democrats on the commission, chair Lina Khan and commissioner Rebecca Kelly Slaughter, voted for the 6(b) order; Republicans Christine Wilson and Noah Phillips voted against it. (For the duration of this article, I will refer to them as Wilson Phillips.)

The seat of the fifth commissioner, who would give the Democrats a majority on the FTC, is currently vacant, made so by Rohit Chopra’s exit to run the Consumer Financial Protection Bureau. Alvaro **Bedoya**, a Georgetown University law professor and privacy expert, was nominated to fill the position last September. But a combination of foot-dragging and Republican obstruction has bottled up his nomination in the Senate Commerce Committee.

In recent weeks, it’s become even more bottled up. Sen. Ben Ray Luján (D-NM) suffered a stroke in late January and has been in a treatment center in New Mexico ever since. Luján released a video last week saying that he would make a full recovery and be **back** in the Senate **in “a few weeks**.”

Until that time, however, he cannot fulfill his duties, which includes service on the Senate Commerce Committee. Because of the 50-50 Senate, there are an even number of Democrats and Republicans on all committees. Lujan’s absence gives Republicans a functioning majority on the Commerce Committee, and if they don’t want to advance Bedoya, it’s in their hands.

Like the FTC, the Federal Communications Commission is also deadlocked at 2-2 and unable to move forward on Democratic priorities like restoring net neutrality protections. Gigi Sohn, the public-interest advocate and Democratic nominee to fill the vacant slot, is also stuck in the Commerce Committee. Earlier this month, Republicans compelled Sohn to stand for a second confirmation hearing to address what she called “unrelenting, unfair and outright false criticism” about her views.

There was talk of also having a second hearing for Bedoya after Republicans raised concerns about his social media posts, but Commerce Committee chair Maria Cantwell (D-WA) shot that down.

But **even after Luján returns**, Republicans still have an option to **block Bedoya** and Sohn from advancing out of committee and to the Senate floor. They could **boycott** the committee hearing, denying Democrats a **quorum** to move a nomination forward. Because of the standing rules of the Senate, there must be a majority of a committee “physically present” to vote on pending nominations in order for them to get a vote on the floor. The even division of Senate committees makes that impossible without one Republican present.

Republicans on the Senate Banking Committee successfully used this maneuver last week to block five Federal Reserve Board of Governors nominees from getting a committee vote, in a bid to stop Sarah Bloom Raskin from becoming the Fed’s vice chair for financial supervision.

Sen. Roger Wicker (R-MS), the ranking member of the Commerce Committee, has **downplayed the prospect** that committee Republicans would **boycott** an FCC or **FTC** vote. **But** Wicker’s staff **threatened** that in advance of the initially scheduled markup for Sohn’s nomination, which led to her second confirmation hearing. “You have to have a quorum to get a vote,” Wicker told reporters last week.

At the FTC, the current blockade ends a bit of a hot streak for Lina Khan. Her first major challenge to a corporate merger, between semiconductor firms Nvidia and Arm, resulted in the companies calling off the deal. Lockheed Martin and Aerojet also terminated their merger, after the FTC filed suit to block it.

The fear of merger scrutiny from Khan and the Justice Department’s antitrust chief Jonathan Kanter is already depressing what had been a historic merger wave; the number of larger mergers actually fell in 2021 amid the boom. Khan and Kanter have also invited comment to alter the merger guidelines, which are currently rooted in ideas about consumer welfare that make it extremely difficult to get a favorable ruling against a merger in court.

Even last Thursday, amid the Wilson Phillips blockade, the FTC voted 4-0 to block a merger between the two largest hospital systems in Rhode Island, Lifespan and Care New England.

The main **way for opponents**—such as the U.S. **Chamber of Commerce**, which under the leadership of major tech firms has unleashed an all-out assault against Khan—to **deter action against corporate concentration** and misdeeds is to **keep** at least some agency actions bottled up while the **2-2 deadlock** persists. That includes potential **rulemaking** and 6(b) orders to study markets. The PBM investigation falls along those lines, giving Wilson Phillips the opportunity to obstruct.

“By voting against investigating these prescription drug middlemen, [Wilson Phillips] are siding with Big Pharma over working families,” said Sarah Miller of Fight Corporate Monopolies, in a statement.

Wilson Phillips have also urged Congress to not increase the FTC’s funding, even though the merger wave has made it impossible for the agency to review all the deal making. Matt Stoller of the American Economic Liberties Project has called this the **“defund the police” strategy**, the police in this case being the cops protecting consumers and competition at the FTC.

High drug prices are a perennial complaint of the electorate. Democrats and Republicans alike constantly pay lip service to fixing the problem. In fact, in addition to the numerous pharmacists and patients who testified at the FTC before last Thursday’s vote, Republican Reps. John Rose (R-TN) and Buddy Carter (R-GA) also testified in favor of the study. Carter is himself a former pharmacist. There’s also a bipartisan bill from Cantwell and Sen. Chuck Grassley (R-IA) that would require the FTC to study PBMs.

But while a handful of Republicans support the study, it was the two Republican commissioners, Wilson Phillips, who blocked it. And it’s Republican senators who are **holding Bedoya’s nomination hostage to prevent a majority** that would likely favor an investigation into PBMs. Republican obstruction, in fact, could prevent any Biden nominees from taking their seats in the indefinite term, **disrupting** Lina Khan’s **efforts to reinvigorate the FTC**, along with hobbling agencies across the government.

**AT: N/L – T/L**

**epistemology – prefer consilience of Kovacic’s expertise as former FTC Chair, principal-agent theory, AND empirical studies**

**Miller 5** (Gary J. Miller, Emeritus Professor of Political Science, Washington University in St. Louis, PhD University of Texas at Austin, “The Political Evolution of Principal-Agent Models,” Annual Review of Political Science, vol.8, 2005, pp.203-225, DOI: 10.1146/annurev.polisci.8.082103.104840)

For **principal-agency theorists**, bureaucratic independence and congressional “dominance” are observationally equivalent as far as monitoring and sanctions are concerned. We should see little of either if bureaucrats are independent; but we should also see little if bureaucratic behavior is shaped by congressionally imposed incentives. Therefore, it is necessary to look beyond monitoring and sanctions to bureaucratic outputs, to determine if they can be shown to vary with congressional preferences. In the case of the Securities and Exchange Commission, Weingast argues that its imposition of deregulation was in response to congressional representation of the interests of large institutional investors. With respect to the Federal Trade Commission (**FTC**), Weingast & Moran (1983) show more **convincingly** that the **ideological preferences** of the **Senate** and the subcommittee chairman (as measured by Americans for Democratic Action scores) were **significantly associated** with the **FTC**’s emphasis over time on consumer-oriented credit (p. 789). In other words, a more conservative Senate led to a less consumer-oriented FTC.

Although neither of these empirical forays could be regarded as the final word on the subject, Weingast’s articles constitute an **enormous contribution** to the **study** of congressional oversight and public bureaucracy by exemplifying **quantitative research** directed at precise questions (e.g., what are the **political** and other **determinants** of bureaucratic outputs?) derived from **rigorous theory**. Almost singlehandedly, these articles **raised the bar for academic research** in the area of bureaucracy. Weingast (1984) offers the “**congressional dominance**” hypothesis: “The mechanisms evolved by Congress over the past one hundred years comprise an ingenious system for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress” (p. 148).

**2 – FTC’s PC – is finite and key – intensifying centrists’ concerns about overreach is fatal**

**Salvino 11-1**-21 (Mary Ashley Salvino, Cybersecurity Lawyer and Privacy & Data Security Professional at Bloomberg Law, CIPP/US, CIPM, member of the DC Bar, JD City University of New York School of Law at Queens College, “ANALYSIS: How Will the FTC Get Its Privacy Mojo Back in 2022?” Bloomberg Law, 11-1-2021, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-will-the-ftc-get-its-privacy-mojo-back-in-2022)

**Leveraging Democratic Political Capital**

The odds are likely that the FTC will seek to optimize and strengthen its authority via its new left-leaning leadership. Lawyers should keep an eye on how the **FTC** leverages and **aligns political capital** in a way that maximizes innovation and **cooperation with Democrats in Congress**. Be ready for a robust rulemaking effort by the FTC, accompanied by a strong push for uniform privacy legislation.

The **confirmation** of Alvaro **Bedoya** as an FTC commissioner will likely give the FTC new leadership and momentum to focus on alternative rulemaking in consumer privacy protection. Additionally, Lina Khan, the new FTC chairwoman, has expressed interest in forging new antitrust rules, which could extend to creating additional privacy rulemaking.

In terms of **political calculus**, a strengthened regulator **faces the same bipartisan gridlock** characterized by a **divided Congress**. Yet legal practitioners should be aware of a growing momentum on both sides of the aisle, seeking more stringent regulations on unbridled Big Tech firms, as well as emerging nonpartisan sentiments toward seeking protection for children online.

Exploring Unprecedented Funding Initiatives

On Sept. 14, the House Committee on Energy and Commerce voted to appropriate an unprecedented $1 billion over 10 years to the FTC to establish and operate a new privacy bureau. Such an infusion, if passed by Congress, would instantly transform the FTC’s ability to effectively regulate unfair or deceptive acts or practices relating to privacy, data security, and data abuses. To put this infusion into perspective, it is critical to compare to FTC’s privacy budget for 2021 ($13 million) to its overall budget of $351 million.

Looking forward to 2022, it is likely that **continued political alignment will be necessary** to reinforce (and perhaps even **expand**) the **FTC’s** data privacy **enforcement** power. However, proponents of the FTC funding boost will need to reckon with rigorous bipartisan scrutiny in the **Senate**, as well as **fierce opposition skepticism** by Republicans and **centrist Democrats** alike. At the very least, proposals will face serious funding trimming, and even **full-throated opposition**, by legislators concerned about **agency overreach**.

**FTC PC is true and determines Congressional backlash**

**Kovacic 14** (William E. Kovacic, Former FTC Commissioner, Global Competition Professor of Law and Policy, The George Washington University Law School; David A. Hyman, Former FTC Special Counsel, H. Ross & Helen Workman Chair in Law and Professor of Medicine, University of Illinois; “Why Who Does What Matters: Governmental Design and Agency Performance;” October 2014, George Washington Law Review, Vol. 82, No. 5, Accessed through HeinOnline, TM)

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Branding considerations also help explain why agencies sometimes resist the assignment of new responsibilities, even when the new function would be accompanied by more resources or greater visibility.121 For the same reason, agencies seek to divest responsibilities that are seen to collide with their core responsibilities.122

**AT: Enforcement Fails – T/L**

**FTC enforcement of existing antitrust law CAN deconsolidate meat packing**

**Kelloway 1-6**-22 (Claire Kelloway, senior reporter and researcher with the Open Markets Institute, BA political science, Carleton College, concentration in political economy and sustainable development, “White House Pushes Plan for Fairer Meat Markets – Will it Work?” Food & Power, 1-6-2022, https://www.foodandpower.net/latest/white-house-meatpacking-plan-jan-2022)

The Biden administration kicked off the new year by promoting an “action plan” for addressing monopolistic behavior in the meat industry, which it blames for rising meat prices and squeezing farmers. The plan largely details how the U.S. Department of Agriculture (USDA) will distribute $1 billion in American Rescue Plan funds to build out new meat processing plants. But some ranching groups and antitrust advocates argue that this investment won’t challenge the core issues of market concentration and corporate power. To **deconcentrate meatpacking**, prevent collusive price hikes, and help new entrants succeed, the Justice Department (DOJ), Federal Trade Commission (**FTC**), and USDA need to boldly **enforce antitrust law** and issue fair competition rules.

At a virtual roundtable of farmers and ranchers, President Joe Biden and other officials expanded on several previous commitments to address meatpacking consolidation. Among the details revealed at Monday’s meeting: The administration plans to distribute $375 million in grants for new plants and $100 million to back guaranteed loans for meat supply chain infrastructure such as cold storage. The administration also allocated $100 million for meatpacking worker training and safety, plus a commitment to work with labor unions on these issues.

Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland also announced a joint USDA and DOJ initiative that will create a “channel for farmers and ranchers to report complaints of potentially unfair and anticompetitive practices.” This adds to anti-monopoly rulemaking and research underway at USDA, including a study of consolidation in food retail markets in collaboration with the FTC and new rules under the Packers and Stockyards Act to better protect farmers from unfair or deceptive tactics by meatpackers.

The Biden administration is doubling down on meat supply chain reform now, in part, because of rising meat prices. Beef cost 20% more this November than a year prior, and the overall price index for meat, poultry, fish, and eggs was up 13%. The administration argues that much of this inflation is the result of monopoly. “The meat industry is a textbook example on the price side” of how consolidated companies control markets, President Biden said Monday. The top four corporations in each industry control 54% of chicken processing, 67% of pork processing, and 85% of beef processing, giving them market power to push down prices for farmers and raise prices for consumers, the White House argues.

Strong evidence for this claim comes from the fact that net profit margins for top meat companies Tyson Foods, JBS, Marfrig, and Seaboard are up more than 300% since the pandemic, according to the White House. Profit margins would not rise if price increases only reflected meatpackers’ increased cost of business; meat corporations are using their market power to charge more and raise profits.

In a healthy and competitive market, economists expect competitors to eat away excess profits by undercutting on price and taking sales. But in an oligopolistic market, companies can more easily coordinate to all raise prices and make more money, whether explicitly or tacitly. “In concentrated industries you don’t need to actually sit down and engage in overt collusion; everybody understands they want to make bigger profits,” says University of Wisconsin law professor emeritus Peter Carstensen. “There are lots of ways to communicate indirectly what your plans are.”

Meatpacking representatives and trade groups contest this explanation, pointing to increased labor, transportation and input costs. The National Chicken Council told The Washington Post that the White House proposal “looks like a solution in search of a problem.” Critics also note that meatpacking has been concentrated for decades yet prices are only jumping now. But economist Hal Singer, managing director of Econ One, argues that cartels often need a cover, like generalized inflation, to get away with sudden excessive price hikes. “Once the market is concentrated and susceptible to a cartel, it still needs a trigger, a pretext to come together and start a price-fixing conspiracy,” Singer says. “[Meatpackers] could have easily gotten together and said, ‘Hey, let’s exploit this inflationary pressure.’”

This leaves a big question — **will the Biden administration’s proposals tame meatpackers’ market power** and thereby tame consumer prices**?** Several agriculture and ranching groups applauded the announcement, noting that new processors would give farmers and ranchers more options for selling their animals and increase competition for livestock, thus improving prices for farmers. In the long term, increased competition could steady the meat supply and shrink profit margins for the big packers, but in the near term, new entrants probably won’t break dominant meatpackers’ pricing power.

“[Injecting] another 10% of capacity through new blood into the industry, that really wouldn’t defeat the price increase if they are coordinating in their pricing,” says Singer. “The only way this new entrant can do anything is if customers consider that entrant as a viable substitution … even if you ignored how long it [would take], I doubt it would make a dent on the pricing dynamics.”

Even with startup resources, new plants will also struggle to gain a foothold in the market against dominant packers. “Those smaller scale processing facilities won’t survive over the long term unless we break up concentrated power and deal with the big structural issues” in meatpacking, Stacy Mitchell, co-director of the Institute for Local Self Reliance, told The Hill.

**Antitrust** and other competition policy can help build a fairer, **more competitive**, and **resilient** meat-processing sector. Antitrust enforcers have the authority to set fair competition rules to ensure businesses compete on innovation and service rather than brute size, exclusion, and bargaining power. For instance, under the Packers and Stockyards Act, Carstensen says the USDA could outlaw the preferential pricing and rebate programs meatpackers use to lock in access to grocery shelves and retail markets.

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**Genoways 20** (Ted Genoways, journalist and author, contributing writer at Mother Jones and The New Republic, editor-at-large at Pacific Standard, books include The Chain: Farm, Factory, and the Fate of Our Food, awards include fellowships from the National Endowment for the Arts and the Guggenheim Foundation, MFA University of Virginia, MA English, Texas Tech University, “Beyond Big Meat,” The New Republic, 8-4-2020, https://newrepublic.com/article/158679/beyond-big-meat-coronavirus-pandemic-meatpacking-monopoly)

“The food system we have is not the result of the free market,” Michael Pollan wrote recently in The New York Review of Books. “No, our food system is the product of agricultural and antitrust policies—political choices—that, as has suddenly become plain, stand in urgent need of reform.” Eric Schlosser, writing for The Atlantic, made an even more specific call for “strict antitrust enforcement that will rid the food system of monopoly and monopsony power, ensure competition, and encourage the innovation that free-market forces produce.” By June, that growing chorus of concern grew so loud that the Department of Justice, in a wholly uncharacteristic move, came forward to announce a series of ongoing investigations.

First, Justice officials revealed that the chief executive officer and a former senior vice president at Pilgrim’s Pride, a poultry producer owned by JBS, along with two top executives at Claxton Poultry, had been indicted for an antitrust conspiracy to fix prices. Tyson had agreed to cooperate with that investigation as part of a leniency application. Next, the department issued civil subpoenas to the four biggest beef processors—JBS, Tyson, Cargill, and National Beef—seeking information about possible collusion in that market, as well. According to The Wall Street Journal, JBS and Tyson were also asked to produce documents related to their pork-processing operations, again to investigate possible antitrust violations. With at least four of the Big Six packers currently under federal scrutiny and indictments already coming down, there seems a greater chance now of establishing market equity in the top-heavy meatpacking economy than at any other time in the last century. **Fully enforcing antitrust laws** to **break up** the twenty-first–century **meat trust** would go a long way toward restoring the **resiliency** of **distributed production** and returning to the fair and transparent marketplace that existed for half a century before the era of consolidation.

But the need for reform of the food supply chain is far more broad-ranging than questions of targeted regulatory enforcement. The age of Covid-19 has revealed profound rifts in our culture concerning food production and distribution—rifts that must be bridged by more than purely economic fixes. Policymakers and consumers alike must reflect on how we have come to collectively accept a food system that is largely based on racial and ethnic discrimination. In a country with a legacy of plantation slavery, perhaps this should come as no surprise. But it’s incompatible with the free society that we claim to embrace. During this pandemic, the White House has declared all food system employees—from farm fields to factory floors to grocery aisles to restaurant kitchens—to be essential workers. But if food workers are indeed essential to our national survival, then we owe them a living wage, paid sick leave, and a safe work environment. We can no longer shrug off the meat industry’s high rates of injury, amputation, and illness as the necessary trade-off for cheap hamburgers and chicken nuggets. The Occupational Safety and Health Administration should be allowed full access to packinghouse workers, and the meat inspectors of the USDA, as well as the packinghouse workers themselves, should be granted a louder voice in determining safe line speeds.

Other cultural changes will have to go deeper than policy. Since the beginning of the great consolidation in the 1980s, meatpacking plants across middle America turned to refugees and immigrants to fill these dangerous and low-paid jobs. First, it was refugees from Vietnam, Laos, and Cambodia. Then the industry saw an influx of Mexican immigrants, when NAFTA led to a rapid devaluation of the peso that hit hardest in rural communities across the border. The creation of Immigration and Customs Enforcement (ICE) and a series of high-profile raids in the mid-2000s changed hiring yet again in ways that further diversified—and fractured—the meatpacking workforce. Today, meatpacking workers may be K’iche’-speaking Mayas from the central highlands of Guatemala; Salvadorans fleeing urban gangs; Karen people from Myanmar, many of whom grew up in refugee camps along the Thai border; Somalis, most of whom come from war-torn Mogadishu by way of the Dadaab refugee complex in eastern Kenya; and Yazidi from Iraq and Syria, who served as interpreters for the U.S. military.

Consumers will have to understand that the routine endangerment and abuse of these workers can no longer be the hidden cost of cheap meat. Indeed, if we can escape the stranglehold of the Big Six’s ruthless profit motive, then we can ensure fair treatment for these workers and sustainable profits for a larger group of small packers without increases in the price of food. Farmers, ranchers, and residents of rural communities must recognize that such a change will also bring them fairer livestock contracts and higher prices. They must resist the politics of division and recognize that they have common cause with meatpacking workers, even though they may look different, pray different, or speak a different language. An emergency such as the Covid-19 pandemic should make it clearer than ever that our interests and our fates are interwoven. In a just world, that would mean immediate citizenship for any undocumented immigrants who have put their lives at risk as essential workers during this pandemic. President Trump is fond of saying that this crisis is a war—that he is a wartime president and that frontline workers are warriors. Since the founding of the country, we have granted citizenship to any foreign national willing to fight on our side. If you worked at a meatpacking plant or in a farm field, on a grocery loading dock or in a restaurant kitchen, during this once-in-a-century crisis, seeing that our nation was fed, then you should be assured a share of our national future.

And, finally, as we build a new food system adapted to the demands of the future, we must seek out production methods that are not only equitable but sustainable. **Climate change** not only accelerates under conditions of monopoly food cultivation and processing but also inserts new communities of migrant workers into the food economy. Our current obstacles will only grow more unmanageable if we don’t address them now. It’s time for us to invest seriously in new ways of farming and eating that can allow us to share precious resources and live better together. It’s an admittedly formidable challenge—but it’s possible, if we open our food system to innovation and forward-thinking models of production and distribution. It’s possible if we **break up** the stunting monopolies of **big meat**.