# NEG Wiki Doc---ADA R2

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### 1NC---T

#### FTCA not antitrust --- no private cause of action or treble damage

VARNEY 10 --- CHRISTINE A. VARNEY, US Assistant Attorney General, “STATEMENT OF HON. CHRISTINE A. VARNEY, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.”, SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS of the COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED ELEVENTH CONGRESS, JUNE 9, 2010, https://www.govinfo.gov/content/pkg/CHRG-111shrg66454/html/CHRG-111shrg66454.htm

Let me also discuss the Commission's increasing use of our Section 5 unfair methods of competition authority, which allows us to go beyond the ambit of the antitrust laws to protect consumers. Congress granted us this authority in 1914, and it balanced it by limiting the remedies available under Section 5. In recent years, Section 5 has been used sparingly since lower courts in the late 1970s rejected some applications of Section 5 when the antitrust laws were viewed much more broadly and I would say in some ways too broadly.

But since that time, the courts have restricted the range of antitrust to some extent as a result of the Chicago School, which, to its credit, has emphasized rigorous economic analysis as well as efficiencies, and to some extent in reaction to the costs of class actions and private treble damage litigation. But for whatever the reason, the result of these changes has been to limit Federal enforcement agencies, which have no treble damage authority, in our efforts to protect American consumers.

Section 5, carefully applied--and it needs to be--is practically tailor-made for this situation. It can effectively protect consumers, but it is not an antitrust law so it does not by its own terms create treble damage liability. So we have broad bipartisan support within the Commission to use Section 5 in appropriate circumstances, and we are going out and re-using it.

#### Voter for limits and ground --- expanding “antitrust” to include section 5 allows the aff to defend the SQ and pivots away from treble damages --- the most controversial part of antitrust

McLaughlin 64 --- Gerald McLaughlin, Federal Judge, 3rd Circuit Court of Appeals, “New Jersey Wood Finishing Company, Plaintiff-appellee, v. Minnesota Mining and Manufacturing Company, Defendant-appellant, and Essex Wire Corp., Defendant, 332 F.2d 346 (3d Cir. 1964)”, US Court of Appeals for the Third Circuit, May 20th 1964, https://law.justia.com/cases/federal/appellate-courts/F2/332/346/326983/

N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that "persons" injured by violations "of the antitrust laws" shall be entitled to threefold damages. 15 U.S.C. § 15 (1958) "Antitrust laws" as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.3 15 U.S.C. § 12 (1958); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 78 S. Ct. 352, 2 L. Ed. 2d 340 (1958). The Sherman and Clayton Acts upon violations of which N. J. Wood's complaint is based, are "antitrust laws" within the meaning of Section 4. Other acts are not, including for our purposes, the Federal Trade Commission Act. See Samson Crane Co. v. Union National Sales, 87 F. Supp. 218 (D.C.Mass.1949).

In its scheme for the enforcement of these "antitrust laws", Congress envisaged both public and private actions. United States v. Borden Co., 347 U.S. 514, 519, 74 S. Ct. 703, 98 L. Ed. 903 (1954); United States v. Cooper Corp., 312 U.S. 600, 608, 610, 61 S. Ct. 741, 85 L. Ed. 1071 (1941); United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D.N.Y. 1949); see 2 Toulmin's Antitrust Laws, Section 16.6 P. 91 (1949); MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bulletin, P. 113, et seq. (1962). Through Section 4, the business public became an ally of government and the private antitrust suit, a substantial weapon of national antitrust policy. Cinnamon v. Abner A. Wolf, Inc., 215 F. Supp. 833, 834 (E.D. Mich. 1963), citing Report of the Attorney General's National Committee to Study the Antitrust Laws, P. 378 (1955). Congress had hoped that these private antitrust suits would supplement government actions and perhaps in some cases make them unnecessary.4

This broad plan of private and public actions is further detailed. The Sherman Act5 contemplates civil (Section 4) and criminal (Section 3) actions by the Justice Department, and treble damage suits by private parties (Section 7). 15 U.S.C. §§ 3, 4, 15 note (1958); but cf. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948). Under the Clayton Act,6 private actions may be in the form of suits for injunctive relief (Section 16) or for treble damages (Section 4). 15 U.S.C. §§ 26, 15 (1958); public actions, in the form of suits principally by the FTC and the Justice Department under Section 11 for violations of Sections 2, 3, 7 and 8 of that act. 15 U.S.C. § 21 (1958).

To be distinguished is the role of the FTC under the FTC Act.

The Federal Trade Commission was established under the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717) and invested with both adjudicatory and investigatory functions. Under Section 5 (of the FTC Act) the FTC was empowered to order the discontinuance of "unfair methods of competition" and later "unfair \* \* practices" which were declared "unlawful" by the Act. See the extensive legislative history in Judge Denison's partial dissent in L. B. Silver Co. v. Federal Trade Commission, 289 F. 985, 992-998 (6 Cir. 1923); Federal Trade Commission v. Klesner, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 647, 51 S. Ct. 587, 75 L. Ed. 1324 (1931). Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent the use of such practice before it worked a Sherman violation. See Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394, 73 S. Ct. 361, 97 L. Ed. 426 (1953); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648, 51 S. Ct. 587, 75 L. Ed. 1324 (1931); see Beer, Federal Trade Law and Practice (1942) P. 76-77. The Sherman Act was to serve as a guide for the Commission, as a "declaration of policy", to be considered in determining what constituted an unfair method of competition. Federal Trade Commission v. Beech Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922); Standard Oil Co. v. Federal Trade Commission, 282 F. 81, 86-87 (3 Cir. 1922) affirmed 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746 (1923).

Within this area of "unfair methods of competition", the FTC Act and the Clayton Act overlap. At the time of the enactment of the Clayton Act, it was believed that its specific prohibitions particularly Section 2 and Section 3 (15 U.S.C. §§ 13, 14 (1958)) would be covered by Section 5 of the FTC Act. However, Congress, by declaring these practices unlawful specifically in the Clayton Act, took away from the Commission its informed judgment respecting them.7 These "unfair methods of competition (later amended to include "unfair \* \* \* practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design. While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and 8 of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are "interlaced" remedially as well as substantively evincing a Congressional desire for a "cumulative remedy" for the threats and dangers to trade and competition. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 694-695, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); United States v. Borden Company, 347 U.S. 514, 518, 74 S. Ct. 703, 98 L. Ed. 903 (1954). 51 Cong.Rec. 16274-16275 (1914). The question here presented concerns in part the "cumulative remedy" Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7. N. J. Wood claims that, by virtue of the FTC proceeding, it is entitled to the benefits of Section 5 of the Clayton Act. Section 5 is auxiliary to Section 4 and provides for the tolling of the statute of limitations in favor of potential private suitors during the pendency of certain government antitrust suits. 3M, however, contends that the FTC proceeding is not a proceeding instituted by the United States within the meaning of Section 5.

### 1NC---CP---Section 5

#### The United States federal government should establish interpretive rules and policy statements prohibiting <x behavior> under Section 5 of the Federal Trade Commission Act, and enforce the prohibitions accordingly.

#### Interpretive rules and policy statements avoid rollback AND solve the case.

Pierce 21 (Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University School of Law; “Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?;” 2021, GW Law School Public Law and Legal Theory Paper No. 2021-42, <https://ssrn.com/abstract=3933921>, TM) [language modified, denoted by brackets]

The FTC does not need to use the notice and comment process to accomplish that worthy goal, however. It can issue an interpretive rule in which it announces and explains why it interprets section five of the FTC Act to ban the inclusion of non-compete clauses in contracts to employ low paid employees. It can couple that interpretive rule with a general statement of policy in which it announces its intention to take aggressive action against any employer who acts in a manner that is inconsistent with its interpretation of the Act. It can follow those two actions with a couple of well-chosen, [high profile] ~~visibility~~ enforcement actions against firms that act in ways that are inconsistent with its interpretation of the Act.

That approach to the problem would be as effective as issuance of a legislative rule, and it would have major advantages over issuance of a legislative rule. There is no doubt that the FTC has the power to issue interpretive rules and policy statements to implement section five of the FTC Act. It has issued scores of interpretive rules and policy statements for many decades. The FTC can issue interpretive rules and policy statements in days, in contrast to the years required to complete a notice and comment rulemaking. There is also no doubt about the FTC’s authority to use adjudication to implement section five. It has exercised that power for over a century. The enforcement actions would be easy to win, given the powerful empirical evidence that non-compete clauses cause significant harm to the performance of both labor markets and product markets and that non-compete clauses in the contracts of low paid employees have no plausible offsetting benefits. In a matter of months, the FTC could use the combination of an interpretive rule, a policy statement, and a couple of high visibility enforcement actions to ban non-compete clauses in the contracts of low paid workers.

By contrast, the notice and comment proceeding required to issue a legislative rule would take years to complete. Once the FTC issued such a rule, it would be subjected to judicial review to determine whether the FTC has the power to issue legislative rules to implement section five of the FTC Act. Since the FTC has never previously attempted to exercise that power, there is a good chance that the issue would go all of the way to the Supreme Court. That could delay the effect of the rule for many years. If the FTC lost in that test of its authority, it would have wasted many years of hard work and a great deal of its scarce enforcement resources engaging in an exercise in futility.

### 1NC---DA

#### Momentum for Manchin BBB now but its close

Everett & WU 3/02 John Burgess Everett is the co-congressional bureau chief for POLITICO, Nicholas Wu is a congressional reporter at POLITICO. “Dems agonize over Manchin's wish list: Taxes, prescription drugs, climate cash.” 03/02/2022. <https://www.politico.com/news/2022/03/02/joe-manchin-democrat-bill-taxes-00013246> {DK}

Joe Manchin is once again setting the agenda for **Dem**ocrat**s** and says he’s willing to make a deal. They’re **listening — cautiously**. Hours after President Joe Biden laid out what he hoped to salvage from Democrats’ defunct “Build Back Better” social spending plan, Joe Manchin quickly assembled a counteroffer. It might amount to deja vu for Democrats, many of whom still feel burned from last year’s debacle, yet many in the party are willing to entertain any shot they have to unify while they still have control of Congress. “Here’s the thing. I’ve always been open to talking to people okay? But they just don’t want to hear,” Manchin said in a Wednesday interview. The West Virginia centrist laid out a basic party-line package that could win his vote in the interview, to lower the deficit and enact some new programs — provided they are permanently funded. It may be Democrats’ best and last chance to get at least some of their major domestic priorities done before the midterm election, even as some leading liberals acknowledged any potential deal would not come close to the $1.7 trillion package Manchin spurned in December. Manchin said that if Democrats want to cut a deal on a party-line bill using the budget process to circumvent a Republican filibuster, they need to start with prescription drug savings and tax reform. He envisions whatever revenue they can wring out of that as split evenly between reducing the federal deficit and inflation, on the one hand, and enacting new climate and social programs, on the other — “to the point where it’s sustainable.” “If you do that, the revenue producing [measures] would be taxes and drugs. The spending is going to be climate,” Manchin said. “And the social issues, we basically have to deal with those” with any money that’s left, he added. As far as whether he thinks his party finally understands his parameters for joining the talks, he said that Democrats “know where I am. They just basically think that I’m going to change.” Negotiating with Manchin isn’t exactly Democrats’ favorite topic after nearly a year of back and forth. Asked about whether he can envision a passable deal, Sen. Mark Warner (D-Va.) responded: “I was hoping you would were going to, like, ask me to expound about Ukraine.” “I’ve got a lot of respect for him. And hope springs eternal,” Warner said. The two are often aligned in centrist deal-making groups. Manchin, who also chairs the Senate Energy Committee, said that the climate portion of any theoretical bill will look different now that Russia is invading Ukraine. He’s calling for the U.S. to ban oil imports from Russia and ramp up domestic energy production, including fossil fuels. He would support big clean energy investments in a potential deal, he said, but wants domestic oil, gas and coal production to still be a big part of the mix. “You want to be able to defend your people, have reliable, dependable and affordable power? You have to use ‘all of the above,’” Manchin said, defending his support for clean energy investments. “They say ‘Manchin doesn’t care … he’s killing the environment.’ I’m not killing anything.” Though he prefers everything in Congress to be bipartisan, Manchin said he has “come to that conclusion” that changing the tax code to make the rich and corporations pay their fair share can only be done with Democratic votes. To enact Manchin’s vision, Democrats would also have to bargain with Sen. Kyrsten Sinema (D-Ariz.) who last year steered the party toward surtaxes and corporate minimum taxes — and away from raising individual and corporate tax rates. Sinema said Wednesday that the tax package negotiated last year, which shied away from raising those rates, would more than pay for what Manchin is talking about. “Any new, narrow proposal — including deficit reduction — already has enough tax reform options to pay for it. These reforms are supported by the White House, target tax avoidance, and ensure corporations pay taxes, while not increasing costs on small businesses or everyday Americans already hurting from inflation,” said Hannah Hurley, a spokesperson for Sinema. Progressives might take a while to warm to it. Asked about Manchin’s hopes of diverting new revenues to deficit reduction and inflation, Sen. Bernie Sanders (I-Vt.) griped: “I don’t care what he wants. We’re talking about what the American people want. He doesn’t like it, he can vote against it, that’s his business.” And Rep. Barbara Lee (D-Calif.) scoffed, saying it would not satisfy many of the House’s frustrated liberals. She seemed more interested in still trying to change Manchin’s mind on the expanded child tax credit and other domestic programs than in accepting his blueprint. “I would hope he would reconsider, and realize how many people are being left behind,” Lee said. “We’ve got to keep going and try to get everything that we can get.” Despite some lawmakers’ aggravation with Manchin, other **progressives** were willing to entertain just about whatever they could get through with only 50 Senate Democrats and a slim House majority. After all, the midterms are now eight months away; recreating the momentum to put a big bill on the floor may take months. Sen. Elizabeth Warren (D-Mass.) put it this way: “There’s so much that we all agree on, that we ought to be able to get a deal.” And Rep. Katie Porter (D-Calif.), the deputy chair of the Progressive Caucus, said she’s “open” to Manchin’s energy proposal provided “it’s paired with a real meaningful commitment, and actual movement.” Biden’s State of the Union address called for congressional action on some of the individual portions of the wide-ranging social spending measure that the House passed last year, including drug pricing, child care, tax hikes on the wealthy and climate change. The momentum that Democrats had mustered for their trillion-dollar-plus proposal has mostly evaporated, and some lawmakers are increasingly open to slimmed-down legislation or even standalone bills to address their policy priorities.

**The plan trades-off**

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

14. Similarly, **despite bipartisan murmurs** about competitive issues, the potential in a **closely divided** Congress that **any** major initiatives will survive is **limited at best**. In part the challenge here is how the Biden administration will **rank its commitments**. If it were to make reform of competition law a major and primary commitment, it would have to **trade off other goals**, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to **give up** stricter competition rules in order to achieve **other legislative priorities**. 15. **A**nother key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not **entirely encouraging**. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating **agriculture** who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a **pessimistic prognostication** for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a **willingness** to take **major enforcement risks**, to **invest significant political capital** in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The **early signs** are that the new administration will be **no more committed** to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Extinction from climate

Åberg et al 21 (Anna Åberg, research analyst in the Environment and Society Programme of Chatham House, formerly served as desk officer at the Swedish Ministry for Foreign Affairs, MSc Development Studies, London School of Economics and Political Science, BSc Business and Economics, and Politics and Economics, Lund University; Antony Froggatt, deputy director and senior research fellow in the Environment and Society Programme of Chatham House; and Rebecca Peters, Queen Elizabeth II Academy Fellow in the Environment and Society Programme of Chatham House, doctoral candidate at the University of Oxford with the UK Foreign, Commonwealth and Development Office REACH Water Security programme, MSc Development Economics, MSc Water Science and Policy, Marshall Scholar; “Raising climate ambition at COP26,” Chatham House (the Royal Institute of International Affairs, London) Research Paper, October 2021, https://www.chathamhouse.org/sites/default/files/2021-10/2021-10-05-raising-climate-ambition-at-cop26-aberg-et-al-pdf.pdf)

We really are out of time. We must act now to prevent further irreversible damage. COP26 this November must mark that turning point.14 UN Secretary-General António Guterres, 16 September 2021 The 26th Session of the Conference of the Parties (COP26) to the UNFCCC is to be hosted by the UK, in partnership with Italy. After a year-long delay, the conference is now scheduled to take place in Glasgow, Scotland, between 31 October and 12 November 2021.15 Organizing an in-person event during a pandemic presents a substantial challenge. The UK government is providing vaccines to accredited delegations, but doses only started to be delivered at the beginning of September 2021 and restrictions, such as quarantine requirements,16 pose further obstacles to participation.17 An alliance of 1,500 civil society organizations are among those calling for a second postponement of the COP, citing concerns about a lack of plans to enable safe and inclusive participation of delegates from, not least, the Global South.18 The UK government is, however, adamant that it will proceed with the conference as planned.19 The pandemic has changed understandings of global risks, the interconnected nature of economies and the role of governments in preparing for and responding to existential threats. This may provide impetus for accelerated climate action. The postponement of COP26 itself has been of considerable significance. Over the past year, the global politics of climate change have shifted, with the election of President Joe Biden and the announcement of China’s climate neutrality target being particularly important. Moreover, the economic recovery packages that are being rolled out to counter the economic consequences of the pandemic present an opportunity to accelerate the green transition.20 To date, however, the members of the G20 have prioritized investments in fossil fuels above those in clean energy,21 and only 10 per cent of the global expenditure is estimated to have been allocated to projects with a net positive effect on the environment.22 COP26 is the most important climate summit since COP21 in Paris, and it differs from earlier COPs in several ways: it is the first test of the ambition-raising ratchet mechanism and marks a shift from negotiation to implementation. An ambitious outcome at COP26 requires substantial action to be taken before the summit – and outside the remits of the UNFCCC process – as well as at the actual conference. Human activity has already caused the global average temperature to rise by around 1.1°C above pre-industrial levels, and every additional increase in warming raises the risks for people, communities and ecosystems. To avoid the most catastrophic climate change impacts, it is essential world leaders make every effort to limit warming to 1.5°C. Working group I of the Sixth Assessment Report of the IPCC shows it is still possible to keep warming to this critical threshold, but that unprecedented action must be taken now.23 As John Kerry, special presidential envoy for climate, stated, ‘[t]his test is now as acute and as existential as any previous one’.24 COP26 has a critical role in getting the world on track for a 1.5°C pathway, and in supporting those most affected by climate change impacts. It also constitutes a key test for the credibility of the Paris Agreement and the UNFCCC process overall. But what can and should the Glasgow summit achieve more specifically? The objective of this paper is to discuss what a positive outcome at COP26 would entail, with the dual aims of encouraging increased ambition and contributing to an informed public debate. The main argument put forth is that substantial progress must be made in three main areas, namely on increasing the ambition of NDCs; enhancing support to and addressing concerns of climate-vulnerable developing countries; and advancing the Paris Rulebook to help operationalize the Paris Agreement. COP26 is undoubtedly hugely significant and national government pledges in the run-up to Glasgow will contribute to shaping the level of future GHG emissions. However, the event is not only critical in terms of reaching an ambitious outcome on climate, it is also an important opportunity to judge the level of confidence in the international process and the UNFCCC. 02 Increasing the ambition of the NDCs A key element of COP26 will be the level of ambition of the revised NDCs put forward by governments to the UNFCCC and the extent to which these keep the 1.5°C global warming target agreed in Paris within reach. According to the United Nations Environment Programme (UNEP), greenhouse gases (GHGs) in 2019 totalled 52.4 gigatonnes of CO₂ equivalent (GtCO₂e)25 of which the majority was CO₂ (38 Gt), then methane (9.8 Gt), nitrous oxide (2.8 Gt) and F-gases (1.7 Gt).26 The same year, GHG emissions were approximately 59 per cent higher than in 1990 and 44 per cent higher than in 2000.The six largest emitters – together accounting for 62 per cent of the global total – were China (26.7 per cent), the US (13 per cent), the EU (8 per cent), India (7 per cent), Russia (5 per cent) and Japan (3 per cent) (see Figure 1).27 **[FIGURE 1 OMITTED]** According to UNEP, the implementation of the first round of NDCs would result in an average global temperature increase of 3°C above pre-industrial levels by the end of the century, with further warming taking place thereafter. If these NDC’s were fully implemented, emission levels are expected to be in the range of 56 GtCO2e (with unconditional NDCs) to 53 GtCO₂e (with conditional NDCs) by 2030.28 To align with a 2°C pathway, the ambition of the second round of NDCs would need to triple relative to the original targets, leading to emissions levels of around 41 GtCO₂e in 2030. Alignment with the 1.5°C target would require a fivefold increase in ambition, leading to emission levels around 25 CO₂e in 2030 (see Figure 2).29 **[FIGURE 2 OMITTED]** The Paris Agreement states that parties shall communicate an NDC every five years,30 and that each submission shall constitute a progression in terms of ambition.31 Parties conveyed their first round of targets prior to COP21, and were due to submit new or updated plans in 2020.32 COP26, originally scheduled for November 2020, would then take stock of the collective level of ambition of these plans vis-à-vis the temperature targets of the Paris Agreement. The postponement of the COP by one year has in practice (albeit not formally) extended the deadline for submitting NDCs to ‘ahead of COP26’. Where do we stand? The delay of COP26 has given countries more time to put forward NDCs and longer-term decarbonization targets. This effort gained significant traction when China pledged to achieve carbon neutrality by 2060 and peak its emissions before 2030, during the general debate of the 75th Session of the UN General Assembly (UNGA) in September 2020.33 Then, in November 2020, the UK submitted its NDC, pledging a 68 per cent reduction in emissions by 2030 (based on 1990 levels)34 and later added a 2035 target of 78 per cent.35 The EU has, moreover, put forward a 55 per cent reduction target relative to 1990 levels,36 with some countries within the bloc going even further, including Germany, which agreed on a 65 per cent reduction target.37 The election of President Biden has fundamentally changed the US’s position on climate change, leading to, among other things, the country re-joining the Paris Agreement.38 At a specially convened Leaders Summit on Climate – hosted by the US – the Biden administration presented an NDC with an emission reduction target of 50–52 per cent39 (based on 2005 levels, which is equivalent to 40–43 per cent below 1990 levels40). During the summit, countries including Canada, Japan and others pledged more ambitious NDC targets.41 While there is more pressure on governments to act on climate change, due to its increasingly devastating impacts, there are also more opportunities for carbon mitigation through available alternative technologies and systems, as well as falling renewable energy costs (see Box 2). Table 1 details the NDC targets put forward by G20 countries prior to COP21 in Paris and the extent to which these have since been revised. The updated NDCs have been assessed by the independent body, Climate Action Tracker, which has analysed to what extent the NDCs align with the 1.5°C pathway. The analysis also looks at domestic policies and actions, which are important as they provide an indication of whether governments are following through on their promises. **[TABLE 1 OMITTED]** As of September 2021, 85 countries and the EU27 had submitted new or updated NDCs, covering around half of global GHG emissions. Some parties, like China and Japan, have proposed new targets but not yet submitted them formally while around 70 parties – including G20 countries like India, Saudi Arabia and Turkey – have neither proposed nor communicated a revised NDC target. Several parties have, moreover, submitted new NDCs without increasing ambition. These include Australia, Brazil, Indonesia, Mexico, New Zealand, Russia, Singapore, Switzerland and Vietnam.42 In some of these cases, adjustments in baselines mean that ambition has de facto decreased (Brazil and Mexico).43 Analysis published by Climate Action Tracker in September 2021 shows that the NDC updates only narrow the gap to 1.5°C by, at best, 15 per cent (4 GtCO₂e). This leaves a large gap of 20–23 GtCO₂e.44 Similar analysis from the UN underscores the need for further NDC enhancements.45 If all current NDCs are implemented, total GHG emissions (not including emissions associated with land use) in 2030 are projected to be 16.3 per cent higher than in 2010, and 5 per cent higher than in 2019. The emissions of the parties that have submitted new or updated NDCs are, however, expected to fall by around 12 per cent by the end of the decade, compared to 2010 levels. The UN report also highlights the importance of providing support to developing countries, as many of these have submitted NDCs that are – at least in part – conditional on the receipt of additional financial resources, capacity-building support, and technology transfer, among other things. If such support is forthcoming, global emissions could peak before 2030, with emission levels at the end of this decade being 1.4 per cent lower than in 2019. However, even the full implementation of both the unconditional and conditional elements of the NDCs would lead to an overshoot of the targets of the Paris Agreement – as alignment with 1.5°C and 2°C require cuts of 45 per cent and 25 per cent, respectively, by 2030 (relative to 2010 levels).46 A large number of countries are also making more long-term net zero emissions or carbon neutrality pledges. As of September 2021, just over 130 countries had made such commitments, but not all of them have formally presented them to the UNFCCC.47 Examples include large economies like China, Japan, Brazil, the US, South Africa, South Korea, and the EU, as well as climate-vulnerable developing countries like the Marshall Islands, Barbados, Kiribati and Bangladesh.48 Climate Action Tracker estimates that if these long-term targets – and the NDCs – are fully implemented, global warming could be limited to 2°C.49 Most of the net zero pledges are, however, formulated in vague terms that are not consistent with good practice. The long-term targets are, moreover, only credible if they are backed up by ambitious and robust 2030 NDCs,50 given that substantial cuts in emissions must occur this decade. An additional concern that has been raised when it comes to net zero pledges is that they may encourage reliance on negative emissions technologies, such as bioenergy with carbon capture and storage (BECCS), which have still to be tested at scale to assess land requirement, efficiency and economic viability.51 **[BOX 1 OMITTED]** The challenge of closing the gap Bridging the gap between current NDCs and targets that would keep warming to 1.5°C is a defining challenge for governments ahead of COP26. As mentioned, UNEP estimates that the ambition of 2030 targets would need to be enhanced fivefold vis-à-vis pledges made in 2015 to align with a 1.5°C pathway.53 Several large emitters – including the US and the EU – have now submitted their new or updated NDCs. According to Climate Action Tracker, the UK’s target is considered to be compatible with a 1.5°C pathway, while those of the US, EU, Japan and Canada are classified as ‘almost sufficient’.54 It is critical that all countries that have not yet submitted a new or updated NDC do so, and that these pledges are aligned with 1.5°C. It is equally important that countries that have submitted unambitious NDCs revisit their targets. The Paris Agreement states that parties may revise existing NDCs at any time, if the purpose is to enhance ambition.55 The G20 countries have a particularly important role to play. In July 2021, the Italian G20 presidency hosted the first ever G20 Climate and Energy Ministerial meeting. In the final communique the countries in the G20 stated that they ‘intend to update or communicate ambitious NDCs by COP26’.56 The importance of action from all members of the G20 is clear, as they collectively account for 80 per cent of global emissions and as UN Secretary-General António Guterres said, ‘there is no pathway to this [1.5°C] goal without the leadership of the G20’.57 With only a few weeks to go it is, however, unlikely that the 20–23 GtCO₂e gap in targets will be closed by COP26. At the UK-hosted COP26 ministerial in July, a number of ministers stressed that parties would need to respond to any gap remaining by the Glasgow conference. Some suggested that such a response could include a ‘clear political commitment’ to keep 1.5°C within reach, a recognition of the gap, and a plan to bridge it. More specific proposals of actions that could be taken, as part of the response, to keep the 1.5°C pathway alive were also discussed. Suggestions included, but were not limited to, encouraging countries whose NDCs are not consistent with 1.5°C to bring their 2030 targets in line before 2025 (when the third round of NDCs are due); calling for parties to submit concrete long-term strategies for reaching net zero; and/or sending clear signals to markets through actions like phasing out unabated coal, carbon pricing, fossil fuel subsidy reform, nature-based solutions, and decarbonizing transport.58 Achieving a positive COP26 outcome The ultimate benchmark for a high ambition outcome at COP26 is whether the new or updated NDCs are ambitious enough to align with a 1.5°C pathway. For many communities and ecosystems, the threat of different climate impacts between 1.5°C and 2°C – not to mention 3°C, 4°C or 5°C – is existential. Each increment of warming is anticipated to drive increasingly devastating and costly impacts, including extreme heatwaves, rising sea levels, biodiversity loss, reductions in crop yields, and widespread ecosystems damage including to coral reefs and fisheries.59 Keeping the goal of 1.5°C within reach will require substantial action this decade. Long-term targets to achieve net zero emissions or carbon neutrality have the potential to be powerful drivers of decarbonization but need to be supported by ambitious NDCs as well as concrete policies and sufficient investment. Should we reach COP26 without sufficient ambition on NDCs, parties would need to present a plan for how ambition will be raised in the early 2020s. This could include a COP decision or a political statement underscoring the need to keep warming to 1.5°C and inviting parties to revisit their NDCs earlier than the Paris timetable dictates (for instance in 2023 instead of 2025).60 To support more ambitious action, countries should look to expand international collaboration and accelerate decarbonization in key sectors. At COP26, parties can help boost the credibility of their pledges by showcasing policies, measures and sector initiatives that will accelerate decarbonization, including on the phase out of unabated coal and the increased use of electric vehicles (see Box 3). **[BOX 2 OMITTED] [FIGURE 3 OMITTED]** In the run-up to COP26, the UK government is mobilizing its counterparts and non-state actors to drive accelerated action on phasing out the use of unabated coal,65 accelerating the deployment of electric vehicles,66 protecting and restoring nature (nature-based solutions67), and aligning financial flows with the goals of the Paris Agreement.68 The role of the private sector is crucial in the transition to net zero economies and is recognized within the framework of the UNFCCC, as they can deliver funding, innovation and technology deployment at a pace and scale beyond that of most governments (see Box 1). It is hoped that some of these initiatives will lead to plurilateral agreements at or ahead of COP26, which could enhance the credibility of mitigation pledges and help keep the 1.5°C target within reach. Being able to showcase a package consisting of ambitious NDCs, plurilateral deals, and national policies at COP26 could generate positive momentum and create a sense of inevitability around the transition to net zero societies. **[BOX 3 OMITTED]** 03 Support to climate-vulnerable developing countries Increased action on climate finance, adaptation, and loss and damage is critical for supporting climate-vulnerable developing countries, strengthening trust and raising ambition on mitigation. The year 2020 was one of the warmest on record.80 As COVID-19 ravaged the world, extreme weather events continued to cause severe devastation. In Bangladesh, torrential rains submerged a quarter of the country,81 resulting in hundreds of deaths, mass displacement and damage to more than a million homes.82 Record-breaking floods in Sudan83 and Uganda84 also displaced hundreds of thousands, while super cyclone Amphan raged across South Asia.85 Extreme weather events were also a defining feature of the summer of 2021. An unprecedented heatwave may have killed almost 500 people in British Columbia,86 as well as a billion marine animals along the Canadian coastline.87 In the Chinese province of Henan people drowned in the subway after a year’s worth of rain fell in just three days.88 Germany and Belgium also experienced death and destruction as a result of severe flooding,89 while villages in Greece burned.90 The impacts of climate change are striking even harder than many anticipated,91 and as temperatures continue to rise extreme weather events are increasing in both frequency and intensity. Limiting global warming to 1.5°C is key to avoiding the most catastrophic events, but substantial measures must also be undertaken to adapt to climate change impacts and build resilience. As the summer of 2021 shows, no country is spared. It is, however, those who have emitted the least that are most at risk,92 and in many countries that are disproportionately affected by climate change – such as the least developed countries (LDCs)93 – financial constraints impede their ability to invest in adaptation, build resilience and deal with loss and damage.94 COVID-19 has aggravated this challenge: while industrialized countries have implemented unprecedented stimulus measures to support their economies – and vaccinated large parts of their populations – many developing countries remain in the midst of a health and economic catastrophe. Scaled up action on climate finance, adaptation and loss and damage are – in addition to increased ambition on mitigation – key priorities for climate-vulnerable nations ahead of COP26. Raised ambition and concrete delivery in these areas are critical for supporting those at the frontline of climate change, key to building trust, and could encourage some parties to raise the ambition of their NDC pledges. The implementation of many NDCs is, in addition, at least partly conditional upon receiving increased levels of finance, as well as other types of support.95 Honouring the $100 billion goal In 2009, developed countries committed to mobilizing $100 billion per year by 2020 for climate mitigation and adaptation in developing countries.96 This pledge was subsequently formalized in the Cancun Agreements in 201097 and reaffirmed in the Paris Agreement in 2015. The resources provided were to be ‘new and additional’98 and come from a variety of public and private sources.99 The $100 billion goal is a core element of the bargain underpinning the Paris Agreement.100 While achieving the mitigation and adaptation goals of the agreement will require trillions of dollars in investment – of which most will need to come from the private sector – the delivery of the $100 billion is critical to building trust between developed and developing countries,101 and is important for raising ambition on mitigation.102 The OECD estimates that $79.6 billion was mobilized in 2019, which is the most recent year for which official figures are available.103 In 2018, the figure was $78.9 billion, and in 2017 it was $71.2 billion.104 Though the verified figures for 2020 will not be available until 2022, it is clear the target was missed.105 Developed countries have, moreover, not yet been able to show that the pledge will be honoured in 2021, nor demonstrate conclusively how it will be met in the 2022–24 period.106 The pledge by developed nations to mobilize $100 billion to developing nations by 2020 is a commitment made in the UNFCCC process more than a decade ago. It’s time to deliver. How can we expect nations to make more ambitious climate commitments for tomorrow if today’s have not yet been met?107 Patricia Espinosa, 23 July 2021 How the goal is achieved matters. Only around one-fifth of bilateral climate finance is allocated to the LDCs,108 and locally led projects receive low priority.109 There are also concerns related to overreporting and lack of additionality. Oxfam estimates, for instance, that 80 per cent of public climate finance provided over the 2017–18 period took the form of loans or other non-grant instruments, and that the actual grant equivalent only accounted for around half of the total amount of finance reported.110 Furthermore, the Center for Global Development has found that almost half of the climate finance reported between 2009 and 2019 cannot be considered ‘new and additional’.111 There is, finally, an urgent need to close the adaptation finance gap (see next section),112 and facilitate access to finance.113 It is widely recognized that honouring the $100 billion goal is a prerequisite for success at COP26.114 The hitherto failure of developed countries to provide clarity on the issue is creating mistrust between countries,115 with the director of the International Centre for Climate Change and Development (who is also an adviser to the climate-vulnerable countries) conveying that, ‘if the money is not delivered before November, then there is little point in climate-vulnerable nations showing up in Glasgow to do business with governments that break their promises’.116 The chair of the LDC Group has also made it clear that, ‘[t]here will be no COP26 deal without a finance deal’. 117 The G7 countries play a critical role in mobilizing the $100 billion,118 and there was a hope that G7 leaders would increase their bilateral commitments substantially – and provide clarity on the $100 billion119 – when they convened in Cornwall in June 2021. Some new pledges were made. Canada, for instance, committed to doubling its climate finance through to 2025 (to CAD $5.3 billion), and Germany pledged to increase its annual commitments from €4 billion to €6 billion by 2025 at the latest.120 The G7 members collectively also committed to ‘each increase and improve’ their public climate finance contributions, and announced they would develop a new international initiative – ‘Build Back Better for the World’121 – the details of which have yet to be fleshed out. However, many developing country officials – and many observers worldwide – expressed disappointment with the summit outcome, with the climate minister of Pakistan describing the G7 commitments as ‘peanuts’.122 Several announcements on climate finance were also made during the 76th Session of the UNGA in September 2021. Most importantly, President Joe Biden pledged to double US climate finance (again) from the previously committed $5.7 billion to $11.4 billion per year by 2024. Actual delivery is, however, contingent on congressional approval.123 The EU – which already contributes around $25 billion in climate finance per year – also stepped up, announcing an additional €4 billion until 2027,124 while Italian Prime Minister Mario Draghi conveyed that Italy would shortly be announcing a new climate finance commitment.125 Though the US pledge in particular has been described as a critical step forward that ‘puts the $100 billion within reach’,126 more will need to be done.127 $100 billion is a bare minimum. But the agreement has not been kept. A clear plan to fulfil this pledge is not just about the economics of climate change; it is about establishing trust in the multilateral system.128 António Guterres, 9 July 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

‘99% about FTC Chair Lina Khan’

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

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

#### Plan expands opposition, derailing confirmation

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

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters.107 Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. 108 Many matters involved powerful economic interests,109 and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of intellectual property. 110 In 1974, the agency also initiated a program that required certain large firms to provide “line-of-business” data concerning a range of performance indicators.111

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.112 Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements.113 The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.114

As a group, the FTC’s competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency’s actions in court and before Congress. 115 The complaints of industry resonated with a large, powerful bipartisan coalition of legislators116 who criticized the Commission’s activism, proposed various measures to curb the agency’s authority, 117 and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act). 118 In 1980, bitter opposition to elements of the FTC’s competition and consumer protection programs led Congress to allow the FTC’s funding to lapse, forcing the agency to temporarily cease operations. 119 Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency’s funding. In January 1981, David Stockman, Ronald Reagan’s first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC’s competition policy program.120

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency’s choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources.121 Many legislators complained that the agency had disregarded the legislature’s preferences and used its powers in ways that Congress never contemplated to fall within the FTC’s remit.122 As Congress considered bills in 1979 to limit the Commission’s powers, Congressman William Frenzel captured the prevailing legislative mood:

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

Ignoring Congress can be a virtue, but the FTC’s excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.123

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

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less-flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency’s unauthorized adventurism. Senator Howard Cannon explained: “The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies.”125

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency’s competition mission. Stockman said, “ . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.”126

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC’s power to order divestiture or other forms ofstructural relief in non-merger cases.127 This was a shot across the bow of the FTC’s pending “shared monopoly”128 cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition.129 Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC’s power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.130

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient (“rogue”) but crazy (“insane”), as well.131 Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, “is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.” 132 David Stockman’s initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC “is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”133

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC’s activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively.134 Leading members of Congress demanded that the agency transform its competition and consumer programs or face extinction.135

Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency’s appetite to undertake ambitious, risky projects—to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency’s elastic powers innovatively. Congress’s admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings.136 During hearings in 1970 to confirm Caspar Weinberger to be the Commission’s new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to “maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well.”137 In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash—including from Congress—that would emerge as the FTC went about “expanding” its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform “tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.”138

Weinberger’s successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission’s powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks.139 In his appearances as FTC chair before congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick’s first appearance before the Commission’s Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

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

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing. I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . . 140

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had “responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States.” 141 Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency’s back: “[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require.”142 McGee closed the proceedings with militant instructions:

“Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing.”143

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

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric. 144

With evident approval, Moss recounted how the FTC had “stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise.” 145 The members of the Senate Commerce Committee, Moss concluded, “consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal.” 146 Member after member of the Commerce Committee echoed Moss’s message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, “I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned.”147

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying “to make the most of that other resource given to us by Congress – our statutory powers.” 148 Weinberger said the Commission had “encouraged the staff to make recommendations to us which will probe the frontiers of our statutes,” had made progress in “[p]robling the outer limits” and “exploring the frontiers” of the agency’s authority, and had shown it “is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices.”149 In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was “moving into ‘high gear’ in the task of preserving and promoting competition in the American economy.”150 He said he and his fellow board members “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.”151

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal152 and petroleum refining industries.153 With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies.154 The Joint Committee’s chairman, Senator William Proxmire, told Engman “the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence.”155 Perhaps astonished to hear that cases to break up the nation’s leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, “The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition.”156

Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. 157 Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors.158 The Commission’s decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands.159 In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry.160 Here, also, the agency’s decision to prosecute the shared monopolization case against the country’s leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems.161 In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.162

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC’s activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC should do and how it should do it. As described below in Section IV.D., 163 that change in legislative temperament and the response by Congress to industry backlash against the FTC’s program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.164

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was “insane.” Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel.165 As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases).166 The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.167 In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

Another focal point for attention in assessing the FTC’s performance in the 1970s was the quality of its substantive agenda. Was the FTC’s substantive program in the 1970s “insane”? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures.168 Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC’sflaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency’s improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC’s knowledge in the 1970s of the positive record of its past enforcement experience.169

B. The Inadequate and Misdirected Enforcement Activity Narrative

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

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration – a period characterized by what one journalist described as an “almost total abandonment of antitrust policy.” 170 In 1987, in discussing Reagan-era federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced “the most lenient antitrust enforcement program in fifty years.” 171 Professor Milton Handler remarked that in the Reagan era “a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free.” 172 Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, “enforcement ceased.”173

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party’s nomination for the presidency, Barack Obama said the George W. Bush administration “has what may be the weakest record of antitrust enforcement of any administration in the last half-century.” 174 The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.175

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe.176 After noting that for most of the 20th century “antitrust enforcement waxed or waned depending on the administration in office,” Professor Robert Reich recently wrote that “after 1980 it all but disappeared.”177 He added that Presidents Bill Clinton and Barack Obama “allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated.” 178

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

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

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s.179 A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.180

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC.181 The Reagan administration is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. 182 Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.183

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. 184 The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action.185 The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School’s concern that private rights of action over-deter legitimate business conduct by dominant firms.186 This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.187

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots.188 More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC’s stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.189

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

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

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

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

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

A FRAGILE SYSTEM

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

FARMERS AND FIELD HANDS

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

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

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

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

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

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

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

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

AN INTRICATE NETWORK

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

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

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

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

MONOCULTURE: A LACK OF DIVERSITY

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

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

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

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

THREATS

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

THE MEAT LOCKER: WHERE’S THE BEEF?

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

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

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

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

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

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

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

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

ON FOOD STRATEGY: A MILITARY PERSPECTIVE

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

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

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

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

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

TO WHAT END

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

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

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

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

#### Extinction

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

The United States faces many threats to our National Security. These threats include continuing wars with extremist elements such as ISIS and potential wars with rogue state North Korea or regional nuclear power Iran. The heated economic and diplomatic competition with Russia and a surging China could spiral out of control. Concurrently, we face threats to our future security posed by growing civil strife, famine, and refugee and migration challenges which create incubators for extremist and anti-American government factions. Our response cannot be one dimensional but instead must be a nuanced and comprehensive National Security Strategy combining all elements of National Power including a Food Security Strategy. An American Food Security Strategy is an imperative factor in reducing the multiple threats impacting our National wellbeing. Recent history has shown that reliable food supplies and stable prices produce more stable and secure countries. Conversely, food insecurity, particularly in poorer countries, can lead to instability, unrest, and violence. Food insecurity drives mass migration around the world from the Middle East, to Africa, to Southeast Asia, destabilizing neighboring populations, generating conflicts, and threatening our own security by disrupting our economic, military, and diplomatic relationships. Food system shocks from extreme food-price volatility can be correlated with protests and riots. Food price related protests toppled governments in Haiti and Madagascar in 2007 and 2008. In 2010 and in 2011, food prices and grievances related to food policy were one of the major drivers of the Arab Spring uprisings. Repeatedly, history has taught us that a strong agricultural sector is an unquestionable requirement for inclusive and sustainable growth, broad-based development progress, and long-term stability. The impact can be remarkable and far reaching. Rising income, in addition to reducing the opportunities for an upsurge in extremism, leads to changes in diet, producing demand for more diverse and nutritious foods provided, in many cases, from American farmers and ranchers. Emerging markets currently purchase 20 percent of U.S. agriculture exports and that figure is expected to grow as populations boom. Moving early to ensure stability in strategically significant regions requires long term planning and a disciplined, thoughtful strategy. To combat current threats and work to prevent future ones, our national leadership must employ the entire spectrum of our power including diplomatic, economic, and cultural elements. The best means to prevent future chaos and the resulting instability is positive engagement addressing the causes of instability before it occurs. This is not rocket science. We know where the instability is most likely to occur. The world population will grow by 2.5 billion people by 2050. Unfortunately, this massive population boom is projected to occur primarily in the most fragile and food insecure countries. This alarming math is not just about total numbers. Projections show that the greatest increase is in the age groups most vulnerable to extremism. There are currently 200 million people in Africa between the ages of 15 and 24, with that number expected to double in the next 30 years. Already, 60% of the unemployed in Africa are young people. Too often these situations deteriorate into shooting wars requiring the deployment of our military forces. We should be continually mindful that the price we pay for committing military forces is measured in our most precious national resource, the blood of those who serve. For those who live in rural America, this has a disproportionate impact. Fully 40% of those who serve in our military come from the farms, ranches, and non-urban communities that make up only 16% of our population. Actions taken now to increase agricultural sector jobs can provide economic opportunity and stability for those unemployed youths while helping to feed people. A recent report by the Chicago Council on Global Affairs identifies agriculture development as the core essential for providing greater food security, economic growth, and population well-being. Our active support for food security, including agriculture development, has helped stabilize key regions over the past 60 years. A robust food security strategy, as a part of our overall security strategy, can mitigate the growth of terrorism, build important relationships, and support continued American economic and agricultural prosperity while materially contributing to our Nation’s and the world’s security.

### 1NC---CP---DOJ

#### The Department of Justice should establish a binding expectation of:

#### ---digital platform interoperability,

#### ---unbiased algorithms,

#### ---and medical privacy in the context of biomedical data in IoT infrastructure.

#### The Federal Trade Commission should not establish a standard of digital platform interoperability.

## Adv---FTC

### 1NC---Turn

#### Collapsing FTC credibility results in elimination of competition authority—the plan is a win that saves FTC antitrust.

Lopez-Galdos 21—(Global Competition Counsel at the Computer & Communications Industry Association, previously served as Director of Competition & Regulatory Policy, and is a professor at George Washington University Competition Law Center and at the University of Melbourne Law School). Marianela 7-28-21. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils”. Disruptive Competition Project. <https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/>

One of the most challenging matters to tackle when it comes to leadership of antitrust authorities, or administrative agency for that matter, is legacy and the impact for the future of the agency. To put it simply, while antitrust leaders leave agencies, the side effects of leadership’s successes and failures condition the future of the agencies. Their leadership has consequences and sets precedent which will bind the agency well into the future.

Under the current political context, it would not be surprising if the current Neo-Brandeisian FTC enjoyed political support and success with its decision to bring big cases, especially against leading tech companies. In the short term, if the FTC makes headlines for opening cases against “Big Tech”, policymakers pushing for antitrust reforms will surely applaud the new changes as they would reflect a commitment to enhanced enforcement outcomes notwithstanding the strength of the cases.

However, in the mid-and long-term, if the FTC loses the big cases, the commitment to policy outcomes won’t be met. And then, it is unlikely that the question would be whether the antitrust norms are fit for today’s economy, but rather if the agency is capable of executing its mandate effectively. The recent decision in the FTC v. Facebook case is a good example of this paradigm, where the Judge expressed that the FTC had not carried out a sufficiently robust analysis supported by evidence, and therefore dismissed the case.

Eventually, the agency’s short-term reputational gains could quickly turn into a debacle for the institution itself with the caveat that by then, most probably, Neo-Brandeisian leadership will be long gone. Unfortunately then, the U.S. antitrust system — which is the only one to keep two federal antitrust agencies, bringing about positive outcomes for consumers — might be at risk. Political support to merge these two institutions could gain even more support, as has happened in the past, to the detriment of consumers.

#### Ending dual enforcement solves tech leadership---ensures antitrust policies align with national security and creates certainty for the tech industry.

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

INTRODUCTION

For over a century, the U.S. has maintained a system of dual antitrust enforcement. Antitrust laws are executed by two federal agencies: the Federal Trade Commission (FTC) and the Department of Justice (DOJ) through its Antitrust Division.1 Throughout their histories, the agencies have struggled to navigate their overlapping jurisdiction, often butting heads and creating redundancies. 2 With the digital revolution, existing cracks in the system have widened to the point of rendering the current system irrelevant and ineffective. Dual enforcement is a waste of government resources that duplicates efforts, fails to provide the technology industry with reasonable certainty for business and investment decisions, introduces barriers to a cohesive foreign policy and defense strategy, and hinders the development of privacy regulation and enforcement.

Accelerated technological change exacerbates three main problems with the dual antitrust agency system. First, while dual enforcement has always created uncertainty and thus harmed business planning and economic growth, developments in computer technology have made these problems more acute. 3 In recent decades, the technology industry has experienced the rise of a handful of dominant companies, such as Facebook, Google, Amazon, and Apple, all central to the economic vitality of the nation. 4 Contemporaneously, debate has erupted over how antitrust law should be adapted to regulate these companies, which have introduced new platforms, markets, and products that were not anticipated by traditional tests. 5 Advocates for cracking down on tech giants like Apple and Google argue that the companies wield outsized market power and harm competition. 6 On the other side, critics of increased competition regulation for the technology sector note that technology advances so quickly that seemingly-entrenched monopolists are in fact easily replaced by competition.7 At such a pivotal moment, the FTC and DOJ have failed to work together effectively. Instead, inter-agency fighting and a divided framework have created uncertainty for the regulation of the economically vital technology industry. 8

Second, the growing power and ever widening scope of computational technology has entangled antitrust policy with international politics and national security.9 Electronic technology has increased the avenues of attack and transformed traditional weapons of war.10 Innovations in hardware and software have introduced novel methods of espionage and cyberwarfare such as computational propaganda, trolling, and sophisticated hacking.11 This technological acceleration has led to an international battle for technological dominance that has been dubbed a "technology cold war." 12 China and Russia in particular have dedicated significant resources towards hostile social manipulation or information/influence warfare.13 Ceding control over communications technologies to foreign powers may leave the U.S. vulnerable to surveillance and infrastructure takedowns. 14 Hacking groups have targeted U.S. defense contractors and telecommunications companies. 15 As both the Obama and Trump administrations recognized, 16 antitrust by giving foreign companies-collaborating with foreign governments-a competitive advantage. Because of the increased importance of antitrust to national security, enforcement should be left to the DOJ alone. Its leaders serve at the pleasure of the president, whose office has greater perspective and tools available in protecting the nation and navigating international relationships.

Third, digital technology has amplified a central issue of consumer protection-privacy. Technology has increased the amount and the ease by which personal data is collected, stored, and shared, leaving consumers in a vulnerable position. The FTC currently oversees both domestic antitrust enforcement and privacy, but has no more than fifty employees working on privacy issues. 17 Without a doubt, the agency requires more people dedicated to privacy law and regulation. 18 But more than a higher headcount, the FTC needs to shed its antitrust jurisdiction because the underlying purpose of competition law can conflict with the development of privacy regulation. 19 Antitrust law promotes the free market, while privacy laws disturb the free market to protect consumers.20 Agencies operate more efficiently when they can focus on a coherent mission free of internal tension.2 1 Eliminating the FTC's antitrust responsibilities would enable the agency to give the consumer protection problems of data privacy and security the focus they warrant.

A recent important case, Federal Trade Commission v. Qualcomm, Inc., 22 showcases the contemporary confusion created by retaining two antitrust enforcement agencies. 23 The FTC brought suit against Qualcomm for allegedly violating antitrust law with its "no license, no chips" policy, which required phone makers to license Qualcomm's patents if they wanted to purchase the company's smartphone chips.24 In the appeal before the Ninth Circuit, 25 the Department of Justice took the podium to argue directly against the FTC's position on standard-essential patents, an issue of great importance to technological development. Additionally, the Department of Justice argued that the suit, brought by one of the government's own agencies, posed a threat to national security because Qualcomm's competitive position as a domestic chipmaker was important to maintain for the nation's safety.26 The impact of the case will be far-reaching, as evidenced by the multiple amicus briefs filed by scholars, companies, and organizations in fields from economics to patent law. 27 With so much on the line, the agencies wasted government resources, created confusion for corporations, and undermined a coherent foreign policy by advocating against each other. Even the Ninth Circuit noted the oddity of a divided opinion from the government. 28

#### Losing competition against autocracies in developing and regulating emerging tech is existential – many scenarios

Jain et al 19 (Ash Jain, senior fellow, oversees the Democratic Order Initiative and D10 Strategy Forum at the Atlantic Council’s Scowcroft Center for Strategy and Security, former member of the secretary of state’s policy-planning staff, focusing on US alliances and partnerships, international norms, and challenges to the democratic order, former adjunct professor at Georgetown University’s School of Foreign Service, JD, MS foreign service, Georgetown University; and Matthew Kroenig, deputy director of the Atlantic Council’s Scowcroft Center for Strategy and Security, professor in the Department of Government and the Edmund A. Walsh School of Foreign Service at Georgetown University, PhD, MA political science, University of California at Berkeley; “Present at the Re-Creation: A Global Strategy for Revitalizing, Adapting, and Defending a Rules-Based International System,” Snowcroft Center for Strategy and Security, Atlantic Council, 10-30-2019, <https://www.atlanticcouncil.org/wp-content/uploads/2019/10/Present-at-the-Recreation.pdf>)

Yet, AI is also transforming economies and societies, and generating new security challenges. Automation will lead to widespread unemployment. The final realization of driverless cars, for example, will put out of work millions of taxi, Uber, and long-haul truck drivers. Populist movements in the West have been driven by those disaffected by globalization and technology, and mass unemployment caused by automation will further grow those ranks and provide new fuel to grievance politics. Moreover, some fear that autonomous weapons systems will become “killer robots” that select and engage targets without human input, and could eventually turn on their creators, resulting in human extinction. The other technologies on this lisgt similarly balance great potential upside with great downside risk. 3D printing, for example, can be used to “make anything anywhere,” reducing costs for a wide range of manufactured goods and encouraging a return of local manufacturing industries.61 At the same time, advanced 3D printers can also be used by revisionist and rogue states to print component parts for advanced weapons systems or even WMD programs, spurring arms races and weapons proliferation.62 Genetic engineering can wipe out entire classes of disease through improved medicine, or wipe out entire classes of people through genetically engineered superbugs. Directed-energy missile defenses may defend against incoming missile attacks, while also undermining global strategic stability.

Perhaps the greatest risk to global strategic stability from new technology, however, comes from the risk that revisionist autocracies may win the new tech arms race. Throughout history, states that have dominated the commanding heights of technological progress have also dominated international relations. The United States has been the world’s innovation leader from Edison’s light bulb to nuclear weapons and the Internet. Accordingly, stability has been maintained in Europe and Asia for decades because the United States and its democratic allies possessed a favorable economic and military balance of power in those key regions. Many believe, however, that China may now have the lead in the new technologies of the twenty-first century, including AI, quantum, 5G, hypersonic missiles, and others. If China succeeds in mastering the technologies of the future before the democratic core, then this could lead to a drastic and rapid shift in the balance of power, upsetting global strategic stability, and the call for a democratic- led, rules-based system outlined in these pages.63

### 1NC---Solvency

#### Delay deficit---rulemaking takes years because of procedural barriers.

Pierce 21 (Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University School of Law; “Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?;” 2021, GW Law School Public Law and Legal Theory Paper No. 2021-42, <https://ssrn.com/abstract=3933921>, TM) [\*9 added for readability]

The FTC was able to use rulemaking to issue about a dozen legislative rules to implement section five of the FTC Act before Congress amended it by adding many mandatory procedures. The FTC was able to issue those rules in an average of 2.94 years each.39 After Congress enacted the first statute that imposed some new procedural mandates in 1975, the FTC was able to issue seven more rules, but the new rulemaking procedure increased the average length of a rulemaking from 2.94 years to 5.57 years.40 The FTC also abandoned several other rulemakings after spending an average of [9] 8.66 years on each.41 In 1980, Congress enacted another statute that amended the FTC Act. That statute added still more lengthy procedures that the FTC must use to complete a rulemaking to implement the FTC Act.42 The FTC has not attempted to issue any legislative rule to implement the FTC Act since Congress amended the Act in 1980.43

Under Chair Khan’s leadership, the FTC recently amended its rules for using the rulemaking process that Congress created in the 1975 and 1980 amendments to the FTC Act.44 The amendments to the rules of procedure are intended to restore the viability of the process. Those changes might trim a year or two from length of the process. The process would still take over five years to issue a single rule, however. It is unlikely that Chair Khan will try to use a process that takes at least five years to issue a single rule in her effort to implement her ambitious agenda to transform most of antitrust law.

#### FTC won’t pursue cases and will lose in court---they fear political backlash.

Bush 16 (Darren Bush, Professor of Law, University of Houston Law Center; “Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency;” Fall 2016, Willamette Law Review, Vol. 33, Issue 1, Accessed through HeinOnline, TM)

C. Little Enforcement Action in Recent Years

Despite the claim that government antitrust enforcement has seen a resurgence in recent years, the data does not bear this out. Federal enforcement has typically been dampened by fear of political backlash and fear of or actual lack of success in federal court. (Later, this article examines the fear of political backlash in greater detail.) Economic thought, too, has shifted the enforcement of antitrust laws, and in particular has focused enforcement away from particular types of cases. For example, section 2 of the Sherman Act, with its focus on monopolization and unilateral conduct once quite prominent in antitrust enforcement, is but distant second to section 1 of the Sherman Act.

The ebb and flow of policy discourse has not dramatically reshaped the landscape of enforcement in the past 40 years. Generally, the larger questions of whether or not "big is bad," whether monopolies should be regulated, or whether we should be concerned about protecting small businesses have been answered by a powerful and entrenched majority. Thus, the vigor of enforcement largely is limited to the nature and intensity of review of horizontal mergers, and the vigor with which the agencies scrutinize conduct subject to the "rule of reason." Per se violations are habitually investigated, regardless of administration, as are criminal violations. Monopolization, regardless of political leanings, is the unicorn of antitrust litigation and adjudication.

Thus, while historically antitrust enforcement has ebbed and flowed, it has in recent decades been converging on the former, with slight variations. During the Clinton administration, the DOJ had more interest in bringing civil antitrust cases, including even some section 2 monopolization cases. However, the DOJ did not take its eye off the criminal antitrust realm, collecting what were at the time historical fines.65 Enforcement in the George W. Bush administration declined in all areas (at least in terms of number of cases brought), except for perhaps criminal cartel enforcement. 66 There is much debate as to what has transpired in antitrust enforcement in the Obama administration. Recent challenges have suggested that perhaps the Obama administration was finally getting tougher on mergers. However, it could be the case that the mergers finally reached a breaking point wherein they could no longer be tolerated as they increased in size. 67 It is too early to tell what a Trump administration holds for antitrust, but this article's view is that it will be at least as lackluster as enforcement under the George W. Bush administration.6 8

Private antitrust litigation, unlike government litigation, is not directly affected by either political pressure or by any political agenda. Nevertheless, the level of private litigation is still affected by political trends. Private cases often follow government litigation, taking advantage both of the government's investigative work and of the successful litigation outcome by the government. When enforcement is low, there are fewer such cases to follow.69

Also, general political trends affect the courts' views toward antitrust litigation. In periods when courts look less favorably on antitrust, private parties bring fewer cases.

Because private antitrust enforcement and the direction of judicial decision rests on successful litigation before courts, the DOJ's lack of enforcement combined with the FTC's lack of deference causes antitrust to linger in a state of minimum enforcement. Hardcore criminal cases will always be enforced, easily won per se joint conduct cases will always be brought, mergers in highly concentrated markets will likely be brought, and the remainder of antitrust law falls by the wayside.

In sum, while the DOJ, the FTC, private parties and the states all serve as important antitrust enforcement agents, the commingling of functions has resulted in antitrust enforcement being led primarily by the DOJ, with enforcement brought before increasingly skeptical courts, which directly impacts upon private and state antitrust enforcement. What follows is a remedy designed to restore the purposes behind the FTC Act.

#### Plan’s enforcement fails---dual jurisdiction causes legal ambiguity, delays, and inconsistent enforcement.

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

“[A] flip of the merger agency coin.”1 That was how a former Department of Justice official characterized the two federal antitrust agencies’ method for determining which will assert jurisdiction.2 In the United States, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) share responsibility for pursuing civil cases for violations of the nation’s antitrust laws.3 This structure of dual jurisdiction demands the establishment of some form of inter-agency system to determine how the agencies will divide enforcement and hopefully avoid duplication of efforts, delays, and—worst of all—inconsistency in approach.4 Over time, an ad hoc system of inter-agency liaison agreements established a loose framework for delegating responsibilities.5 Thus, although “the flip of a coin” does not truly describe the process that the agencies use to delegate their shared responsibilities, it still conveys the tenuousness of their allocation system.6

Recently, escalating clashes between the DOJ and FTC over enforcement policy have called into question the effectiveness of the agencies’ system for dividing enforcement.7

**[[BEGIN FOOTNOTE 7]]**

7 See Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Pol’y, & Consumer Rts. of the S. Comm. on the Judiciary, 116th Cong. (2019) [hereinafter Oversight of the Enforcement of the Antitrust Laws Hearing], https://www.judiciary. senate.gov/meetings/09/17/2019/07/23/2019/oversight-of-the-enforcement-of-the-antitrust-laws [https://perma.cc/J6UX-YJKA] (statement of Joseph Simons, Chairman, Fed. Trade Comm’n) (acknowledging that the agencies’ process to determine which agency would handle an investigation was not working well and that the agencies had fought in the previous year); Kelly Everett, Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?, 29 J. NAT’L ASS’N ADMIN. L.JUDICIARY 727, 770 (2009) (noting that when the DOJ and FTC have contradictory approaches to antitrust enforcement, the public does not know the line between legal and illegal competitive business conduct); Lauren Feiner, Here’s Why the Top Two Antitrust Enforcers in the US Are Squabbling Over Who Gets to Regulate Big Tech, CNBC (Sept. 18, 2019), https://www.cnbc.com/2019/09/18/the-ftc-and-doj-are-squabbling-over-the-right-to-regulate-big-tech.html [https://perma.cc/6TR7-H55S] (discussing the conflict between the DOJ and FTC over the enforcement of antitrust law in the technology sector); Gregory Luib, Unprecedented Agency Divergence on Antitrust Enforcement, LAW360 (Aug. 6, 2019), https://www.law360.com/articles/ 1183986/unprecedented-agency-divergence-on-antitrust-enforcement [https://perma.cc/3U49-U4GQ] (asserting that the unprecedented clash between the DOJ and FTC in the FTC’s case against Qualcomm Inc. (Qualcomm), coupled with the deep divergence in the agencies’ policy approaches to exploitative patent licensing, raises serious concerns about fairness, efficiency, good governance, and the future of antitrust law).

**[[END FOOTNOTE 7]]**

Although historically some disagreement between the two agencies arising from their concurrent jurisdiction has not been uncommon, fights in the last couple decades have taken on a much more derisive and public nature.8 Specifically, an undercurrent of political turmoil and polarization undercut two recent instances of divergence between the agencies.9

First, in 2008, the DOJ released a report presenting its approach to “single-firm conduct”—the business practices and actions that a single economic entity takes to obtain or maintain monopoly power.10 The FTC refused to join the report and criticized it for its pro-business antitrust policies.11 Then, in 2019, in Federal Trade Commission v. Qualcomm Inc., a highly-publicized case before the U.S. District Court for the Northern District of California, the antitrust community witnessed an unprecedented level of divergence between the DOJ and FTC when the two agencies took opposing positions regarding the role of antitrust law in policing patent licensing agreements.12

### 1NC---AT: Biased Algorithms !

#### No impact---Fears of algorithmic bias are overblown

Rainie 17 [Director of internet and technology research at Pew Research Center, quoting various leading AI experts Lee Rainie and Janna Anderson, Theme 2: Good things lie ahead in Code-Dependent: Pros and Cons of the Algorithm Age, Pew Research Center, 2017, <https://www.pewresearch.org/internet/2017/02/08/theme-2-good-things-lie-ahead/>]

Some respondents who predicted a mostly positive future said algorithms are unfairly criticized, noting they outperform human capabilities, accomplish great feats and can always be improved.

An anonymous professor who works at New York University said algorithm-based systems are a requirement of our times and mostly work out for the best. “Automated filtering and management of information and decisions is a move forced on us by complexity,” he wrote. “False positives and false negatives will remain a problem, but they will be edge cases.”

An anonymous chief scientist wrote, “Whenever algorithms replace illogical human decision-making, the result is likely to be an improvement.” And an anonymous principal consultant at a top consulting firm wrote, “Fear of algorithms is ridiculously overblown. Algorithms don’t have to be perfect, they just have to be better than people.”

### 1NC---AT: Engineered Pandemics !

#### No engineered pandemics impact---no capacity, expertise, tech, or ability to avoid detection.

Koblentz 20 (Dr. Gregory D. Koblentz, Associate Professor and Director of the Biodefense Graduate Program at George Mason University's Schar School of Policy and Government; “Emerging Technologies and the Future of CBRN Terrorism;” The Washington Quarterly, Vol. 43, 06-16-2020, Issue 2, Accessed through T&F, <https://doi.org/10.1080/0163660X.2020.1770969>, TM)

Cautions and Caveats

It is important to note that scientific advances and the emergence of new technologies are not the only, or even the most important, factors influencing the likelihood of terrorist groups acquiring and using CBRN weapons. Thankfully, the number of terrorist groups motivated to acquire these weapons has been limited, despite many that have the requisite technical and financial resources.60 The vast majority of terrorist groups have been satisfied with conventional weapons such as guns and bombs. The surprising rise of the Islamic State and their repeated use of chemical weapons in Iraq and Syria, however, serve as a reminder that it only takes one group with the intent and capability to acquire and use CBRN weapons to pose a threat to international security.61

In addition, the ability of a terrorist group to convert CBRN-related material into a weapon depends on intangible factors such as tacit knowledge (the unarticulated knowledge that can only be gained through hands-on, trial-and-error experience or mentorship), the ability of the group to create and share such knowledge, and its ability to assemble and successfully manage interdisciplinary teams.62 Terrorist groups, especially those facing pressure from law enforcement and intelligence agencies, have had difficulties recruiting, retaining, and effectively utilizing individuals with the right combination of scientific, technical, and organizational skills to develop effective CBRN weapons.

Developing a CBRN weapon capable of causing mass casualties is also a very complex process. A scientific breakthrough that makes developing or acquiring one component of a weapon easier might not have any impact on the other stages in the weaponization process. Thus, the impact of a single scientific breakthrough or a novel technology on the acquisition of a CBRN weapon should not be exaggerated. For example, synthetic biology might make it easier for a non-state actor to create a pathogen, but that technology does not help terrorists improve their ability to disseminate the pathogen on a large scale.63

Likewise, it is important to assess the specific contributions that a particular technology can make to a specific aspect of the CBRN threat in practice, not just in theory. In the case of 3D printing, this manufacturing technology is not appropriate for working with metals that are toxic or radioactive. While microreactors are well-suited to covertly producing small quantities of highly pure chemicals, they are not well-suited to the production of most chemical warfare agents and precursors due to excessive heat generated by their synthesis and by the production of solid byproducts that would clog the microfluidic channels at the heart of this technology.64

Finally, advances in science and technology represent not just threats, but also opportunities to make it harder for terrorist groups to acquire CBRN weapons. Unmanned aerial and ground vehicles can be used for border security, CBRN weapon detection, and bomb disposal. For example, the EU is sponsoring the development of unmanned aerial and ground vehicles to investigate CBRN crime scenes under the ROCSAFE project.65 Biometrics and radio frequency ID chips can be used to improve physical security measures and inventory control to prevent unauthorized access to CBRN materials. Advances in science and technology are also leading to improved sensors that can be used to detect the production, transportation, and use of CBRN weapons. The development of dedicated laboratories and new techniques to analyze CBRN materials has also contributed to impressive advances in nuclear, biological, and chemical forensics, which are crucial for attribution.66

### 1NC---AT: Pandemics !

#### Disease can’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence.

However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

## Adv---Interoperability

### 1NC – L/T

#### No link and turn --- interoperability decreases incentives to innovate and locks in incumbents --- No positive effect on competition

Ezrielev & Marquez 21 --- Jay Ezrielev, Managing Principal at Elevecon and former economic advisor to FTC Chairman Joseph Simons. G, Genaro Marquez, Vice President at Elevecon, “Interoperability: The Wrong Prescription for Platform Competition”, June 15th 2021, https://www.competitionpolicyinternational.com/interoperability-the-wrong-prescription-for-platform-competition/

But not all interoperability effects are benign. There are costs as well as benefits to interoperability. The balance between the benefits and costs of interoperability varies across markets, technologies, and business models. Interoperability may lead to higher reliability risks, security breaches, and loss of privacy.6 The benefits of interoperability may be small when the costs of multihoming (using multiple platforms) are low and there is a high degree of differentiation across platforms. Moreover, as we discuss in this article, interoperability may reduce competition and innovation for digital platforms.

There are several ways in which mandatory interoperability may reduce competition and innovation. An interoperability mandate would force competing digital platforms to agree to common functionality standards, eliminating some aspects of competition and limiting differentiation. Interoperability may also weaken platforms’ incentives to compete through innovation and pricing. In addition, interoperability may hinder Schumpeterian competition and entrench incumbents. Establishing interoperability standards would entail a complex process that risks introducing delays in adopting the latest technological advancements and may lead to inferior technological and design choices. The proponents of interoperability argue that interoperability lowers entry barriers and mitigates the negative effects of “tipping” (or capturing the market).7 A major flaw in this argument is that it rests on the assumption that digital platform markets are particularly prone to tipping. However, these markets are unlikely to tip because, for many types of digital platforms, the costs of multihoming are low, users have heterogeneous preferences, and platforms offer differentiated services. There is also no evidence of widespread tipping among digital platforms.

Overall, we urge caution in requiring interoperability for digital platforms, which may do far more harm than good.

### 1NC---AT: Douglas 21

# 2NC---ADA R2

## CP---Section 5

### 2NC---O/V

### 2NC---AT: Perm Do Both

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

#### First, expand the scope---regulations don’t.

Lane 92 --- Mills Lane, Judge on the Second District Court of Nevada, “STATE, GAMING COMM'N V. GNLV CORP”, https://www.casemine.com/judgement/us/5914875dadd7b049344e3895

Moreover, an administrative agency is not required to promulgate a regulation where regulatory action is taken to enforce or implement the necessary requirements of an existing statute. K-Mart Corp. v. SIIS, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985). "An administrative construction that is within the language of the statute will not readily be disturbed by the courts." Dep't of Human Res. v. UHS of The Colony, Inc., 103 Nev. 208, 211, 735 P.2d 319, 321 (1987). The Commission did not engage in ad hoc rule-making because the Commission did not expand the scope of the statute, but merely enforced the requirements of NRS 463.3715(2) in accordance with the plain dictates of the statute.

#### Contextual evidence proves---guidance documents interpreting Section 5 don’t expand the scope---merely alter enforcement.

Federal Register: Rules and Regulations - ‘9 (Federal Trade Commission - *16 Code of Federal Regulations*- 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; *Final Rule* - “Rules and Regulations” - Federal Register - Vol. 74, No. 198 - Thursday, October 15, 2009 - #E&F - https://www.ftc.gov/sites/default/files/documents/federal\_register\_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf)

b. Examples 7-9 – New Media Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.91 Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission’s prior commitment to address word of mouth marketing issues on a case-by-case basis.92 Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.93 Two commenters said that industry self-regulation is sufficient.94

The Commission’s inclusion of examples using these new media is not inconsistent with the staff’s 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ‘‘buzz marketing’’ were appropriate.95 All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides do not expand the scope of liability under Section 5; they simply provide guidance as to how the Commission intends to apply governing law to various facts. In other words, the Commission *could* challenge the dissemination of deceptive representations made via these media regardless of whether the Guides contain these examples; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.96

#### Second, ‘increase prohibitions by… law’---regulations don’t.

John Roberts 15, Chief Justice, US Supreme Court, “Department of Homeland Security, Petitioner v. Robert J. MacLean,” 135 S.Ct. 913, WestLaw

The Government argues that this whistleblower statute does not protect MacLean because his disclosure regarding the canceled missions was “specifically prohibited by law” in two ways. First, the Government argues that the disclosure was specifically prohibited by the TSA's regulations on sensitive security information: 49 CFR §§ 1520.5(a)-(b), 1520.7(j) (2003). Second, the Government argues that the disclosure was specifically prohibited by 49 U.S.C. § 114(r)(1), which authorized the TSA to promulgate those regulations. We address each argument in turn.

\*390 A

1

\*391 In 2003, the TSA's regulations prohibited the disclosure of “ [s]pecific details of aviation security measures ... [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.” 49 CFR § 1520.7(j). MacLean does not dispute before this Court that the TSA's regulations prohibited his disclosure regarding the canceled missions. Thus, the question here is whether a disclosure that is specifically prohibited by regulation is also “ specifically prohibited by law ” under Section 2302(b)(8)(A). (Emphasis added.)

The answer is no. Throughout Section 2302, Congress repeatedly used the phrase “law, rule, or regulation.” For example, Section 2302(b)(1)(E) prohibits a federal agency from discriminating against an employee “on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation.” For another example, Section 2302(b)(6) prohibits an agency from “grant[ing] any preference or advantage not authorized by law, rule, or regulation.” And for a third example, Section 2302(b)(9)(A) prohibits an agency from retaliating against an employee for “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.”

1In contrast, Congress did not use the phrase “law, rule, or regulation” in the statutory language at issue here; it used the word “law” standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). Thus, Congress's choice to say “specifically prohibited by law” rather than “specifically prohibited by law, rule, or regulation” suggests that Congress meant to exclude rules and regulations.

\*392 The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here for two reasons. First, Congress used “law” and “law, rule, or regulation” in close proximity—indeed, in the same sentence. § 2302(b)(8)(A) (protecting the disclosure of “any violation of any law, rule, or regulation ... if such disclosure is not specifically prohibited by law”). Second, Congress used the broader phrase “law, rule, or regulation” repeatedly—nine times in Section 2302 alone. See §§ 2302(a)(2)(D)(i), (b)(1)(E), (b)(6), (b)(8)(A) (i), (b)(8)(B)(i), (b)(9)(A), (b)(12), (b)(13), (d)(5). Those two aspects of the whistleblower statute make Congress's choice to use the narrower word “law” seem quite deliberate.

\*\*920 We drew the same inference in Department of Treasury, IRS v. FLRA, 494 U.S. 922, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990). There, the Government argued that the word “laws” in one section of the Civil Service Reform Act of 1978 meant the same thing as the phrase “law, rule, or regulation” in another section of the Act. Id., at 931, 110 S.Ct. 1623. We rejected that argument as “simply contrary to any reasonable interpretation of the text.” Id., at 932, 110 S.Ct. 1623. Indeed, we held that a statute that referred to “laws” in one section and “law, rule, or regulation” in another “cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.” Ibid. That inference is even more compelling here, because the statute refers to “law” and “law, rule, or regulation” in the same sentence, rather than several sections apart.

Another part of the statutory text points the same way. After creating an exception for disclosures “specifically prohibited by law,” Section 2302(b)(8)(A) goes on to create a second exception for information “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” This exception is limited to action taken directly by the President. That suggests that the word “law” in the only other exception is limited to actions by Congress—after all, it would be unusual \*393 for the first exception to include action taken by executive agencies, when the second exception requires action by the President himself.

In addition, a broad interpretation of the word “law” could defeat the purpose of the whistleblower statute. If “law” included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that “specifically prohibited” whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word “law.”

2

2The Government admits that some regulations fall outside the word “law” as used in Section 2302(b)(8)(A). But, the Government says, that does not mean that all regulations are excluded. The Government suggests two interpretations that would distinguish “law” from “law, rule, or regulation,” but would still allow the word “law” to subsume the TSA's regulations on sensitive security information.

First, the Government argues that the word “law” includes all regulations that have the “force and effect of law” (i.e., legislative regulations), while excluding those that do not (e.g., interpretive rules). Brief for Petitioner 19–22. The Government bases this argument on our decision in Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). There, we held that legislative regulations generally fall within the meaning of the word “law,” and that it would take a “clear showing of contrary legislative intent” before we concluded otherwise. Id., at 295–296, 99 S.Ct. 1705. Thus, because the TSA's regulations have the force and effect of law, the Government says that they should qualify as “law” under the statute.

The Government's description of Chrysler is accurate enough. But Congress's use of the word “law,” in close connection with the phrase “law, rule, or regulation,” provides \*394 the necessary “clear showing” that “law” does not include regulations. Indeed, using “law” and “law, rule, or regulation” in the same sentence would be a very obscure way of drawing the Government's nuanced distinction between different \*\*921 types of regulations. Had Congress wanted to draw that distinction, there were far easier and clearer ways to do so. For example, at the time Congress passed Section 2302(b)(8)(A), another federal statute defined the words “regulatory order” to include a “rule or regulation, if it has the force and effect of law.” 7 U.S.C. § 450c(a) (1976 ed.). Likewise, another federal statute defined the words “State law” to include “all laws, decisions, rules, regulations, or other State action having the effect of law.” 29 U.S.C. § 1144(c)(1) (1976 ed.). As those examples show, Congress knew how to distinguish between regulations that had the force and effect of law and those that did not, but chose not to do so in Section 2302(b)(8)(A).

Second, the Government argues that the word “law” includes at least those regulations that were “promulgated pursuant to an express congressional directive.” Brief for Petitioner 21. Outside of this case, however, the Government was unable to find a single example of the word “law” being used in that way. Not a single dictionary definition, not a single statute, not a single case. The Government's interpretation happens to fit this case precisely, but it needs more than that to recommend it.

Although the Government argues here that the word “law” includes rules and regulations, it definitively rejected that argument in the Court of Appeals. For example, the Government's brief accepted that the word “law” meant “legislative enactment,” and said that the “only dispute” was whether 49 U.S.C. § 114(r)(1) “serve[d] as that legislative enactment.” Brief for Respondent in No. 11–3231 (CA Fed.), pp. 46–47. Then, at oral argument, a judge asked the Government's attorney the following question: “I thought I understood your brief to concede that [the word “law”] can't \*395 be a rule or regulation, it means statute. Am I wrong?” The Government's attorney responded: “You're not wrong your honor. I'll be as clear as I can. ‘Specifically prohibited by law’ here means statute.” Oral Arg. Audio in No. 11–3231, at 22:42–23:03; see also id., at 29:57–30:03 (“Now, as we've been discussing here, we're not saying here that [the word “law”] needs to encompass regulations. We're saying statute.”). Those concessions reinforce our conclusion that the Government's proposed interpretations are unpersuasive.

In sum, when Congress used the phrase “specifically prohibited by law” instead of “specifically prohibited by law, rule, or regulation,” it meant to exclude rules and regulations. We therefore hold that the TSA's regulations do not qualify as “law” for purposes of Section 2302(b)(8)(A).

B

3We next consider whether MacLean's disclosure regarding the canceled missions was “specifically prohibited” by 49 U.S.C. § 114(r)(1) itself. As relevant here, that statute provides that the TSA “shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that \*396 disclosing the information would ... be detrimental to the security of transportation.” § 114(r)(1)(C).

This statute does not prohibit anything. On the contrary, it authorizes something—it authorizes the Under Secretary to “prescribe regulations.” Thus, by its terms Section 114(r)(1) did not prohibit the disclosure at issue here.

The Government responds that Section 114(r)(1) did prohibit MacLean's disclosure by imposing a “legislative mandate” on the TSA to promulgate regulations to that effect. See Brief for Petitioner 28, 33; see also post, at 2–3 (SOTOMAYOR, J., dissenting). \*\*922 But the Government pushes the statute too far. Section 114(r)(1) says that the TSA shall prohibit disclosures only “if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation.” § 114(r)(1)(C) (emphasis added). That language affords substantial discretion to the TSA in deciding whether to prohibit any particular disclosure.

The dissent tries to downplay the scope of that discretion, viewing it as the almost ministerial task of “identifying whether a particular piece of information falls within the scope of Congress' command.” Post, at 3. But determining which documents meet the statutory standard of “detrimental to the security of transportation” requires the exercise of considerable judgment. For example, the Government says that Section 114(r)(1) requires the Under Secretary to prohibit disclosures like MacLean's. The Government also says, however, that the statute does not require the Under Secretary to prohibit an employee from disclosing that “federal air marshals will be absent from important flights, but declining to specify which flights.” Reply Brief 23. That fine-grained distinction comes not from Section 114(r)(1) itself, but from the Under Secretary's exercise of discretion. It is the TSA's regulations—not the statute—that prohibited MacLean's disclosure. And as the dissent agrees, a regulation does not count as “law” under the whistleblower statute. See post, at 1.

#### Third, “standard” in the plan exclusively refers to binding action– legal precision

CFR 98 (U.S. Electronic Code of Federal Regulations, maintained by the Legal Information Institute at Cornell Law School, “49 CFR Appendix B to Part 553 - Statement of Policy: Rulemakings Involving the Assessment of the Functional Equivalence of Safety Standards,” 5-13-1998, https://www.law.cornell.edu/cfr/text/49/appendix-B\_to\_part\_553)

(c) As used in this appendix, the term “standard” refers to mandatory requirements and thus has the same meaning given the term “technical regulation” in Annex 1 to the World Trade Organization Technical Barriers to Trade Agreement.

### 2NC---AT: Links to Bedoya

#### 2. Guidance---it preserves agency PC

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, Volume 71, Issue 1, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

II. BURDEN OF PUBLIC COMMENT ON GUIDANCE LESS THAN LEGISLATIVE RULEMAKING

If the agency is going to solicit public comment on guidance, why not just go the whole nine yards and proceed by legislative rulemaking, which unlike guidance is genuine binding law? The reason is that the actual taking of public comment is only a fraction of the burden that legislative rulemaking imposes, and even if one focuses on the taking of comment alone, it is often less burdensome for guidance than for rulemaking. Thus, for most agencies at least, "notice-and-comment guidance" is considerably faster and less expensive than notice-and-comment rulemaking.

In discussing why legislative rulemaking takes the amount of time and resources that it does, interviewees prominently cited five aspects of the process, all of which are either absent or less costly when the process is voluntary notice-and-comment for guidance. I discuss these in roughly descending order of prominence.

A. Mandates for Cost--Benefit Analysis

Before significant legislative rules can be proposed or finalized by executive agencies, they are reviewed by the President's Office of Management and Budget to ensure, inter alia, that the agency engaged in appropriate cost--benefit analysis. OMB also reviews executive agencies' "significant" guidance documents. The relevant Executive Order's definition of "significant" is, in many ways, open-ended. According to an official at the [\*80] EPA's Office of General Counsel, the decision on which guidance documents to submit to OMB for review is made at the senior management level of the agency, by political appointees, and the handling of the question changes depending on who is in the relevant agency-manager and OMB positions.

Generally, interviewees thought OMB review was less likely for guidance than for legislative rules and, when it occurred, less time-consuming. A former senior official at the EPA's Air Program office said he thought OMB review of guidance took less time than that of legislative rules. Lynn Thorp of Clean Water Action observed that OMB scrutiny of the EPA guidance was less than that for legislative rules. A former senior FDA official noted that OMB was not much engaged with the agency's day-to-day scientific guidance, while a former senior FDA career official said many FDA guidance documents did not go through OMB at all. William Schultz, former HHS General Counsel, in discussing differences between the notice-and-comment process for rulemaking and the notice-and-comment process for guidance, cited OMB delays, which he said can be severe. Daniel Troy, general counsel of GlaxoSmithKline and former chief counsel of the FDA, said one reason for FDA personnel's preference for guidance over legislative rulemaking was that it avoided OMB review. At [\*81] USDA NOP, which does notice-and-comment on "most" of its guidance, the head of the program cited OMB review as one of a few factors that makes legislative rulemaking generally slower than guidance. Richardson, the former chair of the NOSB, said legislative rulemaking was greatly delayed by agency economic analysis in contemplation of OMB review, which was not done for guidance; and whereas OMB was a focal point for private lobbying regarding legislative rules, causing further delay, this was not true of guidance. The result was that legislative rulemaking took "much longer" than guidance even when the latter went through public comment. At the Department of Transportation (DOT), said the former general counsel Kathryn Thomson, guidance, even with public comment, was "much faster" than legislative rulemaking, mainly because it was not necessary to do cost--benefit analysis in contemplation of OMB review; OMB would accept a fast process for guidance more than it would for a legislative rule. At the DOE appliance standards program, recalled a former Department division director, OMB could delay or accelerate legislative rulemaking depending on the administration's calendar and politics, but guidance was not subjected to OMB review.

In banking regulation, where most of the agencies are independent and therefore not subject to OMB review, economic analysis can still cause legislative rulemaking to take longer than guidance, as such analysis may be required on some matters by statute or agency practice. An interviewee who held senior posts at CFPB and other federal agencies said that at the independent banking agencies (i.e., those not funded with tax revenues and not subject to OMB review), where cost--benefit analysis may be required by statute, that analysis would be done for legislative rulemaking but not for guidance, which helped explain why the former took longer. A former senior Federal Reserve official noted that, while the Federal Reserve's legislative-rulemaking-specific cost--benefit analysis was "sometimes a bit skippy," [\*82] the CFPB did voluminous cost--benefit analysis because of its fear of D.C. Circuit case law striking down SEC action for violating cost--benefit requirements.

B. Building a Record and Responding to Comments in Anticipation of Judicial Review

The advent of "hard look" judicial review in the 1970s, ratified by the Supreme Court in Motor Vehicles Manufactures Ass'n v. State Farm, pushed agencies to develop voluminous administrative records to support their legislative rules and to devote countless hours to writing long preambles responding minutely to public comments. An EPA official--in comparing legislative rulemaking (which he said took an "excruciatingly" long time) with guidance (on which he said the agency was "much more nimble")--said that a "huge" difference between the two was the time spent developing the administrative record and replying to comments, both of which he placed under the heading of "judicial review accountability," that is, the agency's "fear" of investing in a legislative rule only to have it struck down in court. EPA lawyers, he explained, were "vigilant" about ensuring that the administrative record was "all there," including the development of supporting documents, with all data gathered and analyzed, which took a "ton of time." Likewise, lawyers were vigilant in making sure the agency accounted for all comments. By contrast, "very little" of this was required for EPA guidance. There might be some accompanying materials, but it was "very rare" to do a full supporting foundation, in part because much of the necessary information would already have been gathered for a prior relevant legislative rulemaking, or would have bubbled up from the implementation process for that prior legislative rule. And even if the EPA took public comment on a guidance document and responded (which it sometimes did), "we're coasting along the surface" compared to what is done for a legislative rulemaking preamble. A former senior official at the EPA Air Program Office concurred that, for guidance, supporting material did not need to be gathered because it had already been assembled in prior legislative rulemakings, and public comments did not need to be addressed [\*83] at the same level of detail as for legislative rulemaking.

There is a similar dynamic at the FDA, which, per the GGPs, takes public comment on a very large proportion of its guidance documents. A former senior FDA official explained the difference. Legislative rulemaking required support for everything in the record and a time-consuming response to comments, and the costs of this process had been part of the agency's drive since the 1990s to rely more upon guidance, for which the process, even with public comment, was much more "abbreviated." Whereas legislative rules were "law" and had to be supported, the agency in issuing guidance felt freer not to develop a voluminous record, and the comments on guidance did not require the kind of response that was required on legislative rules. The fact that the FDA was sued much more on legislative rules than on guidance, he said, was surely part of this. Similarly, a congressional staffer observed that, although the FDA took public comment on guidance, it generally did not give any response to comments, meaning there was not the same kind of " State Farm obligation" as for legislative rulemaking, and so the process did not ensure the same careful consideration of stakeholder views. A former senior FDA official thought the lack of a requirement to respond to comments was a crucial and salutary feature of the FDA's process for guidance: if you required a preamble, you might as well do legislative rulemaking, and the whole thing would become "unworkable." A former senior FDA career official, discussing the difference between legislative rulemaking and guidance, said responding to all substantive comments in a rulemaking in writing for publication added "significantly" to the time spent. Overall, said an FDA Office of Chief Counsel official, whereas legislative rulemaking was criticized for being "ossified," it was possible to issue guidance "pretty quickly."

[\*84] Elsewhere, too, the research and analytic demands are less for guidance than for legislative rulemaking. At OSHA, said the former deputy solicitor of the Department of Labor (DOL), guidance was faster than legislative rulemaking in part because of judicial decisions requiring that the agency in each rulemaking make a showing of significant risk and technological and economic feasibility. By contrast, headquarters might have a regional office draft a guidance document, noted John Newquist, a former assistant administrator of OSHA's Region V (headquartered in Chicago).

C. Taking Comments in Itself

The actual publication of the draft rule/guidance and the taking of comments on it (as distinct from the work of responding to those comments) takes time and effort in itself, but this time and effort did not figure nearly as prominently in the interviews as did cost--benefit analysis, record-building, or responding to comments. And in any event, the burden of taking comment per se tends to be less for guidance documents than for legislative rules. At the banking agencies, said an interviewee who held senior posts at the CFPB and other federal agencies, the comment period tends to be shorter for guidance, and the comments fewer. The comment period was also said to be shorter for guidance at the USDA NOP, and in EPA clean water regulation. Comments were said to be less voluminous on guidance compared to legislative rules at the FDA.

D. Drafting Challenges

Legislative rules are typically harder to draft than guidance, which adds further to the time and resources they demand. Because legislative rules are mandatory, said an EPA official, you "sweat each detail," seeking to account for all factors and contingencies, since once the rule is promulgated, "we can't go back to it for 15 years." Guidance, he said, does not involve the same sweating of details. As to the FDA, a former senior career official [\*85] there said that, in writing guidance, you need not be as careful on wording as on a legislative rule because the language is not binding and is described as reflecting the current thinking of the agency; you are therefore more free to put in details, use narrative form, Q&A form, and plain language, since the document is not "set in stone." He recalled one subject on which he and his colleagues initially sat down to write a legislative rule and found it impossible to start with "codified language," given the complexity of the matter; he therefore suggested handling the problem by writing guidance, as a "dry run," before drawing up binding requirements. In banking regulation, an interviewee who held senior posts at the CFPB and other federal agencies said that guidance was "easier" to write and could be written "faster" than a legislative rule because "you don't need to nail everything down," as the aim is to warn regulated parties to pay attention to certain risks, not prescribe mandatory requirements.

E. Dealing with Mobilized Stakeholders

The length, officially-binding status, and public salience of legislative rulemaking make it a focal point for the mobilization of interest groups to pressure the agency and enlist political allies in Congress, the White House, and elsewhere. This, in turn, makes legislative rulemaking expensive to the agency in terms of political capital. An official at a public interest organization working on immigrants' rights said that, in his experience seeking favorable policies from DHS, he had found that legislative rulemaking tended to "exhaust all [the agency's] political capital," more than issuing guidance did. Legislative rulemaking allowed time for the opponents of an initiative to marshal their forces. If an agency and its stakeholder allies sought to proceed by legislative rulemaking, he said, they were "declaring a grand war" and had to be prepared for greater opposition. A former DOE division director, explaining why there was "no comparison" between the processes for legislative rulemaking and guidance, emphasized that the "politics" of the former process "slowed it down," for whenever the proceeding seemed to veer in a direction that one interest group did not like, [\*86] that group would marshal evidence and political support to stop the process, enlisting friendly members of Congress or the White House. With respect to the USDA NOP, the president of an organic certifier, in discussing factors that slowed legislative rulemaking, immediately cited the agency's internal process for economic analysis (not applicable to guidance), which he said could become a "pawn" in political clashes between different parts of the industry, in which members of Congress might be involved.

### 2NC---AT: Rulemaking Key

#### Text amendment:

#### The United States federal government should establish interpretive rules and policy statements requiring data interoperability, prohibiting algorithmic bias, and prohibiting breaches in data privacy under Section 5 of the Federal Trade Commission Act, and enforce the prohibitions accordingly.

#### Their Mithal ev says they are considering rulemaking BUT already issued guidance and are proceeding with their privacy and data agenda even absent rulemaking

--MSU = BLUE

Mithal 01-13 – Maneesha, Wilson Sonsini Goodrich & Rosati. “2021 Privacy and Cybersecurity Year in Review”, JDSupra, <https://www.jdsupra.com/legalnews/2021-privacy-and-cybersecurity-year-in-4207848/>, 01-13-2022

FTC Activities in 2021 and Likely Trends for 2022

2021 saw the kickoff of the Khan era at the Federal Trade Commission (FTC). During FTC Chair Lina Khan's first nine months on the job, she has announced privacy and security initiatives that offer important insights into her priorities. Companies should pay close attention to FTC activity in 2021 and public statements from FTC's leadership to prepare for 2022. Here's a list of 10 likely trends we can expect to see in 2022 (in no particular order):

New rulemaking proceedings: The FTC is considering a new Rule to "curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination." This rulemaking proceeding is likely to kick off in the coming months. This initiative comes on the heels of the first update in 20 years to the Safeguards Rule under the Gramm-Leach-Bliley Act, which requires non-bank financial institutions (e.g., mortgage companies, tax preparers, debt collectors, fin-tech companies, software providers for financial data) to maintain reasonable security safeguards to protect customer information.

Focus on digital platforms and marketplaces: In a report to Congress, the FTC noted its interest in focusing on the data practices of dominant digital platforms, and in particular, on enforcement of orders against companies like Facebook, Google, Twitter, Microsoft, and Uber. But we do not expect the focus on "marketplaces" to be limited to the largest tech platforms. For example, last month, the Commission announced an enforcement action against OpenX, an ad exchange.

More joint competition and privacy activity: In the same report to Congress, the FTC said, "we need to make sure we are looking with both privacy and competition lenses at problems that arise in digital markets." Notably, the FTC's industry study on social media and video streaming services includes both competition and consumer protection questions. The FTC's amended complaint alleging anticompetitive conduct by Facebook includes references to how Facebook interfered with potential competition on privacy.

Expanded remedies: FTC cases from 2021 continue to reflect the FTC's bread-and-butter emphasis on issues like children's privacy, health privacy, data security, identity theft, algorithms, and ad-tech. But while the subject matter may seem familiar, the FTC's cases from 2021 highlight the panoply of novel remedies the Commission has begun to seek and will likely continue to press for going forward in its privacy enforcement actions. These include deletion of consumer data, deletion of algorithms or models created from consumer data, required notices to consumers, and conduct bans.

Increased enforcement of the FTC's health breach notification rule: In 2009, the FTC issued the health breach notification rule, requiring vendors of personal health records and related entities to notify consumers, the FTC, and in some cases, the media when data is disclosed or acquired without the consumer's authorization. Last fall, by issuing a new policy statement under the Rule, the FTC signaled its intent to step up enforcement efforts under the Rule. Any non-HIPAA covered app, website, or connected device that collects information from consumers should consult the requirements of the Rule, and, where applicable, should comply with its notice and other obligations.

Continued Fair Credit Reporting Act enforcement: Last month, the FTC and U.S. Department of Justice (DOJ) announced a settlement against a company that claimed its background reports may contain arrest, criminal, and sex offender records—even if it didn't include such records—to trick consumers into signing up for auto-renewing subscriptions. Among other things, the agencies' complaint alleged that the company was a consumer reporting agency required to comply with the Fair Credit Reporting Act (FCRA) because it marketed its background reports for employment purposes.

Focus on racial equity: In April, the FTC issued business guidance to highlight that the use of racially-biased algorithms could be an unfair practice under the FTC Act. In October, it issued a staff report titled, "Serving Communities of Color," renewing its commitment to efforts related to surveillance, algorithmic bias, and other emerging issues that may disproportionately affect communities of color.

Emphasis on protecting workers: The FTC required Amazon to pay over $61 million for allegedly deceiving Amazon Flex drivers that they would receive "100% of tips." Chair Khan has urged Congress to consider passing antitrust legislation that would give workers greater protections to organize under antitrust laws. And at a joint FTC/DOJ workshop on promoting competition in labor markets, Chair Khan discussed her interest in scrutinizing non-compete and non-disclosure agreements.

Scrutiny of self-regulatory programs: For the first time last year, the FTC kicked a member out of a safe harbor program under the Children's Online Privacy Protection Act and noted its intent to closely scrutinize other children's privacy oversight companies.

New operational priorities: Internally, the FTC is making some changes to the way it does business, including expanding the regional offices, hosting more open meetings, hiring across disciplines (e.g., technology, data analytics), and reducing the number of public appearances by staff. Companies interacting with the FTC are likely to see changes in policies and practices, for example, an emphasis on business and technical questions, in addition to legal ones.

### 2NC---AT: Rollback

#### Guidance uniquely avoids rollback---it’s not judicially reviewable because it’s not legally binding---guidance is neither ripe nor final.

Kessler 21 (Jeremy Kessler, Professor of Law at Columbia University; Charles Sabel, Maurice T. Moore Professor of Law at Columbia University; “The Uncertain Future of Administrative Law;” 08-01-21, Daedalus, Vol. 150, Issue 3, pp. 188-207, <https://doi.org/10.1162/daed_a_01867>, TM)

Yet government-by-guidance has provoked significant legal controversy, for at least three related reasons.18 First, as notice-and-comment rulemaking became accepted as the paradigmatic mode of administrative rulemaking, the less procedurally onerous issuance of guidance began to strike some scholars, litigants, and judges as a potential cheat. As Justice Elena Kagan put it during an oral argument in 2015, this is the recurrent concern that “agencies more and more are using interpretive rules and are using guidance documents to make law and that … it is essentially an end run around the notice and comment provisions.”19 A second, related fear is that because the provisionality of guidance documents makes them difficult to challenge in court, agencies can use guidance to evade not only the pre-issuance notice-and-comment process but also post-issuance judicial review as well.20 A final concern relates to the proliferation of doctrinal deference to agencies' interpretation of their statutory mandates and prior regulations. Critics warn that such deference perversely shelters agency interpretations announced in guidance documents from judicial scrutiny, even though they do not reflect the deliberation and evidence-gathering required by the notice-and-comment process or by formal agency adjudication.21

Underlying these technical legal objections are deeper normative concerns about the relationship of regulation as “current thinking” to conventional forms of legal authority–legislative, executive, and judicial–that help to explain why guidance continues to bedevil American courts and legal commentators. Guidance, unlike notice-and-comment rules, cannot be seen as analogous to and directly descended from legislation as a natural outgrowth of the constitutional order. But neither does guidance have the finality that marks the culmination of lawful executive or judicial action. Unlike prosecutorial indictments and administrative enforcement actions, it does not purport to represent the executive branch's determination that a particular private party has violated the law; unlike administrative orders and judicial decisions, it is not an assessment of the guilt or liability of an accused party. Guidance is always ripening into a conclusive decision, but it is never ripe; for this reason, unlike administrative rules and orders, it is not reviewable by the courts as a matter of course.

#### Even if it gets challenged, agencies will win on ripeness and finality grounds.

Raso ’10 CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

5. Judicial Challenge

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use guidance documents more frequently relative to legislative rules. Guidance documents are advantageous because they are less likely to be challenged. Even if challenged, agencies have a reasonable probability of winning on ripeness or finality grounds.

#### Their cards are about deference for determining ‘unfair methods of competition,’ an interpretation of the counterplan could be an ‘unfair trade act,’ which is also under Section 5 of the FTCA.

Bush 16 (Darren Bush, Professor of Law, University of Houston Law Center; “Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency;” Fall 2016, Willamette Law Review, Vol. 33, Issue 1, Accessed through HeinOnline, TM)

B. FTC Receives Little Deference in Court

The FTC receives almost no deference with respect to cases it brings under the "unfair methods of competition" prong of the Federal Trade Commission Act. In contrast, the FTC usually receives Chevron deference 57 when it acts under the "unfair or deceptive trade acts or practices" prong of section 5 of the FTC Act. Theories abound as to why this is so.

The most obvious theory is that the dual enforcement scheme clouds the ability of the courts to offer the FTC any deference. Unlike with the FTC's "unfair methods of competition" actions, the courts do not face a non-agency duplicate that appears in the bulk of cases before the courts regarding "unfair or deceptive trade acts or practices."5 The FTC and DOJ both enforce the Clayton Act, and while the Sherman Act is exclusively within the confines of the DOJ, the FTC cases, to the courts, are parallel actions. 59 With an "ugly stepsister" in the midst, it is difficult for the FTC to make a claim of deference successfully. 60

### 2NC---Condo

### 2NC---Theory

## CP---DOJ

### 2NC---Solvency---AT: Clarity

#### 4. Case-by-case is more unclear than Section 5.

Khan ’20 et al; At the time of this writing, Lina Khan was an Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; and former Legal Fellow, Federal Trade Commission. Now, Lina Khan serves as the head of the FTC. The co-author for this piece is Rohit Chopra, who was previously The Assistant Director of the Consumer Financial Protection Bureau and currently sits on the FTC. “The Case for “Unfair Methods of Competition” Rulemaking”, 87 U. CHI. L. REV. 357, 359-63 - #E&F – 2020 - https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\_Rulemaking\_87UCLR357.pdf

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

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of even the most capable institutional actors.1 Generalist judges struggle to identify anticompetitive behavior2 and to apply complex economic criteria in consistent ways.3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.4 And if a standard isn’t administrable, it won’t yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions.5 Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.6

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

#### 5. It’s more certain than the ambiguous language in the status quo.

Emerson 21 (Blake Emerson, Assistant Professor of Law @ UCLA Law School; “Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory;” Public Law Research Paper, 02-05-21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3779457>, TM)

Similar dynamics are common beneath the level of regulations, when agencies issue nonbinding guidance to private parties concerning how to comply with the law. Critics of guidance complain that these documents often impose “coercive” requirements while avoiding the rigors of informal rulemaking or formal adjudication.280 But in contexts where an agency has broad enforcement power, or the capacity to keep products off the market altogether, regulated parties crave guidance like “water in the desert.”281 Even if the terms of the guidance departs from the regulated parties’ ideal-point in preserving their discretion, the gains in certainty make such non-binding yet coercive communications well worth the cost.

#### 6. Setting Section 5 guidelines for “unfair competition” boosts clarity and refines FTC legal standards.

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

FTC Commissioners Joshua Wright and Maureen Ohlhausen have proposed that the Commission adopt Guidelines for the application of Section 5 to Unfair Methods of Competition (“UMC”).2 These UMC Guidelines would apply to non-merger conduct that may not violate the Sherman Act. Agency Guidelines can provide a useful role in defining the scope of agency enforcement intentions and providing guidance to the business community, outside counsel, and agency staff.3 They also can lead to more refined legal standards. This short note will comment on the role of Section 5 distinct from the Sherman Act and how this relates to the Commissioners’ proposed Guidelines.

## Adv---Interoperability

### 2NC---AT: Smart Cities !

#### Their Ahlgren link to smart cities says global interoperability is key – massive ALT cause given the scope of their impacts and the fact that the largest megacities are in Europe, South and East Asia

--MSU = BLUE

Bengt Ahlgren et al, 16, Senior Researcher in the Decisions, Networking, and Analytics Lab at SICS Swedish ICT, PhD in Computer Systems at Uppsala; Markus Hidell, Associate Professor in Communication Systems in Network Systems Laboratory at KTH Royal Institute of Technology, PhD in Telecommunication at KTH Royal Institute of Technology; Edith C.-H. Ngai, Associate Professor in the Department of Information Technology at Uppsala University, PhD in Computer Science and Engineering at Chinese University of Hong Kong; “Internet of Things for Smart Cities: Interoperability and Open Data,” *IEEE Internet Computing*, 20(6), p. 52-56] >Blucas

Today’s cities face a variety of challenges, including job creation, economic growth, environmental sustainability, and social resilience. Emissions from motor vehicles have become a major source of air pollution in the world’s large and medium-sized cities. Many large cities experience serious air pollution and greenhouse gas emission (GHG), which is made worse by increasing traffic congestion. With these challenges in mind, the European Union and many other countries are investing in information and communication technology (ICT) research and innovation, and developing policies to improve the quality of life of citizens and sustainability of cities. Given the trend of ICT for smart sustainable cities, understanding where we are in the evolution of the Internet is critical to future city-planning processes.

The Internet of Things (IoT) has been viewed as a promising technology with great potential for addressing many societal challenges. Cisco believes that many organizations are currently experiencing the IoT, the networked connection of physical objects and the cyberspace.1 According to the International Data Corporation (IDC)’s Worldwide Internet of Things Forecast, 2015–2020, 30 billion connected (autonomous) things are predicted to be part of the IoT by 2020 (see www.idc.com/infographics/IoT). The IoT market size is forecast to grow from US$157 billion in 2016 to $661 billion2 by 2021. The adoption of cloud platforms, development of cheaper and smarter sensors, and evolution of high-speed networks are expected to drive the growth of the IoT market.

Many cities, such as London and New York, see the increasing need and interest of the public sectors to explore IoT technologies to improve traffic flow, reduce pollution and energy consumption, and collect data for policing. Smart cities are an urban development vision to integrate multiple ICT solutions to manage a city’s assets to create a sustainable environment, improve the quality of life, and enhance efficiency and economical value. The number of new IoT products and applications has grown exponentially in recent years. Various communication standards and protocols have been suggested in the community, and some have been adopted in different IoT devices. However, there are also quite a few proprietary protocols and cloud services in the IoT, which make the interoperability and sharing of data across different devices and platforms quite challenging. Open data in smart cities means not only global data collected and opened by the government, but also includes the sharing of data among individual citizens and industries with the government and general public. In this article, we’ll discuss the advantages of open data and standards within the IoT, current limitations, and future trends.

IoT for Smart Cities

The IoT provides individuals, society, and the business world new opportunities to access volumes of data and to develop new applications and services for creating a cleaner environment and more intelligent society.3 The information society is rapidly becoming a central pillar for urban planners, architects, developers, and transportation providers, as well as in public service provision. One good example is using smartphones and smart meters to regulate energy consumption in the Hyllie smart networks of Malmö, Sweden.4 The system enables people to measure, monitor, control, and influence their own energy consumption, and be able to independently produce renewable energy (for example, by using solar panels). One way to optimize the use of renewable energy and reduce costs is to decide how and when you want to charge your electric car. Consumers are informed of the supply of renewable energy in the system and how much electricity costs via smartphones or tablets.

From a public sector leadership perspective, cities can be viewed as microcosms of the interconnected networks for building a clean, energy-efficient, and sustainable society. In Amsterdam, a network-enabled LED streetlighting system has been developed to reduce the city’s energy consumption and costs.5 Similarly, in the US, Cisco and a wide range of public and private stakeholders in Chicago have been driving smart community initiatives to improve neighboring services and the quality of life.6 IoT solutions are more effective when they facilitate open data and encourage public engagement, to achieve the goals of increasing productivity, decreasing costs, and improving citizens’ quality of life.

Interoperability and Open Standard Development

With the popularity of IoT devices, many IoT protocols and standards have been developed. In contrast to ordinary computers, IoT devices are normally constrained when it comes to memory space and processing capacity. In addition, IoT devices might be deployed where there’s limited or no access to continuous power supply, which means that they need to operate under power supplied from batteries or small solar panels. As a consequence, power-efficient communication protocols with small memory footprints and limited demands on processing have been developed to support IoT devices. Traditional TCP/IP protocols haven’t been designed with these requirements in mind. Over the past years, however, IoT protocols have been standardized on virtually all layers of the protocol stack. These protocols typically have low complexity as an important design goal and are optimized for constrained environments.

Table 1 shows a few examples of IP-based open protocol standards commonly used for IoT communication. For instance, IEEE 802.15.4 has been widely adopted in many smart devices as the MAC and Physical layer protocol. Several network layer and application layer protocols have also been proposed for constrained devices. Standard protocols are important to guarantee interoperability of different IoT devices.

However, using open standards doesn’t automatically result in open systems. In our context, an open system means an integrated open IoT infrastructure solution for smart cities, providing access to open data and APIs for cloud services. In many cities, that infrastructure will be paid for, at least in part, by the city authorities using public funding. To motivate this investment, and get the most benefit for society, we argue that any smart city IoT infrastructure needs to be a truly open system, where equipment from many vendors can be used, and where the generated data can be more or less freely used by anyone to develop new services, based on low-level as well as processed sensor and IoT data. This kind of system will maximize innovation in the IoT domain, much as the Internet has done for information and communication services.

Many current IoT systems — for example, for air quality monitoring or the smart home — are either incomplete systems with limited functionalities (that is, in terms of sensing, storage, and analytics), or are closed, proprietary systems dedicated for a particular task. The latter are vertically integrated systems, sometimes called stove pipes or vertical silos, which can’t be combined or extended easily with third-party components or services. The result is that once invested in a particular system, you’re locked into that vendor’s system. Vertically integrated systems are particularly problematic for the public sector, because this prevents fair competition in public procurement and is less suitable for large-scale data sharing.

Patrik Fältström7 argues similarly that market forces work against open interoperability, especially in the IoT domain where, for example, a smart lighting system from one vendor only works with light bulbs from the same vendor. Systems are designed as end-to-cloud-to-end, where the cloud part is vendor-controlled with limited possibilities for third parties, and where the IoT devices often speak proprietary protocols to the cloud. Fältström argues that this lack of interoperability severely limits the market growth (for example, with smart light bulbs). Also, the dependence on a cloud service might render the device nonfunctional, should that cloud service for any reason, temporarily or permanently, disappear.

Instead of these stove pipes, we need horizontally designed systems with well-defined interfaces and data formats that can unleash the potential of open data, and that enable third parties to independently develop new applications and services, possibly combining several data sources. Providing open data has huge potential for innovation in digital applications and services, resulting in very large economic values. These interfaces (APIs) through which the IoT data can be accessed at multiple levels of refinement — from raw data directly from sensors, to highly processed data — also need standardization. The challenge is to provide an open system that lets users access the open data and cloud services without being locked by a particular platform. The open system should also allow third-parties to innovate based on the open data and open APIs.

Case Study: GreenIoT Project in Sweden

We developed a GreenIoT solution that incorporates smart sensing and cloud computing technologies to encompass a more interactive and responsive city administration with private and public parties. The proposed open GreenIoT platform supports a wide range of applications, such as environmental monitoring, transportation, factory process optimization, and home security, and enables third-party innovation in new IoT-based services. Driven by Uppsala Municipality, we implement and demonstrate GreenIoT as a testbed in the city of Uppsala (the fourth largest city in Sweden) to support air pollution monitoring and traffic planning. Because the particulate level of Uppsala occasionally exceeds the EU standard, in particular during the winter and early spring, one objective is to reduce air pollution through active monitoring, traffic management, and better city planning.

Existing IoT technologies have largely contributed to hardware, software and protocol design. However, a major challenge of the IoT lies in how to extract valuable information from vast volumes of data generated from the smart devices (also known as the “Big Data” problem). Our GreenIoT solution leverages cloud computing to support intelligent data management, and integrate with green networking and sensing techniques to support energy-efficient and sustainable operations. The GreenIoT platform in Uppsala will be based on open standards, open to the public and supporting industries to test their new sensing products. It provides open data and open APIs for third parties to access the sensor data and make use of the cloud services. The open data generated by the smart devices and platform will drive the development of innovative applications and services.

One major goal of the project is an integrated solution for an environmental sensing system, which enables experimentation with applications and services using open environmental data, particularly for sustainable urban and transportation planning (see Figure 1). The GreenIoT architecture is manifested in terms of a testbed in Uppsala. The sensing system and application platform are built from unique technology that provides open interfaces at several levels, energy and resource efficiency, and application independence. We use a unique tool for visualization in four dimensions, which supports smart city simulations and is fully integrated with the sensor data for real-time feedback. The testbed, including the open data and open APIs, allow third parties to develop and experiment new sensing products and services that could be exported to international markets.

To fulfill user requirements — from advanced tools for city planning as well as from novel applications making sensor data useful to citizens — we devised the GreenIoT architecture (see Figure 2).

Data produced by sensor networks are delivered through sensor gateways for storage and processing managed by cloud services for sensor data. The sensors use a publish/ subscribe protocol, Message Queuing Telemetry Transport (MQTT), to communicate data in an open format through a broker for further storage and processing in the cloud, or for direct use by applications and services. We’re also experimenting with information-centric networking8 for direct access to sensor data.

Sensor data can be retrieved by tools and applications through welldefined APIs. The sensor data cloud services support both requests for raw sensor data and for pre-processed sensor data. Pre-processed data can be described as a grid of estimated values for a geographical region, where the values are calculated from the actual data produced by sensors in that region. A set of pre-processing types has been defined, such as interpolated data, hourly average, daily average, and weekly average. These types should be seen as a starting point, and more types are likely to be defined in the future. In the long run, it even should be possible for tools and applications to define processing that can be executed by the sensor data cloud services and then retrieve refined data according to their demands. The open APIs and open data format will facilitate the sharing of open data and guarantee the accessibility of cloud services without relying on a single device manufacturer or service provider.

The vision of the “smart city,” making use of the IoT to provide services for the good of citizens and public authorities, promises solutions to some of today’s societal challenges such as air quality, transportation, and energy efficiency. These IoT systems must be based on open data and open standards, including protocols and interfaces, so that the systems enable third-party innovation in new services, and to avoid vendor lock-in. Standardized protocols might not be enough to achieve these goals — systems must be designed with openness in mind at all levels. Based on this concept, we designed and developed a GreenIoT platform in Sweden to demonstrate the benefits of open data and open platforms for smart city development. Over the next year, we will develop applications and carry out experiments using the Uppsala City IoT testbed, and formulate guidelines for public bodies for the procurement of open IoT infrastructure – including open APIs, common data formats, and how to avoid vendor lock-in. Open systems enabling innovation in new services are particularly important for publicly funded IoT infrastructures, to maximize the benefits for society.

#### No megacities impact – too sweeping, empirically denied, and association with criminality is problematic

Pamreiter 13 (Christof Pamreiter, Department of Geography, University of Hamburg, “10 Does size matter? A critical assessment of the megacity-discourse,” in *Institutional and Social Innovation for Sustainable Urban Development*, eds. Harald A. Mieg and Klaus Topfer, Routledge, 2013, Google Book)

Introduction

In the political discourse and scientific literature on urban sustainability, particular attention is being paid to megacities.1 World Bank President Robert Zoellick, for example, stated in a speech delivered to the fourth climate summit of the C40 (the Large Cities Climate Leadership Group) that megacities are responsible for about 80 percent of greenhouse gas emissions. Similarly, the United Nations Human Settlements Programme (UN-Habitat, 2011: 92, 71) underscores that ‘because of their sheer size,’ megacities are critical sites of current and future greenhouse gas emissions, with Asian megacities in particular ‘driving the increase in coastal flood risk globally.’Accordingly, Heinrichs et al. (2012: 5,8) discern a ‘risk habitat megacity’ because, due to ‘the concentration of people and values (... | the extent of a potential risk event is estimated to exceed the capacity of a megacity to react, with the consequence of particularly high losses.’ All in all, therefore, it is ‘no exaggeration to suggest that megacities will play a central role in the future of human civilization, and that meeting the challenges they present is a key to global environmental and social sustainability’ (Sorensen and Okata, 2011: 1).

The message is clear: city size matters for (or should I say, against?) urban sustainability. While the emphasis on ecological problems is relatively novel, the underlying idea that large and fast-growing cities face and pose particular challenges is not new at all. The claim is, in short, that rapid and geographically-centralized urbanization in the ‘Third World’ (often denoted as ‘over-’or ‘hyperurbanization’) is a cause—rather than a consequence—of underdevelopment. From this perspective, megacities are seen as being adverse for economic growth and social well-being, which is why the term ‘megacity’ has been, and continues to be, widely used as a synonym for all kind of evils plaguing poor societies. The most popular account in this vein Is certainly Mike Davis’ Planet of Slums, which depicts inegacities as 'stinking mountains of shit’ (Davis, 2006: 138). Yet, even in the scientific literature, megacity growth is related to ‘pathologies’ (Teune, 1988: 361), and megacities are depicted as ‘major global risk areas’ (Megacity Taskforce of the International Geographical Union, n.d.) that are ‘particularly prone to supply crises, social disorganization, political unrest, natural and man-made disasters due to their highest concentration of people and extreme dynamics of development’ (Kraas, 2008: 583).

Yet, such notions are difficult to sustain, as Richardson’s (1981) well-established argument, that there is neither an optimal city size nor an optimal rate of expansion, showed some 30 years ago. My contention is, thus, that it is mistaken to construct a negative relationship between city size and economic and social development. Such assessments are based, first, on the isolation of just one particular city attribute—population size—from the historical and geographical complexities of cities; and, second, on the subsequent turning of this single descriptive element into one of the—if not the only—explanatory factors of urban trajectories. This transformation of a quantitative into a qualitative dimension is, however, neither backed with empirical evidence nor theoretically developed; rather, population size is essentialized. The ‘megacity’ is reified and established as a distinctive analytical category, yet without conceptualizing its contents and boundaries. The results are totally depoliticized readings and representations of megacities, which disregard die circumstances of their making and transformations. If, however, urbanization is a social process (and who would disagree?), then a comprehensive understanding of this process requires a historical-geographical perspective: What are the forces driving and shaping mega-urbanization and its outcomes? What are die economic, social, and political settings in which megacities are being produced, and how do their specific characteristics and interrelationships impinge on the quality of megacity life? My claim is, in sum, that the question of what makes big cities (un) sustainable in economic, social or ecological terms, can be properly addressed only through a social perspective. Or; as David Harvey (1985, xv; emphasis added) put it: ‘I am primarily concerned with how capitalism creates a physical landscape of roads, houses, factories, schools, shops, and so forth in its own image, and what the contradictions are that arise out of such a process of producing space’. In the remainder of this chapter, I will present some general arguments to counter typical notions of the megacity-discourse. Additionally, I will assess the making of one of the world’s most prominent megacities, Mexico City, to back my claim that rapid city growth and high primacy are not necessarily linked to poverty and economic stagnation. From that, I will conclude that whether size matters, and, more importantly, how it matters, depends not on a city’s size, but on the concrete economic, social and political settings in which megacities are being produced and lived.

### 2NC---AT: BioD !

#### Their link to gene sequencing is just the grant proposal for an existing data aggregation project that will be open-source and interoperable by design – plan’s obviously NOT key

--MSU = BLUE

Mark Ellisman, 17, Mark Ellisman UC San Diego/National Science Foundation; “EAGER: An Interoperable Information Infrastructure for Biodiversity Research (I3BR),” <https://www.nsf.gov/awardsearch/showAward?AWD_ID=1255035>, >Blucas

Biodiversity comprises all variations of life at all levels of biological organization, most of which arise from genomic diversity. As genomic technologies become available across the biological sciences, a full characterization of biodiversity demands a full characterization of genomes. Similarly, data synthesis across the full range of biodiversity research domains demands development, implementation, integration and harmonization of data exchange standards. Such interoperable informatics would be transformational for our understanding of biology, with consequent impact on environmental and conservation policy. Adding to the transformational potential is the fact that the microbial world represents half of the world's biomass and nearly all of its biodiversity, yet is still effectively invisible and intractable to traditional biodiversity research. Metagenomic data are not amenable to the concepts, standards, semantics, and methods of traditional eukaryotic biodiversity, and therefore, require an alternate informatics framework. The EAGER will transform the collaborations between two previously separate research communities: the informaticists of the traditional biodiversity community, who employ the Darwin Core (DwC) as a standard, and the informaticists of the Genomic Standards Consortium (GSC), who have developed the Minimal Information about any Sequence (MIxS) standard for genomics, metagenomics and marker genes. Together, these groups will engage in a unified informatics effort to develop three layers of interoperability. The EAGER will harmonize the observational (DwC) and genomic (MIxS) standards, building on a community dialogue and interdisciplinary networking hosted and established under an NSF Research Coordination Network. Standards interoperability is the basis for the next two layers. Syntactic interoperability (in the context of Internet APIs and a database Reference Model) will be supported. The EAGER will assemble experts from the two communities to (a) devise a database Reference Model that integrates the DwC and GSC MIxS standards; and (b) for effective data management, create specific implementations for different database platforms to foster adoption. The practical implementation of the reference model on/for different database systems will allow, for the first time, systematic comparative testing of technical performance and of use cases (e.g., which implementation best serves which complex data query). The EAGER will create task groups to establish the infrastructure for managing ontologies, and to construct a reference model on the purely semantic level in order to fuse the two worlds of data standards, both of which are advanced enough to engage in useful interoperability. In developing an interdisciplinary information infrastructure to achieve data interoperability across domains, this EAGER would advance understanding of complex environmental phenomena and, thereby, inform future policy decisions. Indeed, by leading to an informatics standards platform to conceive a novel conceptual and theoretical framework for the world of microbial ?dark matter,? the EAGER would have a transformational impact beyond science.

#### Microbes are resilient AND adaptable – the balance between current science and ignorance flips their implied presumption that any microbe we haven’t studied is key to extinction

Jeremy Hance 18 (Jeremy Hance is a writer for the Guardian and a KSJ fellow at MIT, 1/16/18, accessed 10/8/21, “Could biodiversity destruction lead to a global tipping point?”, https://www.theguardian.com/environment/radical-conservation/2018/jan/16/biodiversity-extinction-tipping-point-planetary-boundary)AGabay

But what’s arguably most fascinating about this event – known as the Permian-Triassic extinction or more poetically, the Great Dying – is the fact that anything survived at all. Life, it seems, is so **ridiculously adaptable** that not only did **thousands** of **species** make it through whatever **killed off nearly everything** (no one knows for certain though theories abound) but, somehow, after millions of years life even recovered and went on to write new tales. Even as the Permian-**Triassic extinction event** shows the fragility of life, it also **proves** its **resilience** in the **long-term**. The lessons of such mass extinctions – five to date and arguably a sixth happening as I write – inform science today. Given that extinction levels are currently 1,000 (some even say 10,000) times the background rate, researchers have long worried about our current destruction of biodiversity – and what that may mean for our future Earth and ourselves. In 2009, a group of researchers identified nine global boundaries for the planet that if passed could theoretically push the Earth into an uninhabitable state for our species. These global boundaries include climate change, freshwater use, ocean acidification and, yes, biodiversity loss (among others). The group has since updated the terminology surrounding biodiversity, now calling it “biosphere integrity,” but that hasn’t spared it from critique. A paper last year in Trends in Ecology & Evolution scathingly attacked the idea of any global biodiversity boundary. “It makes no sense that **there exists** a **tipping point** of **biodiversity loss** beyond which the **Earth will collapse**,” said co-author and ecologist, José Montoya, with Paul Sabatier Univeristy in France. “There is **no** **rationale** for this.” Montoya wrote the paper along with Ian Donohue, an ecologist at Trinity College in Ireland and Stuart Pimm, one of the world’s leading experts on extinctions, with Duke University in the US. Montoya, Donohue and Pimm argue that there isn’t **evidence** of a point at which loss of species leads to **ecosystem collaps**e, **globally** or **even locally**. If the planet didn’t collapse after the **Permian-Triassic extinction event**, it won’t collapse **now** – though our descendants may well curse us for the damage we’ve done. Instead, according to the researchers, every loss of species counts. But the damage is **gradual** and **incremental**, not a **sudden plunge**. Ecosystems, according to them, slowly **degrade** but never **fail** **outright**. “Of more than **600 experiments** of **biodiversity** effects on various functions, **none showed a collapse**,” Montoya said. “In general, the loss of species has a detrimental effect on ecosystem functions...We progressively lose pollination services, water quality, plant biomass, and many other important functions as we lose species. But we never observe a critical level of biodiversity over which functions collapse.”

#### Speciation rates are soaring

Briggs 16 – John C. Briggs, Affiliate Professor in the Department of Fisheries and Wildlife, Oregon State University, Global biodiversity loss: Exaggerated versus realistic estimates, Environmental Skeptics and Critics, 1 June 2016, Vol. 5, No. 2, pdf

**4.1 Species gained**

Over the past 50 years, alarm over a present **biod**iversity crisis and the beginning of a sixth mass extinction has continued to be spread by many ecologists, while **little attention** was paid to the possibility that there might have been **gains to offset the losses** or to actually cause an **overall increase**. As noted for the marine environment (Briggs and Bowen, 2013), invader species are part of a worldwide, dynamic system that often serves to **increase global diversity** by speciation following successful invasion. Other paths to speciation have also become apparent. Molecular research has revealed numerous cases of **rapid, adaptive divergence** resulting in ecological speciation. Such cases have been demonstrated in plants, vertebrates, and invertebrates (Hendryet al., 2007). Specific examples have been reported in mammals (Rowe et al., 2011), echinoderms (Puritz et al., 2012), and plants (Foxe et al., 2009). Within the past few centuries, species diversity has **increased** on oceanic islands and in many continental regions; in addition, no general decreases in diversity have been known to occur at regional scales (Sax and Gaines, 2003). Human introductions for agricultural and ornamental purposes have produced **substantial gains** in continental plant diversity (Ellis et al., 2012). Furthermore, De Vos et al. (2014), who examined a series of individual phylogenies, found that average extinction rates were less than average diversification rates. For these reasons, and in view of minimal losses, except for species endemic to isolated islands, it appears that terrestrial biodiversity gain is concurrent with, and probably **exceeds** biodiversity loss.

### 2NC---AT: LIO !

#### **LIO thumped** – can’t overcome internal or external antidemocratic forces, the aff’s impact on the LIO is unpredictable and insufficient

Cooley 22 (ALEXANDER COOLEY is Director of Columbia University’s Harriman Institute and Claire Tow Professor of Political Science at Barnard College, DANIEL H. NEXON is a Professor in the Department of Government and at the Walsh School of Foreign Service at Georgetown University, foreign affairs, January/February 2022, “The Real Crisis of Global Order” <https://www.foreignaffairs.com/articles/world/2021-12-14/illiberalism-real-crisis-global-order>) MULCH

Key players in the established democracies, especially in Europe and North America, assumed that reducing international barriers would facilitate the spread of liberal movements and values. It did for a time, but the resulting international order now favors a diverse array of illiberal forces, including authoritarian states, such as China, that reject liberal democracy wholesale, as well as reactionary populists and conservative authoritarians who position themselves as protectors of so-called traditional values and national culture as they gradually subvert democratic institutions and the rule of law. In the eyes of many right-wing Americans and their overseas counterparts, Western illiberalism looks perfectly democratic.

Soon after his inauguration, U.S. President Joe Biden began talking about “a battle between the utility of democracies in the twenty-first century and autocracies.” In doing so, he echoed a widespread view that democratic liberalism faces threats from both within and without. Authoritarian powers and illiberal democracies are seeking to undermine key aspects of the liberal international order. And the supposed pillars of that order, most notably the United States, are in danger of succumbing to illiberalism at home.

Whether they want to “build back better” or “make America great again,” every American analyst seems to agree that the United States needs to first sort itself out to effectively compete with authoritarian great powers and advance the cause of democracy on the global stage. But the two major political parties have very different understandings of what this project of renewal entails. This schism is far greater than disputes over economic regulation and public investment. Partisans see the other side as an existential threat to the very survival of the United States as a democratic republic.

The United States is one of the more polarized Western democracies, but its political conflicts and tensions are manifestations of broader, international processes. The U.S. reactionary right, for example, is linked to a variety of global networks that include both opposition political movements and governing regimes. Efforts to shore up liberal democracy in the United States will have cascading and sometimes unpredictable effects on the broader liberal order; at the same time, policymakers cannot set the country’s affairs in order without tackling wider international and transnational challenges.

All of this goes way beyond giving American democracy a fresh coat of paint and remodeling its kitchen. The crisis cannot be addressed by simply recommitting the United States to multilateral institutions, treaties, and alliances. Its roots are structural. The nature of the contemporary liberal international order leaves democracies particularly vulnerable to both internal and external illiberal pressures.

In their current form, liberal institutions cannot stem the rising illiberal tide; governments have struggled to prevent the diffusion of antidemocratic ideologies and tactics, both homegrown and imported. Liberal democracies must adapt to fend off threats on multiple levels. But there is a catch. Any attempt to grapple with this crisis will require policy decisions that are clearly illiberal or necessitate a new version of liberal order.

OPEN FOR INSTABILITY

Critics of the notion of a new cold war between China and the United States highlight fundamental differences between the world of today and that of the early decades of the Cold War. The Soviet Union and the United States formed the centers of discrete geopolitical blocs. By contrast, Beijing and Washington operate in overlapping and interconnected geopolitical spaces. For years, politicians in Washington have debated how many restrictions to place on Chinese investment in the United States. There was no such angst, and no need for it, when it came to the Soviet Union. U.S. companies did not outsource production to Soviet factories; the Soviet Union was never a significant supplier of finished goods to the United States or its key treaty allies.

A wide range of developments—all of which accelerated over the last three decades—have made the world denser with flows of knowledge and commerce, including the expansion of markets, economic deregulation, the easy mobility of capital, satellite communications, and digital media. People are more aware of what is happening in different parts of the world; formal and informal transnational political networks—limited during the Cold War by hard geopolitical borders and fewer, costlier forms of long-distance communication—have grown in both importance and reach.

These unfolding changes jumbled the geopolitical landscape that emerged after the implosion of the Soviet Union. No single, uniform international order replaced the more bifurcated international order of the Cold War; the world, despite the hopes of neoliberal politicians, never became “flat.” Instead, the international order that took shape by the turn of the century was highly variegated. Many of the new democratic regimes that appeared in the 1990s were only tenuously democratic; optimists wrongly dismissed early indications of weak liberal democratic institutions as but bumps on the road to full democratization. Eastward across Eurasia, liberal ordering became increasingly patchwork. Some states, such as China, managed to effectively access the benefits of the liberal economic order without accepting the requirements of political liberalism.

Liberal institutions cannot stem the rising illiberal tide.

Many analysts in those years promised that market expansion would produce robust middle classes that would in turn demand political liberalization. They argued that the development of a global civil society—underpinned by human rights, the rule of law, and environmental nongovernmental organizations (NGOs)—would help cultivate and mobilize pro-democracy forces, especially in the post-Soviet space. The Internet, widely imagined as an unstoppable force for freedom, would do its part to spread the irresistible appeal of both liberal economic principles and liberal political freedoms.

One could still make a case for optimism even after 2005, the last year that had a net increase in global democracy, according to the pro-democracy advocacy group Freedom House. But in retrospect, it seems hopelessly naive.

## Adv---FTC

### 2NC---Solvency

### 2NC---AT: Engineered Pandemics !

#### Zero chance of production working---tacit knowledge and expertise barriers remain.

Kosal 19 (Dr. Margaret E. Kosal, Associate Professor in the Sam Nunn School of International Affairs at Georgia Institute of Technology, Director of the Sam Nunn Security Program, Ph.D. in Chemistry from University of Illinois at Urbana-Champaign, Former Chief of Staff of the US Army Strategic Studies Group, Former Science and Technology Advisor within the Office of the Secretary of Defense, Former Associate to the National Intelligence Council; “The threats from nanotechnology;” 2019, Bulletin of the Atomic Scientists, Vol. 75, No. 6, Accessed through T&F, <https://doi.org/10.1080/00963402.2019.1680054>, TM)

While frugal science-inspired tools can help humanitarian aid efforts and improve stability in conflict zones, as the technologies become cheaper, more advanced, and more generally useful, the potential for dual use increases. Distribution of more open technologies lays the groundwork for the potential proliferation of chemical and biological weapons. Of course, this is the opposite effect of what humanitarian organizations would want.

A terrorist organization would find it hard to use frugal science to increase its overall capabilities. Frugal equipment is intended to be less complex, easier to use, more accessible, and cheaper, but a proliferator or terrorist group would still need both the tacit knowledge and expertise to create chemical and biological agents and toxins for a weapon that can inflict mass casualties. Frugal technology can help groups experiment and test the materials with which they are working, but if a group only has rudimentary knowledge of how to develop a tactically effective chemical or biological weapon, it is unlikely to successfully develop an effective one. Experimentation with agents and toxins using frugal science (or any other means) does not equate to overcoming the challenges of producing a weapon.

### 2NC---AT: Pandemics !

#### Finishing Ord:

[END FOOTNOTE]

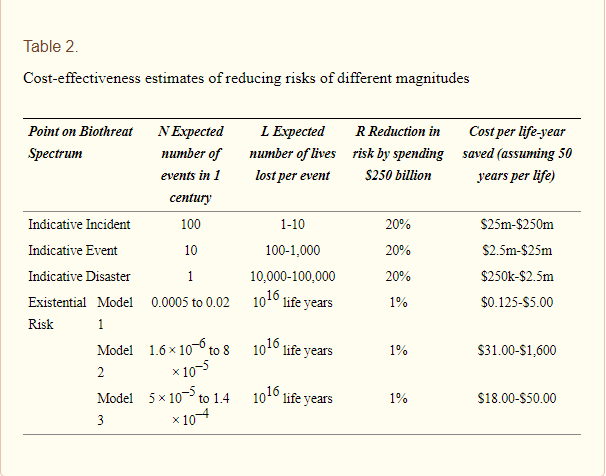
In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

#### The most generous probability estimate is…0.02 events in the next century! Inserting chart below (and that estimate is found in Model 1):

Millett & Piers 17 – Piers Millett, PhD, is a Senior Research Fellow, & Andrew Snyder-Beattie, MS, is Director of Research; both at the University of Oxford, Future of Humanity Institute, Oxford. [Existential Risk and Cost-Effective Biosecurity, Health Secur. 15(4), 373–383, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/]//BPS



### 2NC---AT: Algorithmic Bias !

#### Only scenario is AGI---INSERT

Thomas ’21 [Mike; 7/21/21; Citing Stuart Russell, Professor of Computer Science and Smith-Zadeh Professor in Engineering @ UC Berkeley, Former Vice-Chair of Council on AI and Robotics @ World Economic Forum, PhD in Computer Science @ Stanford; Max Tegmark, PhD in Physics @ UC Berkeley, Professor of Physics @ MIT, Gold Medal Recipient @ Royal Swedish Academy of Engineering Sciences for AI research; “The Future of AI: How Artificial Intelligence Will Change the World”; <https://builtin.com/artificial-intelligence/artificial-intelligence-future>]

“There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.”

But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should.

“Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

#### No capability to cause extinction AND counter-measures check.

Tomasik 16 (Brian Tomasik, Founder of the Center on Long-Term Risk, Former software engineer at Microsoft, “Artificial Intelligence and Its Implications for Future Suffering;” June 2016, Center on Long-Term Risk, <https://longtermrisk.org/files/artificial-intelligence-and-its-implications-for-future-suffering.pdf>, TM) [language modified, denoted in brackets]

There’s a (very low) chance of deliberate AI terrorism, i.e., a group building an AI with the explicit goal of destroying humanity. Maybe a somewhat more likely scenario is that a government creates an AI designed to kill select humans, but the AI malfunctions and kills all humans. However, even these kinds of AIs, if they were effective enough to succeed, would want to construct cosmic supercomputers to verify that their missions were accomplished, unless they were specifically programmed against doing so.

All of that said, many AIs would not be sufficiently intelligent to colonize space at all. All present-day AIs and robots are too simple. More sophisticated AIs – perhaps military aircraft or assassin mosquito-bots – might be like dangerous animals; they would try to kill people but would lack cosmic ambitions. However, I find it implausible that they would cause human extinction. Surely guns, tanks, and bombs could defeat them? Massive coordination to permanently [prevent] disable all human counter-attacks would seem to require a high degree of intelligence and self-directed action.

Jaron Lanier imagines one hypothetical scenario:

There are so many technologies I could use for this, but just for a random one, let’s suppose somebody comes up with a way to 3-D print a little assassination drone that can go buzz around and kill somebody. Let’s suppose that these are cheap to make.

[...] In one scenario, there’s suddenly a bunch of these, and some disaffected teenagers, or terrorists, or whoever start making a bunch of them, and they go out and start killing people randomly. There’s so many of them that it’s hard to find all of them to shut it down, and there keep on being more and more of them.

I don’t think Lanier believes such a scenario would cause extinction; he just offers it as a thought experiment. I agree that it almost certainly wouldn’t kill all humans. In the worst case, people in military submarines, bomb shelters, or other inaccessible locations should survive and could wait it out until the robots ran out of power or raw materials for assembling more bullets and more clones. Maybe the terrorists could continue building printing materials and generating electricity, though this would seem to require at least portions of civilization’s infrastructure to remain functional amidst global omnicide. Maybe the scenario would be more plausible if a whole nation with substantial resources undertook the campaign of mass slaughter, though then a question would remain why other countries wouldn’t nuke the aggressor or at least dispatch their own killer drones as a counter-attack. It’s useful to ask how much damage a scenario like this might cause, but full extinction doesn’t seem likely.

# 2NR

## CP---Section 5

### 2NR---AT: Congress Backlash

#### Congress wouldn’t waste their time retaliating.

Raso ’10 CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

Agencies facing a hostile Congress should use guidance documents more frequently to avoid attracting additional scrutiny. Measuring congressional preferences toward an agency or a particular issue is difficult. Roll call votes rarely concern one issue or even one agency. Congress rarely votes on individual agency budgets, and the few available votes are contaminated by the threat of a presidential veto. Other potential measures of congressional dissatisfaction, such as attempts to override agency rules, occur too infrequently.

#### Guidance documents build Congressional support.

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 unfair methods of competition, 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.

#### Even if they hate the counterplan, it goes under the political radar and solvency generates support before opponents can mobilize to overturn it.

Raso ’10 CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

Guidance documents generally attract less attention from Congress and the President, giving agency leaders greater latitude to impose their preferred policy choices. Guidance is not subject to the many procedural requirements devised to alert the political branches to agency rulemaking activity. 92 In addition, guidance documents arouse less attention and opposition. Agencies can generally issue a guidance document without attracting advance publicity. The agency therefore has the opportunity to set a new status quo before opponents mobilize. This status quo may generate self-reinforcing feedbacks that strengthen the agency's position. By contrast, agencies must solicit comments on legislative rules. This process generates political activity that may be noticed by Capitol Hill and the White House; some important legislative rulemakings gain political salience as interest group conflict escalates during the notice and comment process. 93 This comparison is not intended to suggest that interest groups are unaware of guidance documents. Rather, at the margin, legislative rules arouse more interest group attention and opposition, which results in greater congressional interest. Guidance documents, therefore, are relatively more attractive in cases where Congress and the President are likely to intervene against the agency.

### 2NR---AT: Certainty

#### Other Section 5 ambiguity thumps---it can already be invoked in enforcement AND guidance, which is way worse.

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

To understand this, we must understand how the FTC has wielded its Section 5 authority in recent years. The scope of Section 5 is unclear. This is substantially because the FTC has declined to explain what it believes the scope to be. Lacking such explanation, firms must live in constant fear of the agency’s potential vigilance. The possibility that the agency may challenge a firm’s conduct is a daunting one, especially because the FTC may elect to first challenge the conduct internally through an administrative hearing.241 [FOOTNOTE 241 BEGINS] Indeed, under most circumstances the FTC will pursue a Section 5 violation in an administrative hearing. The FTC has authority to litigate many matters in the first instance before an Article III court and can litigate most matters in the first instance before an Article III court upon petition to the Attorney General. See generally Fed. Trade Comm’n, A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, FTC.GOV, http://www.ftc.gov/about-ftc/what-we-do/ enforcement-authority (last updated July 2008). [FOOTNOTE 241 ENDS] Should the defendant-firm lose, that decision may be appealed only to the full FTC. Until recently, the FTC never failed to uphold a complaint under its review.242 Effectively, then, it is only after multiple years and two complete rounds of litigation that the matter can be appealed to an Article III tribunal.243

#### Uncertainty is a NEG arg---if companies are uncertain if platforms can be non-interoperable, they’ll err on the side of making them interoperable.

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Cases in which the FTC has asserted a broader understanding of Section 5 have generally been resolved in one of two ways: settlement or litigation. Most of the attention paid to the FTC’s expanded use of Section 5 unfair methods of competition claims has focused on high-profile cases that have ultimately settled. When initially bringing a claim, the FTC need not allege anything more than a reason to believe that Section 5 has been violated.147 The FTC need not frame its allegations with any greater specificity; in particular, it need not specify whether it asserts a violation of the traditional antitrust laws (which it can enforce under Section 5) or a standalone Section 5 claim. Rather than limit its options, the FTC typically does not specify a precise legal theory but rather embraces the expansive ambiguity inherent in Section 5’s “unfairness” standard. This approach increases the litigation uncertainty faced by the targets of an FTC investigation, which can be used as leverage by the FTC in securing a favorable settlement.148 This was the pattern used in McWane (discussed below). The FTC also used it in three recent high-profile investigations into high-tech industries: Intel,149 N-Data,150 and Google.151 This approach has also been the basis of the FTC’s privacy and data security jurisprudence, spanning more than one hundred cases.152

While the FTC’s use of Section 5 in high-profile cases has garnered the most attention, its use of Section 5 in lower profile cases, especially those that do not settle, is more revealing. As an administrative agency, a case brought by the FTC is typically heard by an Administrative Law Judge (“ALJ”).153 The FTC prepares and files a complaint, the subject of the investigation files an answer, and both parties submit briefs of their arguments to the ALJ, who will then submit findings of fact and law in an Initial Decision to the Commission.154

A curious thing has happened between the complaint and briefing stages of unfair method of competition cases that the FTC brings before an ALJ. Often, the complaint will cite only Section 5 as the legal basis for the complaint. In the vast majority of cases, this is sufficient to spur the target of the investigation to settle, and, typically, the settlement will have been agreed to prior to the filing of the complaint. In those cases that do not settle, the FTC explains in its brief that Section 5 unfair methods of competition claims incorporate Sections 1 and 2 of the Sherman Act.155