# 1NC---Districts R4

## OFF

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T—Not Filed Rates

#### “Scope” defines the area of practices prohibited

Buccirossi et al. 9, LEAR and EUI, “Measuring the deterrence properties of competition policy: the Competition Policy Indexes,” September 2009, https://www.learlab.com/wp-content/uploads/2016/03/competition\_policy\_indexes\_final\_sept09\_2\_1296464280.pdf

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004. 47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

#### Expanding it requires reducing or eliminating a full immunity – those are only sectoral exemptions, state action, and Noerr-Pennington – NOT filed rates, which just limits private damage remedies

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Bruce H. Kobayashi and Joshua D. Wright, "Antitrust Exemptions and Immunities in the Digital Economy," Global Antitrust Institute, 5-28-2020, https://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/

Introduction

The antitrust laws were designed to regulate private conduct in order to promote competition and protect consumer welfare from exercises of monopoly power by firms. In other words, the antitrust laws, as “the magna carta of free enterprise,”[1] are designed primarily to regulate private conduct, not government conduct and public restraints of trade.[2] Private activity may still fall outside the scope of the antitrust laws when it is exempted specifically by Congress, heavily guided or influenced by the government, or relates to attempts to petition the government to take action.

Antitrust laws’ outer boundaries fall into three categories: (1) sectoral or industry-level exemptions, which single out an industry or business line from antitrust scrutiny; (2) state action immunity, which provides immunity for anticompetitive behavior by state governments and municipalities under certain conditions; and (3) Noerr-Pennington immunity, which aims to protect speech in the form of petitioning activity from antitrust liability.[3] The digital economy interfaces with the government in many respects; therefore, the antitrust laws’ reach—shaped by these exemptions and immunities—plays a clear role in guarding consumer welfare.

#### Vote NEG – full immunities ensures a predictable limit for prep, and centers ground on the balance between antitrust and regulation, ensuring conceptual stasis.

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#### The United States federal government should establish interpretive rules and policy statements prohibiting business practices exempted by the Filed Rate Doctrine 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.

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Deadlock DA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

‘99% about FTC Chair Lina Khan’

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

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

#### Plan expands opposition, derailing confirmation

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

THE POLITICAL ASSAULT ON THE FTC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Inadequate and Misdirected Enforcement Activity Narrative

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Meat and Mergers

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

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

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

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

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

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

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

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

#### Key to regenerative farming

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Consolidation Threatens Democratic Systems

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

C. Consolidation Threatens the Growth of Regenerative Farming

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

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

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

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

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

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

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

#### Extinction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1NC

#### Counterplan:

#### Without increasing prohibitions on anticompetitive business practices exempted by the Filed Rate Doctrine, the United States federal government should implement the recommendations of the Peskoe 21 evidence, conditioning approval of transmission capital expenditures by private electricity and gas corporations on ceding operational control to independent planners and waiving antitrust immunity defenses.

OFFICIAL CLARIFICATION FOR REFERENCE:

#### --announce and implement a presumption that transmission capital expenditures by private electricity corporations are prudent only when

#### ----transmission capital expenditures are committed pursuant to an independently administered planning process,

#### ----private electricity corporations waive regulatory antitrust immunities,

#### ----private electricity corporations disclose all transmission information relevant to planning processes,

#### ----private electricity corporations invoking rights of first refusal adopt the terms and conditions proposed by the developer awarded the project by the regional transmission organization through its competitive process,

#### ----and private electricity corporations do not impose discriminatory rate structures and non-price barriers to distributed energy resources;

#### --subject all other transmission expenditures to a prudence review

#### ----including consumer advocates, generation developers, rival electricity corporations, and entities advocating for deployment of technologies that can obviate new transmission,

#### ----prioritizing distributed energy resources and grid resilience in project selection;

#### --where transmission is independently planned, mandate that planners

#### ----independently verify the accuracy of disclosed transmission information,

#### ----prioritize distributed energy resources and grid resilience in project selection,

#### ----engage third-party evaluators to oversee the project selection process,

#### ----and where planners use the solicitation model to select project developers, require them to hand that function to a third party;

#### --preempt state siting authority;

#### --and provide sufficient staff and appropriations to the Federal Energy Regulatory Commission to conduct this oversight.

#### Solves case without expanding the scope of antitrust laws

Peskoe 21 (Ari Peskoe, Director of the Electricity Law Initiative at Harvard Law School, “Is The Utility Transmission Syndicate Forever?” Energy Law Journal, 42(1), 2021, https://www.eba-net.org/assets/1/6/5\_-\_%5BPeskoe%5D%5B1-66%5D.pdf)

V. TO TRIGGER FURTHER PLANNING REFORMS, FERC SHOULD DISCIPLINE IOU LOCAL TRANSMISSION SPENDING

It is difficult to change the direction of large electric power systems—and perhaps that of large sociotechnical systems in general—but such systems are not autonomous. Those who seek to control and direct them must acknowledge the fact that systems are evolving cultural artifacts rather than isolated technologies. As cultural artifacts, they reflect the past as well as the present. Attempting to reform technology without systematically taking into account the shaping context and the intricacies of internal dynamics may well be futile. If only the technical components of a system are changed, they may snap back into their earlier shape like charged particles in a strong electromagnetic field. The field also must be attended to; values may need to be changed, institutions reformed, or legislation recast.385

The power sector has changed since the days when the benefits of unchecked IOU coordination outweighed the potential advantages of open competition. New technologies, market structures, operational methods, and public policy goals have since taken the industry into once unforeseeable directions. Transmission development should evolve to meet these needs. To the extent that there was ever any rationale for bestowing upon local monopolists the collective responsibility of shepherding the development of our interstate networks, those justifications are no longer valid. IOUs are creatures of the early twentieth century, designed to focus on their state-granted service territories. Their local purpose and local monopolies should not constrain the evolution of the nation’s transmission systems. Twenty-five years ago, FERC finally confronted IOU transmission dominance, ordering reforms that restructured the industry. Ten years ago, FERC attempted to unleash competitive regional transmission development, but obstructionist IOUs, claiming entitlements to perpetual local transmission monopolies, have evaded competition by changing rules and retreating to non-competitive development processes. I propose that FERC spark bottom-up reforms by targeting IOU-run local planning.

Procedural reforms in Order No. 890 require IOUs to share information about their local plans in order to facilitate public participation and scrutiny. But FERC itself fails to examine IOUs’ transmission development plans or subsequent investments. Implicitly, it relies on other parties to discipline IOU spending. This abdication of its core ratemaking authority is an unjustified giveaway to IOUs that biases them in favor of non-competitive local investments over larger scale projects or more cost-effective non-transmission technologies.386

FERC should reverse its longstanding adoption of a presumption that all transmission expenses are prudent387 and replace it with a presumption that only capital expenditures committed pursuant to an independently administered planning process are prudent. For all other transmission expenses, FERC should place the burden of proof to establish prudence back on IOUs in any section 205 filing seeking transmission rate increases.388 FERC’s prudence review is necessary to protect customers and ensure just and reasonable rates.389 A heightened standard of review is sensible where FERC’s planning oversight is less robust and the development process is controlled by the IOU seeking the rate increase.

To implement this policy change, FERC should craft a policy, embodied in a policy statement or developed through a rulemaking,390 that delineates requirements of “independently administered” planning, outlines how IOUs can demonstrate prudence, and provides limited exceptions related to reliability, the dollar value of projects, or other metrics. The policy should also address how FERC’s prudence review will apply to formula rates391 and whether FERC will end, on a prospective basis, its policy allowing state regulation of transmission rates when they are included as part of a bundled retail rate.392 Placing the burden on IOUs is clearly within FERC’s legal authority. Section 205 explicitly states that an IOU seeking to increase rates has the burden to prove that its proposal is just and reasonable.393 FERC ought to insist that IOUs meet the statute’s explicit command by proving prudence in their section 205 filings.

The specter of FERC’s prudence review could have significant effects on transmission planning. Ideally, FERC’s policy would convince IOUs to place all transmission planning — regional and local (subject to carve-outs allowed under the policy) — under the control of an independent entity.394 In transmission operations, separating ownership from operational control allowed the industry to capture benefits of both coordination and competition. Separating ownership from control over planning could have similarly significant benefits by untethering planning from IOU’s state-granted advantages. In addition, unifying local and regional planning could finally achieve the promise of Order No. 1000 by leading to more cost-effective portfolios of projects.395

**[FOOTNOTE 394]**

394. Opponents of independent planning might argue that FERC does not have authority to regulate entities in non-RTO regions because they that are not “public utilities” under the FPA. In non-RTO regions, the regional planning entities do not file tariffs with FERC. IOUs participating in those regional processes met their Order No. 1000 obligations by amending their own OATTs. See, e.g., Avista Corp., et al., 143 F.E.R.C. ¶ 61,255 (2013). These regional planning entities do not meet FERC’s “independence” criteria. Two of these six entities are governed by their member utilities. Three are run by boards with utility and stakeholder members. The remaining organization, ColumbiaGrid, has an independent board appointed by its member utilities, although each of the three current board members is a recently retired executive of a member utility. Review of Recent Regional Plans, supra note 197, at 7; https://www.columbiagrid.org/board-of-directors.cfm. FERC might take one of two approaches to regulating these entities. First, it could continue its practice of regulating regional planning through member IOU filings. While IOUs would retain section 205 rights, they could create procedures that would require them to defer to independent management of the planning entity. Should FERC find that IOUs are interfering with the planning entity, it could conclude that the planning process is not independent and therefore require IOUs to demonstrate prudence. Second, FERC could instead adopt the approach it articulated in the RTG policy statement, where it concluded that although RTGs were not public utilities, their agreements “affect or relate to jurisdictional transmission rates or services” and therefore must be filed under section 205. RTG Policy Statement, supra note 217, at 41,629.

**[/FOOTNOTE 394]**

FERC should take three additional steps to enhance the independence of transmission planners. First, FERC should reduce planners’ reliance on IOUs for information, which might free RTOs from a measure of undue influence that IOUs may currently be able to exert on the planning process. FERC should require IOUs to disclose all transmission information relevant to planning processes and, where transmission is independently planned, mandate that planners independently verify the accuracy of that information.396 Second, FERC should order planners to engage third-party evaluators to oversee the project selection process.397 Third, where planners use the solicitation model to select project developers, FERC should require them to hand that function to a third party. RTOs and other planning entities may be ill-equipped to evaluate development proposals, particularly where their IOU members are competing against other companies.

Even if FERC’s new prudence policy does not induce IOUs to cede planning decisionmaking authority, it may still mitigate IOU transmission dominance. Prudence reviews might include state regulators, consumer advocates, generation developers, rival transmission companies, and entities advocating for deployment of technologies that can obviate new transmission. Information provided by these parties and scrutinized by FERC staff may cause IOUs to propose different projects than they otherwise would. I suspect that, with money on the line, IOUs might disclose more information than they already do pursuant to Order No. 890.

FERC could reject IOU project proposals if it has evidence that consumers would be better served by more cost-effective alternatives. This more pro-active prudence policy would cast FERC as the central planner, a role that it may not be suited to play. To pull it off, it might need additional staff, perhaps housed in a new office dedicated to transmission oversight.398 The goal of the policy, however, is not to plan all transmission development in Washington, D.C., but to spur improvements to planning processes around the country administered by independent entities.

FERC’s prudence policy could also partially mitigate the effects of discriminatory state laws that impede non-IOU transmission development. Following Order No. 1000, several states in the MISO and SPP regions enacted right-of-first refusal laws.399 For example, Minnesota’s ROFR law grants IOUs and other owners of in-state transmission lines rights to build any project planned by MISO that connects to the incumbent transmission owner’s facilities within the state’s boundaries. When the incumbent utility invokes its ROFR, FERC could establish a presumption that the utility’s investment is imprudent unless the utility adopts the terms and conditions proposed by the developer awarded the project by the RTO through its competitive process. This presumption would undoubtedly benefit consumers, as it would effectively force IOUs to either adopt terms and conditions that result from a competitive process or it would lead IOUs to decline to exercise their state ROFRs when they are unwilling to adopt competitively determined terms and conditions.

If IOUs do not voluntarily cede planning to an independent entity, FERC could force IOUs to do so. To justify this move, FERC could point to its recent orders on minimum offer price rules (MOPRs) in capacity markets. In several orders, FERC claimed that to ensure just and reasonable capacity rates it must nullify advantages that states provide to particular resources that offer into the auction.400 While there are numerous factual differences between capacity auctions and transmission development, FERC has identical legal authority under section 206 to remedy unjust and unreasonable rates caused by advantages conferred on particular market participants by state law.401 Applying the MOPR logic to transmission planning, FERC could neutralize advantages that IOUs have in transmission development that are traceable to their exclusive service territories, captive ratepayers, and discriminatory siting laws.

If it chooses not to exercise its newly discovered power to nullify the economic effects of state laws (or if FERC reverses course on MOPRs), FERC could argue that the D.C. Circuit decision rejecting challenges to Order No. 1000 provides a sufficient legal basis for further reforms, including efforts to mitigate IOU advantages in local planning processes. The D.C. Circuit’s decision affirmed that FERC has broad discretion to define unduly discriminatory conduct and remedy such conduct in transmission planning processes.402 The court did not limit FERC’s broad authority to regional planning or establish any legal barrier that prevents FERC from imposing new procedures in local planning, requiring planning be independently administered, or subjugating IOUs’ local planning outcomes to the regional process.

Regardless of whether FERC mandates independent planning or IOUs voluntarily join independently run planning organizations, the efficacy of FERC’s reforms depend in part on states’ cooperation. Many states have been willing participants in IOU efforts to stifle competition.403 Using their nearly exclusive authority over transmission siting, states can effectively veto pro-competitive reforms by refusing to provide siting permission to a non-IOU or out-of-state developer. Indeed, numerous states, often with IOU support,404 have blocked non-IOU transmission development by providing IOUs with ROFRs,405 refusing to site non-IOU projects,406 and rejecting innovative merchant projects that do not align with traditional notions of the “public convenience and necessity” standard that regulators must meet in order to provide siting permission.407

Congress could preempt state siting authority or at least prevent states from enforcing their most anti-competitive laws, such as ROFRs. In 2005, in its first major energy legislation since FERC issued its Open-Access mandate, Congress provided FERC with limited authority to site transmission lines in areas designated by the Department of Energy as having transmission congestion or capacity constraints.408 FERC has never used this siting authority successfully, in part because a federal appeals court interpreted the provisions narrowly.409

In the same bill, Congress also repealed Part I of the 1935 Public Utility Act, paving the way for a wave of utility mergers and perhaps ushering in a new era of IOU transmission dominance.410 The twenty largest U.S.-based publicly traded transmission owners (as measured by miles) have a combined market capitalization of nearly $700 billion (not including Berkshire-Hathaway, the second largest transmission owner that itself is valued at more than $500 billion).411 These companies’ assets are increasingly reliant on cost-of-service ratemaking as several companies have shed competitive lines of business.412 Suffice it to say, these mega-IOUs and their counterparts413 are likely to oppose Congressional action that opens transmission to competition or in some way dilutes IOU control over local transmission development.

With states and Congress seemingly unwilling to oppose IOU dominance, FERC appears most likely to take further action. Yet, I acknowledge that IOUs will inevitably (and rationally) resist further FERC reforms designed to chip away at their transmission dominance. Efforts to dismantle the IOU transmission development “cartels”414 may be delayed through litigation and weakened through implementation. Recognizing the inevitability of IOU backlash, FERC might instead choose to rescind its competitive mandate and direct its reforms towards substantive outcomes, such as motivating more regional investment or incentivizing deployment of new technologies. In that vein, FERC might impose certain technical analyses in the planning process that will cause IOUs and RTOs to select the “right” projects415 or establish particular goals for regional plans to achieve, such as unlocking new resources or connecting regions. Rules that directly target substantive results may have the side-benefit of addressing IOU dominance by ensuring that projects that harm a particular IOU’s parochial interests are nonetheless developed, provided they meet FERC’s technical standards.

Replacing Order No. 1000’s pro-competition procedural reforms with substantive rules engineered to drive IOU investment into FERC-preferred projects may well mitigate IOU backlash and therefore lead to more regional transmission spending, at least in the short term.416 It is worth noting that RTO transmission planning efforts held up as gold standards — MISO’s Multi-Value Projects (MVP) and SPP’s Priority Projects417 — were approved by RTO boards prior to Order No. 1000 and therefore parceled out projects to IOUs without competition.418 Nonetheless, I suggest that while substantive reforms may be necessary, they will be insufficient, and FERC should continue to focus its reforms on IOU transmission dominance for three reasons.

First, FERC has never attempted to dictate substantive outcomes and has in fact explicitly disclaimed that goal.419 Any rule that aims to influence substantive outcomes would have to be robust enough that planners would be unable to subvert FERC’s goal by tailoring the analysis or filtering the results with additional studies designed to either benefit IOUs or achieve results contrary to FERC’s goals. FERC would also run the risk that its rule simply will not work and might result in unintended outcomes.

Second, addressing IOU transmission dominance through procedural reforms aligns with FERC’s expertise, experience, and legal authority. FERC derived its comparability, information transparency, and independence principles from its statutory duty to remedy unduly discriminatory IOU practices and prescribed them as antidotes to IOUs’ anticompetitive behavior. While these principles have proven adaptable, they have not yet liberated transmission development from IOU dominance. Nevertheless, I believe that procedural reforms are necessary, even if FERC also issues substantive rules designed to achieve particular planning goals.

Third, as I have documented throughout this article, IOUs have used their unearned advantages to thwart the development of competitive power markets and transmission development processes. They continue to have incentives and abilities to develop interstate networks that reflect their parochial interests. They are designed to thrive under the status quo, and are ill-suited and unmotivated to facilitate new market entrants and unleash the competitive forces that can allow the sector to realize its innovative potential. Relegating IOUs to participants in the planning process on equal footing with other companies is a necessary step.

Finally, I do not believe that independently administered planning will be a panacea that instantly unlocks innovative transmission projects. Other reforms, particularly to interconnection processes, may be necessary as well.420 FERC might also consider expanding the scope of its independence principle, in part by revisiting allocations of filing rights between RTOs and IOU members.421

**[FOOTNOTE 420]**

420. See MISO, 174 F.E.R.C. 61,084 (2021) (Commissioner Clements, concurring) (“[I] am concerned that the status quo in MISO risks discrimination by transmission owners” in the interconnection process); MISO, 172 F.E.R.C. ¶ 61,248 (2020) (Commissioner Glick, dissenting) (“I remain concerned . . . that the Commission’s determination on remand will provide an opportunity for transmission owners to favor their own generation and create an environment where similarly-situated interconnection customers pay higher network upgrade costs . . . .”); Anbaric Development Partners v. PJM, 171 F.E.R.C. ¶ 61,241 (2020) (denying complaint filed by merchant transmission developer about PJM interconnection rules and setting issues for technical conference); TranSource v. PJM, 168 F.E.R.C. ¶ 61,119 (2019) (reversing ALJ’s conclusion that PJM interconnection practices were nontransparent and unduly discriminatory but finding PJM’s tariff omits material terms on interconnection studies and that PJM made errors in processing interconnection studies); Caspary, et al, supra note 417.

**[/FOOTNOTE 420]**

VI. CONCLUSION

FERC-set rates support the development of more than $20 billion of transmission facilities each year.422 This safe investment opportunity is available primarily — in fact, nearly exclusively — to IOUs. Their incentives to protect their superior access to this lucrative arrangement drive a defensive approach to transmission development that prioritizes projects that they can build without competition and with little oversight. This development model breeds collusion among IOUs who promote transmission rules designed to shield their state-granted territories from outside developers.

FERC’s efforts to break up the IOU transmission clubs have not yet pried control over transmission development from IOUs. FERC’s comparability and transparency principles have mitigated IOU transmission dominance but, without further reforms, the IOU transmission syndicate may indeed be forever. To foster innovation and facilitate development of interstate networks that meet twenty-first century needs, FERC should disentangle transmission planning from IOUs’ financial and strategic interests.

### 1NC

#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy.

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20 The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself. A. Case-by-Case, Fact-Specific Approach Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen. B. Slow, Usually Predictable Doctrinal Development A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26 Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts. C. Market-Driven Case Selection In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development. [\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below. D. Generalists versus Industry Experts Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39 As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges. E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics. [\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42 The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction. However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement. The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary. The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable shifts ruin biz con AND overall growth.

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery. Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook. Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak. Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show. “Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.” Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic. Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists. Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence. The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’” Businesses appear to be less risk-averse now, he said. After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital. Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit. Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first. “We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities. Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

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

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

### 1NC

#### The 50 states and relevant territories should:

#### engage in multistate antitrust action and enforcement to increase prohibitions on anticompetitive business practices exempted by the Filed Rate Doctrine

#### increase subsidies and incentives for renewables including at least advanced biofuels in transportation

#### fund grid resilience projects to create redundancies and spare capacities

#### harmonize competition policies to minimize inter-state effects

#### Solves warming – Milliken internal is about advanced biofuels

#### Solves grid – Greene is about hardening the grid, not spare capacity

#### Solves populism – harmonizes state policy

### 1NC

#### “Antitrust laws” AND “prohibitions” are statutory---excludes court judgements.

Kalbfleisch 61, District Judge. (Kalbfleisch, Opinion in Paul M. Harrod Company v. AB Dick Company, 194 F. Supp. 502 - Dist. Court, ND Ohio 1961. Google scholar caselaw, Accessed: 9-11-2021)

The definition of "antitrust laws" in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term "antitrust laws" could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term "antitrust laws," as used in the statute, as to require no further discussion.

#### Violation: the filed-rate doctrine is a judicial doctrine

#### Voting issue for limits and ground---alternatives wreck link uniqueness and force teams to prep new categories of generics.

## Adv---Rates

### 1NC – Solvency

#### Even without immunity, cases still fail – their author – may be necessary but NOT sufficient

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

Finally, in contrast to instances in which regulators set prices prospectively, computing retrospective damages with complete accuracy is not as critical. The purpose of damages is to deter future antitrust violations and compensate victims. Particularly in the context of price fixing and other forms of collusion between horizontal rivals, the risk of overdeterrence is nonexistent. 219 Unlike other forms of economic behavior that can have both anticompetitive and procompetitive effects, collusion does not have procompetitive benefits, so excessive deterrence is not a practical concern. 22 0

**[NU’s CARD ENDS]**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Courts are captured too

Anderson 18 (J. Jonas Anderson, Associate Professor, American University Washington College of Law, “Court Capture,” Boston College Law Review, 59(5), 5-29-2018, https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3683&context=bclr)

2. Regulatory Capture Applied to the Federal Courts

Although agencies differ from federal courts along a multitude of dimensions,127 those differences do not preclude capture from occurring in the courts.128 In the end, both courts and agencies are governmental bodies that often deal in matters of great interest to industry. Capture theory predicts that where there is value to special interests, there is potential for capture.129

The traditional model of capture is premised on the expected pecuniary benefits to agency personnel.130 In both the revolving door and the iron triangle version of capture, perks (including bribes, money for budgets, nongovernment jobs, etc.) entice a regulator to make favorable decisions to the industry dangling the perk.131 More modern versions of capture include capturing via information and cultural capture, neither of which require knowingly benefitting industry.132 Similarly, a court might receive benefits from capture (indirect economic benefits, for example) or it might be completely unaware of capture by the industry (cultural capture is a good example of this phenomenon).

There are differences between courts and agencies that relate to what type of “industry” might be attempting to do the capturing. In the agency context, the centralization of power over a particular type of rule-making tends to attract the interest of a group of companies that share those same interests. The Federal Reserve, for example, will attract lobbyists from major banks, which are interested in what regulations they will have to follow.

Conversely, although there is some informal specialization and centralization in the federal court system,133 the courts are typically generalists. Because of this, there is no central repository for specific types of cases (like disputes over financial regulations). Courts may, however, attract another type of special interest that does appear continually before them: the litigation industry. The plaintiff and defense bars are powerful organizations that clearly have an interest in influencing courts.134 These “industries,” in particular, deserve further study as to their ability to capture courts.

There are two principal reasons that courts and those seeking to influence courts have been excluded from the literature on capture. Scholars generally view courts as politically independent and immune from capture, and, consequently, they consider courts to be unattractive targets of capture. The next section will analyze the soundness of thinking that courts are immune from capture concerns.

B. The Theory of Court Capture

In contrast to the wealth of scholarship about regulatory capture, scholars have generally ignored courts as a target of capture.135 There have been some attempts to theorize about court capture, but those attempts have been limited and often focused on state courts.136 To be sure, scholars have raised capture concerns in relation to specific specialized courts.137 The United States Court of Appeals for the Federal Circuit,138 landlord tenant courts,139 specialized criminal courts,140 specialized antitrust courts,141 bankruptcy courts,142 and the United States Foreign Intelligence Surveil- lance Court143 have all been considered susceptible to special interest influence at one time or another. Yet many of these “courts” are not Article III courts.144 Furthermore, all of them maintain specialized caseloads that may increase the likelihood of capture.145 Scholars generally consider the generalized federal courts to be free of any serious capture concerns.146 As Thomas Merrill has stated:

Only administrative agencies are subject to the unique pathologies of bureaucracy such as interest group capture. Rival institutions, like the legislature and the courts, [a]re implicitly regarded as being immune from these pathologies or at least as suffering from them to a significantly diminished degree.147

There are two primary arguments that scholars rely upon in assuming federal court immunity from capture. The first argument is a constitutional argument. Federal judges enjoy life tenure and a constitutionally guaranteed salary. Thus, scholars assume judges are more politically independent than regulators, who are beholden to both the President and to Congress.148 This political independence makes judges less reliant on approval from the other branches and the special interest influences that work upon those branches.149 Also, life tenure insulates judges from the need to search out future employment, thereby closing any proverbial revolving door.150

The second argument is an efficiency-based argument. Judges are considered poor targets of capture because they cannot influence an industry to the degree that agencies can.151 Because courts are decentralized repositories of cases, courts and judges are less valuable targets of capture.152 Why capture one federal judge out of over seven hundred, when capturing one regulator can be so much more valuable?

This section will critique the two common justifications for thinking that the federal courts are immune from capture risks.

1. Political Independence Does Not Shelter Judges from Capture

Political independence is a primary reason scholars are skeptical of judicial capture. The argument claims that judges are much more politically independent than either the executive or Congress and this independence protects the courts from capture because they do not have to worry about raising money for reelection, pleasing constituents from a district, or making politically unpopular choices.153 Essentially, there are few political repercussions for a judge that makes a politically unpopular ruling.

It is true that agencies are subject to a higher level of political pressure than courts.154 Political appointees serve the President and are also closely monitored by Congress. Judges, on the other hand, are an independent branch of government and their tenure does not depend upon the other branches’ approval of their decisions. The courts are, however, dependent on Congress for appropriating funds necessary to carry out the work of the federal judiciary.155 But this sort of control is much less firm than the control that Congress and the Executive wield over the heads of agencies.156

The Constitution tries to secure judicial independence through (1) guarantees of life tenure for judges who serve with good behavior and (2) an accompanying unreduced salary.157 These protections are perhaps the most often invoked reasons why the judiciary is not susceptible to capture.158 Alexander Hamilton, in The Federalist No. 78, extolled life tenure as having the power to shield judges from politics, granting them “complete independence.”159 By appointing judges for life, it is thought, many of the personal benefits of capture that redound to agency employees are unavailable to judges.160 The most obvious potential benefit is the prospect of future employment.161 A judge, unlike a regulator, is not interested in what employment opportunities exist at the company about which a matter must be decided. David Stras and Ryan Scott state the matter thusly:

[Term limits for judges] would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary. . . . It is easy to imagine that a young Justice, such as Justice Thomas, who will be sixty-one after serving eighteen years on the Court, could have a successful “second career” in politics.162

Although some scholars dispute that life tenure leads to judicial independence,163 the majority of scholars who have written about life tenure look upon judicial independence as one of the goals of life tenure.164

With the greater political pressure that agencies feel, it is logical to conclude that they are more likely to be captured than judges. Even so, the lessons of the Interstate Commerce Commission (ICC) and the creation of a specialized court to supervise the ICC teach us that just such a state of capture can arise in courts.165 The United States Commerce Court was a small, federal court that was tasked with the duty of hearing challenges from regulations issued by the ICC. By capturing this small court, the railroads discovered a way to restrict competition while at the same time enjoying the public perception of regulation.166

Furthermore, the protection against capture afforded by political independence has generally been overstated by scholars. While it is true that courts are independent from the other two branches of government, this independence does not protect courts from the influence of private parties. Even if we assume that courts do not experience political pressure, this would only shield courts from the type of capture referred to as “the iron triangle.”167 Other forms of capture (namely, the revolving door type) can exist without political pressure of any sort. In fact, this sort of capture flourishes in the absence of political checks. If a judge is looking for the next job, there is nothing that political independence does to stop that judge from being biased in favor of potential employers.168

When scholars speak of judicial independence as protecting courts from capture, they often use that term as a short-hand for the life tenure and guaranteed salary that judges enjoy. It is these two constitutionally guaranteed benefits that scholars have believed protect the federal courts from private interests. Judge Richard Posner is among those scholars that believe life tenure makes judges far less-susceptible to capture than agencies:

Execution of valid regulatory policies is often thwarted by the dependence of regulators on information supplied by the regulated entities and by the perverse incentives created by “revolving door” behavior. The large staffs of most regulatory agencies result in the typical agency-cost problems of bureaucracies that are not disciplined by marketplace competition.169

Here, Judge Posner is arguing that the structure of the federal judiciary makes the judiciary less attractive to those trying to exert their influence over the courts. Life tenure, by eliminating this “revolving door,” should also eliminate the perverse incentives that accompany it, such as working for the same industry one used to regulate, not having the necessary information to make socially-beneficial decisions, and pay-for-play.170

It is questionable, however, whether life tenure acts as a capture deterrent or is actually an enticement. Some scholars believe that life tenure is a means to achieve “partisan entrenchment,” by which they mean political parties using life-tenured judges to extend their power beyond their time in elected positions.171 It stands to reason that industry would enjoy the same long-term benefit by placing sympathetic judges on the bench. Just as political parties might seek to capture the nomination process to extend their power, so too might an industry seek to capture the same processes and place favorable judges on the bench for life.

Even if we assume life tenure decreases capture risk, there is evidence to suggest that it does not eliminate “revolving door” behavior. While guaranteeing salary and life tenure make leaving the bench for another job less likely, it hardly eliminates the concern. Federal judges are some of the very best lawyers in the country; they are likely to attract significant interest from law firms. Recently, many judges have been leaving the bench because judicial salaries are so far under market.172 A number of judges have retired early to increase their salaries in private practice.173 Of course, the relatively small percentage of federal judges that leave the bench in any given year is not evidence of a revolving door between the judiciary and private sector employment.174 It may, however, signal the weakening of judicial autonomy from the private sector.

Thus, even though judicial retirements do not have a large effect on the judiciary as a whole, the concentrated nature of those retirements may raise the question of whether post-employment opportunities influenced any decisions.175 If judges know that there are potentially lucrative post-bench employment opportunities, regulatory capture theory would suggest that we would see many of the same effects on judicial actors that we observe in agencies. The specter of future employment has long been a factor that capture theorists take very seriously.176 There is no reason to think that the prospect of future employment should not influence judges as well as regulators. Capture via employment opportunities may be less a concern in the judiciary than in the agency context, but it is a concern nonetheless.

2. Courts Present Attractive Capture Targets

The second argument identified by scholars that supposedly shields courts from capture centers on the generalized nature of judging. Because courts and judges are, generally, unspecialized, some scholars believe they are far less appealing targets of capture than agencies. According to Judge Posner:

Agencies are subject to far more intense interest-group pressures than courts. The agency heads are political appointees and their work is closely monitored by congressional committees. The fact that agency members are specialized, and that they are less insulated from the political process than judges are, makes them tar- gets for influence by special-interest groups; hence the term “regulatory capture.”177

Similarly, Judge Posner feels that specialization of courts makes capture more likely, but that it remains implausible because of the safeguards inherent in the judiciary. According to Posner, “the federal courts are very difficult to ‘buy.’”178 Thus, one seeking to buy influence would be better served trying to “buy” a high-ranking member of the relevant agency than a federal judge. With a federal judge, the random assignment of cases, the restrictions on venue, and the number of other federal judges, makes ‘buying’ any particular judge a losing proposition.179 Despite this, Posner repeatedly points to specialization as an invitation to be captured.180 Agencies are specialized, courts are not. Therefore, courts are not likely to be captured, according to Posner.181

But as Posner notes, federal courtrooms are becoming increasingly specialized.182 In patent law, all appeals are heard by a single court of appeals: the United States Court of Appeals for the Federal Circuit. Because of this specialization, the Federal Circuit enjoys the attention of nearly every patent attorney in the land. This specialization also brings them the attention of special-interest groups interested in strengthening or weakening the patent system.183 The Federal Circuit is a capture target because of its specialization. Posner and Landes state:

It was predictable that a specialized patent court would be more inclined than a court of generalists to take sides on the fundamental question whether to favor or disfavor patents, especially since interest groups that had a stake in patent policy would be bound to play a larger role in the appointment of the judges of such a court than they would in the case of the generalist federal courts.184

While Posner acknowledges that specialized appellate courts are “less independent” than a generalist court, he still finds the risk of capture at such courts to be low.185 Although these specialized courts are centralized and therefore may attract special interest influence in a way that generalist courts would not, Posner believes the built-in differences between agency administrators and judges make agencies juicier targets for special interests to capture.186

Specialization of courts has also been a focus of Lawrence Baum. Baum has theorized about the relationship between specialized courts, capture, and centralization.187 He notes that the CCPA (a forerunner to the Federal Circuit) was captured by the patent bar.188 By filling the court with sympathetic judges, the CCPA became a tool for patent lawyers and patentreliant industries.189 Although it is true that courts are more decentralized than agencies and therefore present a poor target for parties seeking to capture the entire judicial branch, it might be the case that specialized courts— with their increased centralization—could be attractive targets for capture.

However, Baum downplays the impact of capture within specialized courts, generally. For Baum, the “theme of capture should not be overstated.”190 Capture cannot be presumed to have occurred because the impetus for the creation of specialized courts comes from other courts.191 Furthermore, the judges do not benefit from a court being captured. In fact, the advocates for court specialization were not in a position to directly benefit from those courts.192 To Baum, specialized courts do not show evidence of capture because the desire for specialized courts is often driven by ideas rather than interests.193

Baum’s position that capture does not occur with specialized courts is based on the specifics of the court’s creation. However, courts can be captured at any time, not only upon creation. Even though a court may have been created with the best of intentions, that fact tells us nothing about whether the judges on the court have been captured by a particular interest group. And the creation of specialized courts creates attractive targets for people interested in capturing legal institutions to harness private gains.194

Furthermore, generalist courts can present targets for capture as well as specialized courts. Cases are not randomly distributed across the country. Particular types of cases tend to cluster in certain courts. This clustering may occur because the court is located near industry, the court has a reputation for handling certain types of cases, juries within a particular district are thought to be exceptionally adept (or inept, depending on your viewpoint), or any number of reasons. The U.S. legal system allows plaintiffs to select their court, with personal jurisdiction and venue serving as limiting principles. But while this might be advantageous to litigants, it may also lead to concentration of cases in a particular district. Therefore, while courts are less specialized than federal agencies, to say that courts have no value to industry because they are not at all specialized would be inaccurate.

\* \* \* \*

This Article has thus far endeavored to show that court capture is theoretically possible, both at specialized courts and at courts of general jurisdiction. The supposed constitutional limits on court capture do not actually limit anything, but merely ensure that federal judges cannot be removed without cause. If a judge wants to be influenced by certain constituents or take a job with a law firm, there is nothing in the constitution that prevents such actions. Furthermore, the widespread belief that judges make poor capture targets because of their decentralized docket accurately describes the majority of federal judges; but it is the exceptions we should care about. Some judges find that they receive an inordinate amount of a certain type of case. Those judges are certainly capture targets.

### 1NC – Chevron Turn

#### They said they narrow Chevron – that’s weaponized to erase the administrative state broadly

Hernandez 17

Carlos A. Hernandez, JD-Southwestern Law School's SCALE program, employment lawyer, and Warren Grimes, Professor of Administrative Law-Southwestern, NOTE AND COMMENT: FROM ARLINGTON TO TENNESSEE: THE BEGINNINGS OF A CHEVRON DEFERENCE FAREWELL TOUR?, 47 Sw. L. Rev. 179, 2017

In addition to the executive and legislative branches' direct assaults, the change in the composition of the Supreme Court following the death of Justice Antonin Scalia poses another fundamental challenge to the authority and power of the administrative state. Assumedly, the replacement of a "conservative" Justice by another conservative would not upend a constitutional majority regarding a controversial aspect of administrative law. But, attempts to pigeonhole Supreme Court Justices with predictive labels of "conservative" or "liberal" can be more misleading than helpful. 7Link to the text of the note This is certainly true of the late Justice Scalia. While the conservative label often presumes an anti-regulatory position, Scalia was an ardent proponent of affording deference to the ability of administrative agencies to interpret law. 8Link to the text of the note This deference is referred to as Chevron deference9 from the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 10Link to the text of the note In Chevron, the Court upheld the Environmental Protection Agency's statutory interpretation of a Clean Air Act provision. 11Link to the text of the note In large part, Scalia's pro-Chevron conservative judicial orientation stemmed from his long-standing preference to leave power with the executive agencies to interpret statutory ambiguities, rather than with unelected judges. 12Link to the text of the note Based on the Trump Administration's anti-regulatory agency pronouncements and actions during its first year, it comes as no surprise that the newest member to the Supreme Court, Justice Neil Gorsuch, a presidential nominee, does not share Justice Scalia's pro-Chevron proclivities. 13Link to the text of the note As such, the direction [\*181] of the Court is likely to sway in favor of further limiting administrative agency's power.

This comment focuses on the resurgence of a federalism-based judicial narrative that undercuts the power and authority of the administrative state. Specifically, the comment traces recent judicial attempts to challenge the Chevron deference afforded to the Federal Communications Commission ("FCC"), the independent administrative agency tasked with primary authority for laws, regulations, and innovation related to interstate and international communications. 14Link to the text of the note Namely, the comment contrasts two recent decisions: the Supreme Court's 2013 Arlington v. FCC opinion 15Link to the text of the note with that of the Sixth Circuit's Tennessee v. FCC decision in 2016. 16Link to the text of the note The Sixth Circuit's federalism-based Tennessee decision challenges not only the Court's holding in Arlington that upheld the FCC's Chevron deference, but, more significantly, Tennessee challenges the power and scope of the post-New Deal administrative state. It accomplishes this by positing a fundamental remaking of the Chevron framework. 17Link to the text of the note

This judicial challenge is not based on a new legal theory. It has been percolating in judicial dissents such as the one in Arlington. 18Link to the text of the note In Tennessee, the court accomplishes this challenge to Chevron deference by inserting the clear statement rule, a federalism-based canon of statutory construction, 19Link to the text of the note into its Chevron analysis. This federalism-based refashioning of the Chevron framework substantially limits an agency's ability to exercise its regulatory power, imposing what has been referred to as a "clarity tax" 20Link to the text of the note that effectively denies Chevron deference within the context of potential federal preemption of state law.

At the end of the day, this paper suggests that the Sixth Circuit's federalism-based refashioning of Chevron is a consequential judicial act, especially in light of President Trump's decision to fill the Supreme Court vacancy after Justice Scalia's death with Justice Neil Gorsuch. The Sixth Circuit's decision foreshadows the ascendance of a long dormant desire in an agglomeration of dissenting judicial opinions to place limits on the regulatory power and scope of administrative agencies. Given the anti- [\*182] regulatory zeal ushered in by President Trump's ascendancy to the White House and Justice Gorsuch's Supreme Court confirmation, 21Link to the text of the note this dual case study of Arlington and Tennessee aims to provide insight into one of the ways in which the landscape of the post-New Deal administrative state is almost certain to fundamentally change for years to come, from within the highest courts in the land.

Part I provides an overview of the persuasive power of federalism-based arguments and dissenting opinions to influence and, more significantly, change substantive areas of law. In particular, it explains how Chevron deference works and illucidates how it fits within these federalism-based dissenting opinions as a prime substantive target to curtail. Part II examines the Supreme Court's majority and dissenting opinions' underlying federalism-based arguments in Arlington. This five-to-four decision narrowly upheld the FCC's Chevron deference. Specifically, it contrasts Justice Scalia's defense of Chevron deference in his majority opinion with Chief Justice Roberts' dissent. Particular attention is paid to the dissenting opinion's federalism-based concerns about what it perceived as the threat posed by the growth and power of the regulatory state. Part III focuses on the Sixth Circuit's federalism-based denial of Chevron deference to the FCC in Tennessee. After providing background for the specific issues at stake, this Part explains the fundamental change the Sixth Circuit made to the Chevron analysis, undercutting the power and scope of the FCC. Part IV evaluates the state of Chevron deference post-Tennessee by placing the Sixth Circuit's decision within the current anti-regulatory political context. In essence, this Part suggests that the Sixth Circuit's decision concerning Chevron deference elucidates the rise of a potent federalism-based legal narrative that champions state sovereignty against what has been derisively characterized by critics since the New Deal era as a unconstitutional overreach by the federal government and its administrative apparatus.

#### Extinction

Posner 17 – Professor of Law, UChicago

Eric Posner, University of Chicago Law School, and Emily Bazelon, Truman Capote Fellow at Yale Law School and staff writer at The New York Times Magazine, The Government Gorsuch Wants to Undo, The New York Times, April 1, 2017, <https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html>

But the reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government — including the rules that keep our water clean, regulate the financial markets and protect workers and consumers. In strongly opposing the administrative state, Judge Gorsuch is in the company of incendiary figures like the White House adviser Steve Bannon, who has called for its “deconstruction.” The Republican-dominated House, too, has passed a bill designed to severely curtail the power of federal agencies.

Businesses have always complained that government regulations increase their costs, and no doubt some regulations are ill-conceived. But a small group of conservative intellectuals have gone much further to argue that the rules that safeguard our welfare and the orderly functioning of the market have been fashioned in a way that’s not constitutionally legitimate. This once-fringe cause of the right asserts, as Judge Gorsuch put it in a speech last year, that the administrative state “poses a grave threat to our values of personal liberty.”

The 80 years of law that are at stake began with the New Deal. President Franklin D. Roosevelt believed that the Great Depression was caused in part by ruinous competition among companies. In 1933, Congress passed the National Industrial Recovery Act, which allowed the president to approve “fair competition” standards for different trades and industries. The next year, Roosevelt approved a code for the poultry industry, which, among other things, set a minimum wage and maximum hours for workers, and hygiene requirements for slaughterhouses. Such basic workplace protections and constraints on the free market are now taken for granted.

But in 1935, after a New York City slaughterhouse operator was convicted of violating the poultry code, the Supreme Court called into question the whole approach of the New Deal, by holding that the N.I.R.A. was an “unconstitutional delegation by Congress of a legislative power.” Only Congress can create rules like the poultry code, the justices said. Because Congress did not define “fair competition,” leaving the rule-making to the president, the N.I.R.A. violated the Constitution’s separation of powers.

The court’s ruling in Schechter Poultry Corp. v. the United States, along with another case decided the same year, are the only instances in which the Supreme Court has ever struck down a federal statute based on this rationale, known as the “nondelegation doctrine.” Schechter Poultry’s stand against executive-branch rule-making proved to be a legal dead end, and for good reason. As the court has recognized over and over, before and since 1935, Congress is a cumbersome body that moves slowly in the best of times, while the economy is an incredibly dynamic system. For the sake of business as well as labor, the updating of regulations can’t wait for Congress to give highly specific and detailed directions.

The New Deal filled the gap by giving policy-making authority to agencies, including the Securities and Exchange Commission, which protects investors, and the National Labor Relations Board, which oversees collective bargaining between unions and employers. Later came other agencies, including the Environmental Protection Agency, the Occupational Safety and Health Administration (which regulates workplace safety) and the Department of Homeland Security. Still other agencies regulate the broadcast spectrum, keep the national parks open, help farmers and assist Americans who are overseas. Administrative agencies coordinated the response to Sept. 11, kept the Ebola outbreak in check and were instrumental to ending the last financial crisis. They regulate the safety of food, drugs, airplanes and nuclear power plants. The administrative state isn’t optional in our complex society. It’s indispensable.

### 1NC – AT: Blackouts

#### No blackouts link – their ev’s about rolling blackouts from price spikes – those are necessarily localized AND temporary – also means they don’t solve the resilience impact

No internal link to grid collapse - ev says inefficiencies cause "rolling blackouts" which is NOT the same as total loss required for their impacts

#### AND, market competition doesn’t prevent those spikes

Skibbens 21 – Environment Campaigns Associate at U.S. PIRG.

Erin Skibbens, December 14 2021, “The real reason behind rising gas prices, and how electrification can help,” U.S. PIRG, https://uspirg.org/blogs/blog/usp/real-reason-behind-rising-gas-prices-and-how-electrification-can-help

These price spikes are likely due to a [combination of factors](https://www.forbes.com/sites/energyinnovation/2021/11/15/with-high-natural-gas-prices-now-is-the-time-to-build-back-better/?sh=787744933a07). However, the simplest explanation is low supply and high demand. During the early stages of the pandemic, it just wasn’t profitable for oil and gas companies to continue drilling because demand was so low. Then, right as businesses were starting to reopen, we entered into one of the hottest summers on record, leading to a huge jump in demand for meeting the nation’s cooling needs. This combination of low supply and high demand caused a spike in prices that we’ll continue to see, not only in the states, but also [globally](https://www.npr.org/2021/09/25/1040669075/global-natural-gas-prices-are-soaring). Even though demand is still high, the fuel industry is purposefully not increasing production, using high prices to pay off debts and funnel money into stakeholders’ pockets— at the expense of their paying customers.

#### Many alt causes are comparatively more likely to cause their impacts – expert consensus (National Academies study)

Morgan et al 17 (M. Granger Morgan, Chair of the National Academies of Sciences, Engineering, and Medicine, Professor of Engineering at Carnegie Mellon University; with the Committee on Enhancing the Resilience of the Nation’s Electric Power Transmission and Distribution System, Board on Energy and Environmental Systems, Division on Engineering and Physical Sciences, National Academies of Sciences, Engineering, and Medicine; “Enhancing the Resilience of the Nation's Electricity System,” National Academies Press, 2017, DOI: 10.17226/24836)

3

The Many Causes of Grid Failure

INTRODUCTION

A wide variety of events can cause disruption of the power system. As noted in Chapter 1, given the numerous and diverse potential sources of disruption, it is impressive that relatively few large-area, long-duration outages have occurred. The causes of outages differ in a number of important ways. Two of the most important differences are as follows: (1) how much warning system operators have that a disruption is coming so they can take protective action, and (2) how much of the physical and cyber control systems that make up the power system remain operative once the disruption has passed. Figure 3.1 categorizes disruptions by the amount of advance warning that operators and others are likely to receive and the amount of time it takes to recover. Figure 3.2 categorizes the range of damages that may result after a disruption occurs.

DIFFERENT CAUSES REQUIRE DIFFERENT PREPARATION AND HAVE DIFFERENT CONSEQUENCES

Building a strategy to increase system resilience requires an understanding of a wide range of preparatory, preventative, and remedial actions and an awareness of how these actions impact planning, operation, and restoration over the entire life cycle of different kinds of grid failures. Strategies must be crafted with awareness and understanding of the temporal arc of a major outage, as well as how this differs from one type of event to another.

It is also important to differentiate between actions designed to make the grid more robust and resilient to failure (e.g., wind resistant steel or concrete poles rather than wood poles; opaque fences around substations to protect against damage from firearms) and those that improve the effectiveness of recovery (e.g., preemptive powering down of select pieces of the system to minimize damage). Some actions serve both strategies, some serve one but not the other, and some serve one while inhibiting the other. For example, good substation design with clear separation of functions makes the substation more resistant to damage and helps repair crews. Building a coffer dam around a transformer may make it more resistant to flooding, but by limiting access for heavy equipment it can also make it harder to complete repairs when it actually fails. Of course a coffer dam does nothing to guard against the effects of earthquake or cyber attack. Similarly, concrete poles may be more resistant to wind but offer no clear advantage or disadvantage in restoration.

The timing of repairs is different depending on the cause. For example, repairs can begin immediately after a tornado has passed, but flooding following a hurricane can delay the start of repairs for weeks and impede restoration efforts. Good planning and preparation are essential to mitigating, ameliorating, and recovering from major outages effectively. Systems—both human and technical—must be built prior to grid failure to allow the responders to assess the extent of failure and damage, dispatch resources effectively, and draw on established component inventories, supply chains, crews, and communications. The next section reviews the major causes of outages depicted in Figure 3.1, beginning with those for which operators have the least warning and ending with those for which they have the most. The chapter then makes a number of general findings and recommendations related to both human and natural threats to the power system.

REVIEWING THE CAUSES OF OUTAGES

Earthquake

Moving through Figure 3.1 from left to right, the first point is labeled E for earthquake. Especially in the West, the central Mississippi valley, the coastal area of South Carolina, and southern Alaska and Hawaii (Figure 3.3), the potential for disruption of major power system equipment by earthquake is significant. Severe damage to distribution poles, transmission towers, and substations can result. Generators may be damaged or subjected to enough stress that they have to be taken off-line. For example, the North Anna Nuclear Power Station was taken off-line following a magnitude 5.8 earthquake in Virginia in 2011 and remained off-line for more than 10 weeks as the owner and operator conducted thorough damage assessments and the Nuclear Regulatory Commission granted approval for restart (Vastag, 2011; Peltier, 2012). In addition, there is substantial risk of the loss of fuel, particularly from natural gas systems, given the long supply chain and vulnerability of pipelines to earthquakes.

While earthquakes typically come without warning, the propagation velocity of earthquake waves is much slower than the speed of light, so that in some cases it is possible with appropriate instrumentation to obtain several seconds of advance warning (hence the horizontal line that runs to the right of point E in Figure 3.1). When possible, such warning could give time to de-energize critical components so as to minimize damage. Research is continuing on a wide range of grid-specific technologies. Organizations like the Pacific Earthquake Engineering Center are working on technologies such as more durable ceramic and non-ceramic insulators, flexible electrical connectors, and advanced materials for towers and attachments. Restoration following a major earthquake is a massive problem requiring a wide range of difficult engineering and construction projects in a compromised environment, with competition from other restoration priorities. For example, key bridges or roads required to access damaged facilities may be impassable. If an earthquake destroys key generating, substation, or transmission equipment, it may take weeks or months to restore service.

Physical Attack

A physical attack, denoted by point P, could occur without warning or with only limited warning. Physical attacks on major system components could cause serious physical damage, especially to large transformers and other hard to replace substation and transmission equipment such as high‑voltage circuit breakers. The possibility of such attacks has been a concern for many years (OTA, 1990; NRC, 2012; DOE, 2015; Parfomak, 2014). Globally, transmission and distribution systems have been a focus of physical attacks, bombings, and terrorist activity—for example, in Afghanistan, Colombia, Iraq, Peru, and Thailand (NRC, 2012). In the United States, there have been relatively few well-planned attacks on the electricity system, though the 2013 sniper attack of the Metcalf transmission substation (Box 3.1) provides a reminder of the physical vulnerability of the system. Recovery could easily require many days or weeks. Generation facilities tend to have greater physical security and thus are less vulnerable to physical attack than substation and transmission facilities.

Cyber Attack

Like a physical attack, a cyber attack, denoted with a C, could also occur with limited or no warning. The best defense against cyber attacks is preventing intrusions to critical systems and detecting and expunging malware before it becomes activated. However, if that is not possible, the consequences of a successful cyber attack may be almost instantaneous, they could take a few seconds to some minutes to be fully realized, or an attacker may lay dormant for months collecting information as happened in the 2015 cyber attack on the Ukrainian power system (Box 3.2). It is difficult to determine how many cyber attacks have been attempted against U.S. utilities, by what means, and with what consequences.

In the time between detection of an intrusion and manifestation of any consequences, it may be possible to take some steps to limit the potential disruptive impacts. In many cases a cyber attack may not give rise to major physical damage to the system, although in some circumstances physical damage can result, especially if the attackers are sophisticated. Depending on the nature of the attack, just how long it would take to restore is unclear. The unique issues associated with cyber risks and restoration are discussed in Chapters 4 and 6. There are also diverse types of cyber attacks and vulnerabilities within the electricity system. According to recent analysis done for the Quadrennial Energy Review (Argonne National Laboratory et al., 2016), the electricity system vulnerabilities include the following:

• Supervisory control and data acquisition systems that rely on modern communication infrastructure to collect data and send control signals in both the bulk power system (generation and transmission) and at the substation level;

• Large power plant distributed control systems that use local communications channels to perform local control on large power plants;

• Smart grid technologies, including software-based components with communication capabilities, used to increase the reliability, security, and efficiency of the grid as well as communicate data between utilities and customers;

• Distributed energy resources that are connected to open networks for communication and can include smart inverters with remote access;

• Supply chain that might have vulnerabilities of legacy software systems from commercial vendors; and

• Corporate communication networks that might have an entry point to electricity systems’ control networks.

The modern power system also makes extensive use of the global positioning system (GPS), especially for time synchronization. Hence, disruption of GPS by space weather, or through cyber attack, could cause disruption in the bulk power system.

Operations Error

A number of historical blackouts have been caused by one or more faults, typically when the system is heavily loaded, that could have been managed if not for a sequence of subsequent operator errors. The network structure of the grid allows large-scale disruptions to result from distant, localized electrical faults, and system irregularities can propagate near instantaneously, generally through the work of protection relays acting unexpectedly to unusual system conditions. For example, the infamous 2003 Northeast blackout was triggered by a simple fault—a tree caused a transmission line short circuit—but within hours it became the largest blackout in U.S. history, owing to two computer/ software errors that caused a lack of situational awareness from grid operators. A smaller but similar cascading failure occurred in 2011 in the southwestern United States, when a problem at a single substation in Arizona grew into a major outage across Southern California in a few minutes.

There are a vast number of potential types of operations error—in both control rooms and in the field—that can lead to cascading blackouts, which makes planning difficult. Fortunately, because virtually all key components of the power system have protective devices that disconnect before damage can occur, cascading blackouts typically do not cause serious physical damage to system components beyond the initiating failure. Depending on system conditions and the nature of faults, operator error can unfold over periods of minutes to hours, and there may be opportunities to detect errors and take corrective action. With improved training and drilling, better instrumentation, improved situational awareness, and improved control methods, the risks of operator error leading to cascading failure have been, and can continue to be, reduced. At the same time, other external threats such as terrorist attacks and pandemics can place operators under stress and potentially increase the probability of errors. In Figure 3.1, operations errors are denoted by point O.

Tsunamis

The domain of damage for tsunamis, denoted T in Figure 3.1, is limited to coastal regions. Figure 3.4 shows locations in the United States that have experienced major tsunami events over the past millennium, which are almost entirely on the Pacific coast. A large international warning system, involving 26 nations, monitors and provides warning across the Pacific basin. As part of that system, the United States hosts the Pacific Tsunami Warning Center near Honolulu, Hawaii, and also operates the Alaska Tsunami Warning Center in Palmer, Alaska. With advance warning, critical facilities can be shut down to reduce damage. Although the best way to reduce the risks to the power system is to place major facilities in locations that are not vulnerable to tsunamis, abandoning and moving existing installations is expensive, and there may be other protective steps that can be taken such as elevating backup generators. This is increasingly a factor in utility planning in Hawaii and along the West Coast.

Regional Weather

Weather events can be a major cause of disruption for the power system. Scientific knowledge about both the causes of severe weather events and the ability to detect changes in the risks varies considerably. Some changing risks, such as the likelihood of more frequent and extreme precipitation events and more frequent heat waves, are reasonably well understood in both regards. Others, like the frequency and intensity of ice storms (which can devastate power systems), are not understood in either regard. Figure 3.5 displays this considerable variation in the level of scientific understanding of weather and how the frequency and intensity of different weather events may evolve as a consequence of natural variability, climate system oscillations (El Niño–Southern Oscillation, North Atlantic Oscillation, etc.), and secular climate changes (IPCC, 2013; NASEM, 2016).

In Figure 3.1, point R denotes regional weather events such as intense convective storms and tornadoes that are capable of widespread damage, especially to distribution systems. Generally, individual tornadoes impact only a small area, and the specific locations at which damages occur are often difficult to anticipate. However, increasing resolution in weather forecasts does provide system operators with some ability to prepare and be ready to respond quickly once damage has occurred—for example, by pre-positioning repair crews.

Tornadoes have occurred in all parts of the country, but they are rare west of the Rocky Mountains. Similarly, tornadoes do not occur at a uniform rate across the year and are most frequent in April, May, and June (Figure 3.6). Utilities and communities in high-frequency areas are aware of the risk and routinely prepare, building shelters for people and hardening the utility infrastructure.

The frequency of tornadoes shows a strong temporal and seasonal variation (Figure 3.7). The annual frequency of tornadoes strong enough to cause damage to power lines shows no apparent time trend. On the other hand, Tippett et al. (2016) report that “the largest U.S. effects of tornadoes results from tornado outbreaks . . . we find that the frequency of U.S. outbreaks with the many tornadoes is increasing and that it is increasing faster for more extreme outbreaks.” Tippett et al. (2016) report that, to date, they have been unable to link this increase to climate change. While not ruling out climate change, they speculate that low-frequency climate variability may be a contributing factor, among others. Figure 3.8 shows a track of storms on April 21 and 22, 2006, impacting four states from Mississippi to North Carolina. Often these different events are not connected by local authorities, each of which is responsible for recovery from a fraction of the total impact.

Ice Storms

Point I in Figure 3.1 denotes ice storms (freezing rain). As is evident from the experience in 1998 in Québec, Ontario, and in upstate New York, ice storms (freezing rain) can result in very widespread damage after which full recovery may take many weeks. Figure 3.9A shows the historical distribution of freezing rain events in the United States over the past 50 years. Figure 3.9B shows the slight upward trend in event frequency over the period 1975 to 2014. Figure 3.9C shows the likely trend in the frequency of future ice storms across the different regions at risk. Ice storms interrupt power through the accumulation of ice on distribution and transmission lines, as the added weight brings lines down and causes damage to poles and towers. In addition to increased weight, wind blowing against ice-laden transmission lines can cause low-frequency (1 Hz) high-amplitude (1 m) oscillations (called conductor gallop) that further stress towers and insulators. Ice accumulation on nearby trees can cause branches to fall on lines or bring vegetation close enough to allow arcing current to cause a short. Impacts to distribution systems are common, whereas damage to transmission towers is less common but requires more resources and time to recover from. Many evocative pictures of damaged transmission and distribution infrastructure are available, dating back nearly 100 years. Figure 3.10A illustrates the extent to which ice can accumulate on distribution systems, and Figure 3.10B shows towers that collapsed due to ice accumulation during a massive storm in Québec in 1998. After the first tower failed, others were pulled down.

Winter storms are a leading cause of power outages nationally but do not receive as much national attention as concentrated events like hurricanes. However, they often do not meet Department of Energy (DOE) reporting requirements and might be exempt from the system average interruption duration index and the system average interruption frequency index reliability metric reporting. Because winter storm outages may be underreported, accurate statistics are not available. The majority of outages are relatively localized and handled by utility crews experienced with recovering from them. There are established and emerging techniques to reduce the risk of damage from ice storms and accelerate restoration. Building towers to higher standards is a known strategy, but there is insufficient data on the likelihood of extreme ice events and the associated costs of outages to support greater investment. Techniques being explored for distribution systems include helically staked guying for poles, hydrophilic coating to help electrical infrastructure shed ice, and disconnecting wires that fall to the ground without damaging poles.

Floods

Floods (Point F in Figure 3.1) can take many forms, from very abrupt flash floods that follow a sudden rainstorm or the breach of a dam, to events whose buildup occurs over extended periods. Floods can damage distribution or transmission towers and their footings or damage equipment installed on the ground. Most utilities have used historical flood data to choose locations for major facilities, such as substations, that are unlikely to be inundated. However, as the climate changes, the frequency of inundation is also changing (e.g., in some places a “100-year event” may have a much more frequent return period).

Hurricanes and tropical storms are a principal cause of flooding. Detailed maps of the “100-year flood plan” are available for much of the United States from the Federal Emergency Management Agency (FEMA). As of 2005, about one million miles of stream have been mapped. Figure 3.11 shows an example map for an area impacted by the flood following Hurricane Agnes. The map reproduced here is compressed (and hence the legends are not readable), but it is included here to convey the type of information that is available.

The Intergovernmental Panel on Climate Change (IPCC) fifth assessment report anticipates that, in light of climate change, North America will experience “an increase in the number of heavy precipitation events” and “increased damages from river and coastal urban floods” (IPCC, 2014). These changes suggest that it is time to explore the development of more informative strategies to communicate the likely extent and frequency of future flooding since the traditional 30-year or 100-year flood metric is problematic when the underlying physical processes are not stationary.

The National Research Council Committee on Floodplain Mapping Technologies examined map accuracy in 2007 in a report titled Elevation Data for Floodplain Mapping and recommended much greater use of lidar altimetry (NRC, 2007). There are several challenges to accurate flood mapping, including these two: (1) the changes in the rate of river flows (and height of crest) as land is developed in a watershed, and (2) popular pressure to understate risk to lower flood insurance costs and avert an adverse impact on real estate value. Despite these limitations, the FEMA flood maps, if interpreted conservatively, provide a superb basis for assessing flood risks to electrical assets and planning flood remediation.

In addition to disrupting the bulk power system, flooding can make access difficult for distribution system repair crews, cause damage by flooding manholes, and cause other problems in underground distribution systems and components. This suggests that care should be taken in design and building of underground systems in flood-prone areas.

Space Weather and Other Electromagnetic Threats

A variety of solar activities (referred to as space weather, point S in Figure 3.1) can impact the earth’s environment (NRC, 2008). Large bursts of charged particles ejected by storms on the sun, called coronal mass ejections, can intersect the earth, causing fluctuations in earth’s magnetic field that create very low frequency voltage gradients across land, generally at northerly latitudes, and induce quasi-steadystate current that can flow in long transmission lines. These low-frequency currents can cause saturation of transformer magnetic cores and result in damage from overheating. Transformer saturation can also result in reactive power and harmonic generation, which can impact the entire power system. The largest storm of this type in the historical record is the 1859 Carrington Event, which caused telegraph systems in the United States and Europe to fail. More recently, smaller solar storms have caused blackouts and very limited damage in power systems. In March 1989, approximately 6 million people lost power for up to 9 hours across Québec from a solar storm that damaged a few transformers and other equipment. A smaller hour-long outage occurred in Sweden in October 2003.

A risk summary prepared by Lloyds (2013) argues that “historical auroral records suggest a return period of 50 years for Québec-level storms and 150 years for very extreme storms, such as the Carrington Event.” In a 2011 study, the Department of Defense’s (DOD’s) JASON advisory panel concluded that the federal response to the risk “is poorly organized; no one is in charge, resulting in duplications and omissions between agencies” (MITRE, 2011). In 2015, the North American Electric Reliability Corporation (NERC) published a Notice of Proposed Rulemaking that requires transmission operators to conduct a vulnerability assessment and update it periodically (FERC, 2015). In October 2016, President Obama issued a comprehensive executive order addressing space weather, which gave the Department of Homeland Security overall leadership in geomagnetic disturbance preparedness and the DOE leadership in addressing grid impacts.

In 1989, there was no warning for the impending geomagnetic disturbance, whereas now satellites can provide 30 minutes of advance warning and sun observation up to 2–3 days ahead of impact. This warning could provide utilities an opportunity to protect the grid—for example, implementing operating procedures that are designed to protect critical transformers. The time constants determining impacts on transformers from solar storms (or from the E3 portion of electromagnetic pulse [EMP] events) are slow enough that there is time to protect transformers even as the event is occurring. Developing standard approaches for real time monitoring of transformers that could be susceptible to damage during solar storms (which can be identified through vulnerability assessments required by NERC) would help operators minimize damage. Such real-time monitoring could be combined with automated protection schemes that prevent transformer damage from geomagnetic disturbances. Other engineering solutions exist to make electrical systems more resistant to geomagnetic disturbances, including building better protection into transformers and designing systems to provide more reactive power on demand.

The National Oceanic and Atmospheric Administration (NOAA) and the U.S. Air Force jointly operate the Space Weather Prediction Center that uses solar and satellite observations (including NOAA’s DSCOVR satellite at the L1 point in deep space) to provide forecasts of space weather events. By observing the limb of the rotating sun, the addition of a satellite at L5 could provide valuable additional advance warning (Gibney, 2017). While coronal mass ejections are relatively slow moving, requiring a day or more to reach the earth, there are a number of events that can produce highly energetic particles that can arrive at the earth in hours, sometimes with little or no warning. These high-energy particles can cause damage to GPS and other satellites, which are used by the power system.

Recent standards for transmission system performance in the event of geomagnetic disturbance (GMD)—for example, NERC standard TPL-007-1—are currently under revision but require that responsible entities maintain detailed system and geomagnetically induced current system models, use these to perform GMD vulnerability assessments every 5 years, and document and communicate this information to other affected entities.

Finally, the committee notes that several of the protective strategies that power companies adopt to reduce vulnerability to solar storms may also provide protection against the lower energy frequencies of an EMP,1 which is a surge of electromagnetic radiation (Box 3.3) with different components that impact the power system. The early time component of an EMP (E1) is an intense, rapid pulse on the order of tens of kV per meter that decays to nearly zero in less than 1 microsecond; the intermediate time component (E2) has an amplitude of several hundred volts per meter and a duration of one to several hundred microseconds; and the late time component (E3) is a very low amplitude pulse on the order of millivolts per meter with a duration between 1 and 100 seconds. The electric fields associated with EMP can impact power systems directly (E1 and E2) or induce currents in transmission lines similar to the low frequency currents associated with GMD events (E3). Small, suitcase-size EMP devices2 can also cause electromagnetic disturbances that can impact the power systems’ (especially substation) equipment, but the impacts will likely be very localized.A nuclear weapon or a dedicated non-nuclear EMP device detonated at a high altitude could cause widespread damage to the electricity grid; nonetheless, understanding of this risk is largely theoretical. The Electric Power Research Institute (EPRI) collaborated with DOE recently to develop a Joint Electromagnetic Pulse Strategy that outlines broad objectives and research needs but stops short of presenting a plan for EMP hardening (DOE and EPRI, 2016).

While most critical satellites have been “hardened,” a large enough space weather event could cause damage to earth-orbiting satellites including those used for communication and the GPS. Modern utilities use the GPS to provide time synchronization across their spatially distributed systems. Disruption of these precise timing signals can result in operational problems. While the GPS is well protected, it is also possible that sophisticated earth-bound hackers could disrupt GPS software and control systems. There are technologies that can minimize this risk, but to date their adoption has been limited (Achanta et al., 2015).

Hurricanes or Tropical Cyclones

As we have learned repeatedly, tropical cyclones can create enormous havoc in power systems. Modern forecasting methods typically provide several days of advance warning, with increasingly more precise and accurate predictions about intensity and the location of landfall as a storm comes closer. Over their lifetime, tropical storms have three basic impacts on power systems: (1) initial impact of wind and rain, (2) storm surge in coastal areas and near major inland waters (e.g., Lake Pontchartrain during Katrina), and (3) flooding due to precipitation. Hurricane risk is concentrated on the Atlantic and Gulf coasts of the United States and in the state of Hawaii (Figure 3.12A).

A 2016 report of the National Academies of Sciences, Engineering, and Medicine concludes that a “broad consensus has emerged as to the expected future trends in their levels of certainty . . . tropical cyclones are projected to become more intense as the climate warms. There is considerable confidence in this conclusion . . . the global frequency of tropical cyclone formation is projected to decrease . . . but there is less confidence in this conclusion than in the expectation of increasing intensity,” as indicated with historical data in Figure 3.12B (NASEM, 2016).

Along with winter storms, hurricanes and tropical storms3 (Point H in Figure 3.1) are some of the largest sources of disruption of power systems. As illustrated by Superstorm Sandy and Hurricane Katrina, the resulting destruction can be widespread. Sandy was an immense and meteorologically complex storm that caused outages in 17 states and the District of Columbia, with the impacts beginning over a relatively short period of time. In contrast, Hurricane Katrina was a very different storm. While its impact on New Orleans (due largely to dike failures) and coastal Mississippi was the focus of press coverage, the total impact on electricity infrastructure was much broader because the storm had more rainfall, had higher sustained wind speed over larger areas, and traveled up the Mississippi River valley causing outages as far inland as Tennessee. Both Katrina and Sandy were devastating, but while Sandy was essentially a concentrated event, Katrina caused damage to power systems across a much larger region. While advanced models allow scientists to project the course and development of hurricanes with greater precision than ever before, weather events still have the capacity to surprise. In planning and preparation, it is important to remember that the evolution of a hurricane can involve substantial uncertainty.

Volcanic Activity

In much of the country volcanic activity (V in Figure 3.1) is not a concern, but in the Pacific Northwest, and parts of Alaska and Hawaii, it presents a low probability but high consequence risk from eruption, ash fall, lava flow, and lahars. The U.S. Geological Survey maintains an active warning program (USGS, 2016b). Clearly the best strategy to avoid problems is to locate critical facilities away from vulnerable locations. However, as Figure 3.13 illustrates, in the case of Mount Rainier, the impacted region can be quite large. Additional damage can be caused by fine particulate dust and falling ash, which can cause insulator flashovers and potentially disable transformers. The geographic extent of falling ash may greatly exceed the immediate hazard area.

Wildfire

Climate scientists have long predicted more frequent and more intense wildfires as a result of ongoing climate change (NCAR, 1988). While fire typically does not cause widespread damage to power systems, it can have major impacts on specific substations and transmission systems, and operators may have to re-route power flows to avoid affected areas. Vulnerability can often be limited with vegetation control, although very large fires can often jump even the most aggressive protective margins. Restoration of fire-damaged facilities can require days or weeks. Fire is denoted as point W in Figure 3.1.

Drought

Finally, in the extreme upper right corner of Figure 3.1 is point D, for drought. Droughts have multiple implications for power systems, ranging from reduced hydroelectricity generation, limited availability of cooling water for power stations, or increased demand for power needed for pumping and treatment. The IPCC report on extreme events concluded that “there is medium confidence that droughts will intensify in the 21st century in some seasons and areas, due to reduced precipitation and/or increased evapotranspiration. This applies to regions including . . . central North America” (Seneviratne et al., 2012).

While the power system can become very stressed during extreme heat (heat waves), ordinarily it manages to deal with such events. Of course, when the power system is highly stressed, the probability of hardware failures or operator error resulting in significant outages increases. The IPCC Fifth Assessment Report (2014, p. 10) concluded, “It is virtually certain that there will be more frequent hot and fewer cold temperature extremes over most land areas on daily and seasonal time scales, as global mean surface temperature increases. It is very likely that heat waves will occur with a higher frequency and longer duration.” The 2014 U.S. National Climate Assessment drew similar conclusions (USGCRP, 2014).

#### No impact to blackouts

Joe Uchill 18, internally citing Department of Homeland Security officials and other cybersecurity experts, “Why "crashing the grid" doesn't keep cyber experts awake at night,” Axios, 8/23/18, https://www.axios.com/why-crashing-the-grid-doesnt-keep-cyber-experts-awake-at-night-a40563a5-f266-493d-856a-5c9a5c1383dd.html

Reality check: The people tasked with protecting U.S. electrical infrastructure say the scenario where hackers take down the entire grid — the one that's also the plot of the "Die Hard" movie where Bruce Willis blows up a helicopter by launching a car at it — is not a realistic threat. And focusing on the wrong problem means we’re not focusing on the right ones.

So, why can't you hack the grid? Here's one big reason: "The thing called the grid does not exist," said a Department of Homeland Security official involved in securing the U.S. power structure.

Think of the grid like the internet. We refer to the collective mess of servers, software, users and equipment that routes internet traffic as "the internet." The internet is a singular noun, but it’s not a singular thing.

You can’t hack the entire internet. There’s so much stuff running independently that all you can hack is individual pieces of the internet.

Similarly, the North American electric grid is actually five interconnected grids that can borrow electricity from each other. And the mini-grids aren't singular things either. Taking down "the grid" would be more like collapsing the thousands of companies that provide and distribute power accross the country.

"When someone talks about 'the grid,' it's usually a red flag they aren't going to know what they are talking about," says Sergio Caltagirone, director of threat intelligence at Dragos, a firm that specializes in industrial cybersecurity including the energy sector.

Redundancy and resilience: Every aspect of the electric system, from the machines in power plants to the grid as a whole, is designed with redundancy in mind. You can’t just break a thing or 10 and expect a prolonged blackout.

On some level, most people already know this. Everyone has lived through blackouts, but no one has lived through a blackout so big it caused the Purge.

'The power system is the most complex machine ever made by humans," said Chris Sistrunk, principle consultant at FireEye in energy cybersecurity. "Setting it up, or hacking it, is more complicated than putting a man on the moon."

An attack that took out power to New York using cyber means would require a nearly prohibitive amount of effort to coordinate, said Lesley Carhart of Dragos. Such a failure would also tip off other regions that there was an attack afoot. Causing a power outage in New York would likely prevent a power outage in Chicago.

### 1NC – AT: Renewables

#### New FERC regulations solved the renewables access barriers their ev’s about

Johnston 21 (Kimberly Johnston, Partner, Power & Utilities, Ernst & Young LLP, June 15th, 2021, “Landmark FERC decision opens market for distributed energy resources” Ernst & Young, <https://www.ey.com/en_us/power-utilities/ferc-opens-market-for-distributed-energy-resources>) MULCH

Today’s regulatory framework is based on the traditional centralized energy delivery model which is becoming outdated given the uptick in carbon-free technologies. The Federal Energy Regulatory Commission (FERC) and state public utility commissions continue to focus on modernizing regulations to promote a level playing field for new market participants, approve the rate recovery of pilot programs and offer incentives for grid performance enhancements. Co-developing the regulatory framework needed for tomorrow’s carbon-free economy is critical to a successful transition to the future customer-centric, decentralized and carbon-free operating model.

There is going to be a lot more demand for electricity, both with electrification and demand for cleaner resources. We have to figure out policies that will hopefully promote a greater investment in the transmission grid to facilitate access to cleaner resources. Rick Glick, FERC Chairman

One recent monumental regulatory policy change occurred with the issuance of Order No. 2222 by FERC. This Order will essentially open the wholesale electricity markets to distributed energy resources. This is historic because the policy is ahead of the carbon-free technologies that will transform the way energy is produced and delivered across America.

FERC Order 2222

On September 17, 2020, FERC issued a landmark ruling, Order No. 2222, requiring Regional Transmission Organizations (RTOs) and Independent System Operations (ISOs) to amend their tariffs to allow distributed energy resources (DERs) to fully participate in the wholesale electricity markets and compete alongside traditional energy market players.

Order No. 2222 is intended to remove market barriers to participation of DERs in the RTO/ISO wholesale electricity markets, which represents two-thirds of customers across the US energy market. The Order enhances market competition while ensuring that RTO/ISO wholesale electricity markets produce just and reasonable rates.

Order No. 2222 presents a huge opportunity for investor-owned utilities and key stakeholders to design the future carbon-free, distributed operating model with the customer at the center.

Each RTO/ISO grid operator must submit FERC compliance filings by July 19, 2021. A filing must propose an implementation plan tailored for its region and must outline how the final rule will be implemented in a timely manner.

#### Their ev never says US key – everybody else solves

Miyazu 22 (Hina Miyazu, Shibuya Data Count, provides market research reports to various business professionals across different industry verticals, “Distributed Energy Generation Market Size, Demand, Outlook, Trends, Revenue, Future Growth Opportunities,” MarketWatch, 1-3-2022, <https://www.marketwatch.com/press-release/distributed-energy-generation-market-size-demand-outlook-trends-revenue-future-growth-opportunities-2022-01-03#:~:text=%22Global%20Distributed%20Energy%20Generation%20Market,the%20forecast%20period%202020%2D2027>.)

"Global Distributed Energy Generation Market is valued at approximately USD 243 billion in 2019 and is anticipated to grow with a healthy growth rate of more than 11.5% over the forecast period 2020-2027. The distributed energy generation (DEG) is a kind of decentralized system used to produce electricity energy and is served to homes, businesses, and industrial areas. These systems are frequently performed their functions through using technologies, such as solar power and fuel cells. More often, distributed energy generation systems are utilized to offer as substitute or addition to the conventional electric power system, and they deliver small-scale electricity generation (usually in the range of 1 kW to 10,000 kW). Distributed energy can be derived from both renewable and non-renewable sources. Furthermore, the deployment of distributed energy generation system also becomes more significant in many countries, with the legislative package on the new electricity market. For instance, the European Commission's has developed a new legislative policy within the Clean Energy Package. As such, the revised Electricity Regulation, which will enter into force on 1st January 2020, opens up opportunities for electricity wholesale markets to renewables, and energy storage. This, in turn, is expected to accelerate the installation of distributed energy generation system in the region. Moreover, the rise in investments in renewable energy projects and smart grid infrastructure, along with growing government focus on reduction of carbon footprint level and usage of cleaner energy resources are the few factors responsible for the high CAGR of the market during the forecast period. For instance, in 2020, the Korean government planned to invest 11 trillion won (USD 9 billion) in renewable energy projects for the upcoming three years. Whereas, Southeast Asian countries will invest USD 9.8 billion in smart grid infrastructure from 2018 to 2027. This, in turn, is likely to strengthen the demand for distributed energy generation, thereby contributing to the market growth around the world. However, the regulatory issues associated with distinct distributed energy resources is one of the prime the few factors restraining the market growth over the forecast period of 2020-2027.

The regional analysis of the global Distributed Energy Generation market is considered for the key regions such as Asia Pacific, North America, Europe, Latin America, and Rest of the World. Asia-Pacific is the leading/significant region across the world in terms of market share owing to the rising renewable energy generation capacity, along with the growing investment & deployment of smart grid and microgrid in the region. Whereas Asia-Pacific is also anticipated to exhibit the highest growth rate / CAGR over the forecast period 2020-2027. Factors such as the stringent government norms concerning environment safety and emission, coupled with the presence of significant number of market players across the developing nations, such as China and India, are the few factors creating a lucrative opportunity for the growth of the Distributed Energy Generation market in the Asia-Pacific region.

#### BUT, renewables can’t solve either impact fast enough

--new IPCC report said we have 4 years before their catastrophic impacts are locked in – absolutely no chance DERs can scale in time, even if they’re right

--already past tipping points, even with net zero emissions, ice and permafrost/methane hydrates will continue melting for centuries, causing their impacts regardless

King 21 (David King, Founder and Chair, Centre for Climate Repair at Cambridge, University of Cambridge; and Jane Lichtenstein, Associate, Centre for Climate Repair at Cambridge, University of Cambridge; “Surviving the next 50 years is an existential crisis – 3 things we must do now,” The Print, 8-14-2021, https://theprint.in/opinion/surviving-the-next-50-years-is-an-existential-crisis-3-things-we-must-do-now/715069/)

The only way to reverse some of these catastrophic patterns, and to regain a kind of stability in climate and weather systems, is “climate repair” – a strategy we call “reduce, remove, repair” – which demands that we make very rapid progress to net zero global emissions; that there is massive, active removal of greenhouse gases from the atmosphere; and, in the first instance, that we refreeze the Earth’s poles and glaciers to correct the wild weather patterns, slow down ice-melt, stabilise sea level, and break the feedback loops that relentlessly accelerate global warming. There are no either/or options.

Reducing emissions

About 70% of world economies have net zero emissions commitments over varying timescales, but this has come too late to restore climate stability.

The IPCC has asked for accelerated progress on this trajectory, but whatever happens, current emission rates of atmospheric greenhouse gases imply global warming of 1.5℃ by 2030 and well over 2℃ above pre-industrial level by the end of the century – a devastating outcome. In particular, melting ice and thawing permafrost are considered inevitable even if rapid and deep CO2 emissions reductions are achieved, with sea-level rise to continue for centuries as a result. In every area of the world, climate events will become more severe and more frequent, whether flooding, heating, coastal erosion or fires.

There are definitely important steps that can still reduce the scale of this devastation, including faster and deeper emissions reductions. However, this is not enough on its own to avert the worst. Together there is real evidence that the massive removal of greenhouse gases from the atmosphere and solutions such as repairing the Earth’s poles and glaciers could help humanity find a survivable way out of this crisis.

#### No energy wars impact

Meierding 20 (Emily Meierding, assistant professor of national security affairs at the Naval Postgraduate School in Monterey, California, “The Exaggerated Threat of Oil Wars,” Lawfare, 8-2-2020, <https://www.lawfareblog.com/exaggerated-threat-oil-wars>)

Over the past year, Chinese seismic survey vessels and their paramilitary escorts have interfered repeatedly with Vietnamese and Malaysian oil and natural gas exploration in the South China Sea, harassing drilling rigs and support ships. These confrontations have prompted concerns that they could provoke a larger military conflict, especially as China exploits the unsteadiness created by the coronavirus to become more aggressive in its various international territorial disputes.

Happily, the historical record indicates that China and its neighbors are unlikely to escalate their energy sparring. Contrary to overheated rhetoric, countries do not actually “take the oil,” to use President Trump’s controversial and inaccurate phrase. Instead, my recent research demonstrates that countries avoid fighting for oil resources.

No Blood for Oil

Between 1912 and 2010, countries fought 180 times over territories that contained—or were believed to contain—oil or natural gas resources. These conflicts ranged from brief, nonfatal border violations, like Turkish jets entering Greek airspace, to the two world wars. Many of these clashes—including World War II, Iraq’s invasion of Kuwait (1990), the U.S. invasion of Iraq (2003), the Iran-Iraq War (1980-1988), the Falklands War (1982), and the Chaco War between Bolivia and Paraguay (1932-1935)—have been described as classic oil wars: that is, severe international conflicts in which countries fight to obtain petroleum resources.

However, a closer look at these conflicts reveals that none merits the classic “oil war” label. Although countries did fight over oil-endowed territories, they usually fought for other reasons, including aspirations to regional hegemony, domestic politics, national pride, or contested territories’ other strategic, economic, or symbolic assets. Oil was an uncommon trigger for international confrontations and never caused major conflicts.

On approximately 20 occasions, over almost a century, countries engaged in minor conflicts to obtain oil resources. However, these “oil spats” were brief, mild, mostly nonfatal, and generally involved countries whose hostility predated their resource competition. Greece and Turkey have prosecuted oil spats. So have China and Vietnam, Guyana and Venezuela, and a dozen other pairs of countries. These confrontations inspired aggressive rhetoric while they were underway, but none of them ever escalated into a larger armed conflict.

Oil has periodically influenced the trajectories of major conflicts that were launched for other reasons. At the end of World War I, British troops seized Mosul province in order to secure its oil resources. Oil aspirations also motivated Germany’s invasion of the Russian Caucasus (1941-1942) and Japan’s invasion of the Dutch East Indies (1941-1942). While the latter attack precipitated U.S. involvement in World War II, it was also a continuation of the Second Sino-Japanese War (1937-1945). All of these “oil campaigns” were inspired by aggressors’ wartime resource needs. Absent the ongoing conflicts, these countries would not have fought for oil.

The historical record also reveals one “oil gambit”: Iraq’s invasion of Kuwait in 1990. Conventional explanations for the attack assert that Saddam Hussein was either greedily attempting to grab his neighbor’s oil resources or needily attempting to limit Kuwait’s oil output in order to raise oil prices and escape from a deepening economic crisis caused by falling oil prices and Iraq’s large debts, incurred during the Iran-Iraq War. The first explanation is wrong. The second is correct, but incomplete, because it omits Saddam’s larger motive for aggression: his fear of the United States. The regime’s records, seized during the 2003 U.S. invasion, reveal Saddam’s belief, nurtured since the 1970s, that the United States was determined to contain Iraq and remove him from power. In 1990, this false conviction led Saddam to assume that the United States was engineering Iraq’s economic crisis by encouraging Kuwait and the United Arab Emirates to exceed their OPEC oil production quotas and refuse Iraq’s repeated entreaties to cancel its war debts. After his infamous meeting with U.S. Ambassador April Glaspie failed to persuade Saddam of the United States’s benign intentions, he concluded that conquering Kuwait was his only remaining means of survival. Fear of U.S. hostility, not oil aspirations, prompted Iraq to invade Kuwait.

A Question of Value

The absence of oil wars is surprising and counterintuitive. Petroleum is an exceptionally valuable resource. It fuels all countries’ economies and militaries. Oil sales are also a crucial revenue source for producer states. Surely, countries are willing to fight to obtain petroleum resources.

In fact, classic oil wars are extraordinarily costly. A country that aims to seize foreign oil faces, first, the costs of invading another country. International aggression is destructive and expensive under the best of circumstances. It may also damage the oil infrastructure that a conqueror hopes to acquire. Next, if a conqueror plans to exploit oil resources over the long term, it faces the costs of occupying seized territory. As the United States has learned from its “endless wars,” foreign occupation is extremely challenging, even for the world’s most powerful country.

Additionally, a conqueror faces international approbation for oil grabs. As censorious responses to Trump’s proposition that the United States “take the oil” from Syria, Iraq and Libya have indicated, seizing another country’s oil is considered reprobate behavior. It violates international laws against plunder and materially threatens to consolidate control over global oil resources. As Iraq learned in 1990, other countries and international institutions respond to oil grabs with diplomatic censure, economic sanctions and even military force. Finally, if a conqueror manages to maintain control over foreign oil resources, it may not be able to exploit them. Conquest scares off the foreign oil companies that many countries rely on to finance and manage oil production.

Because of the high costs of invasion, occupation, and international opprobrium, classic oil wars are simply not worth the effort, regardless of petroleum’s value. Countries may occasionally decide that it is worth initiating an oil spat to obtain desired resources, especially when targeted territories are contested and other issues are at stake. However, fighting major conflicts for oil does not pay.

Keep Your Eyes Off the Prize

All of this is good news for stability in the South China Sea and other oil-rich regions. There is no reason to expect that China’s recent energy sparring with Vietnam and Malaysia will escalate into a larger international conflict, at least with regard to the oil at stake. Oil spats never do, no matter how acrimonious they appear while underway.

That being said, China and its neighbors could still fight for other reasons. The South China Sea’s abundant but impacted fisheries are a critical food and livelihood source for the littoral states’ populations. Critical sea lines of communication pass through the region. And China has attempted to extend its hegemonic influence in the South China Sea by refusing to abandon its legally untenable “nine-dash line” maritime claim and by constructing artificial islands on numerous maritime features. Any of these factors could spark a larger international conflict.

This also means that the low oil prices that are expected to accompany peak oil demand will not produce a peace dividend. Countries won’t engage in fewer conflicts as oil’s value declines, because they weren’t fighting over oil in the first place.

It’s tempting to use oil to explain armed conflict. Oil is valuable and tangible, so it seems to be an obvious target for international aggression. In contrast, factors like hegemonic aspirations and national pride are amorphous and their value hard to quantify. Yet, historically, these other factors have caused significant numbers of severe international conflicts, while petroleum has not. To effectively discourage conflict escalation in the South China Sea and elsewhere, policymakers need to focus on these factors, and resist being distracted by oil.

#### No warming impact

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CLIMATE TRENDS

Beyond exhibiting extreme overconfidence in a cherry-picked analysis of climate-change causes, politicians and activists frequently ground their alarmism in frightening predictions about consequences that are likewise far from certain. This is not only true within the very new (and still quite unreliable) field of predictive climate science; it is true even in the context of ongoing climate phenomena. Indeed, politicians and journalists frequently characterize dramatic or unusual climate phenomena as the product of anthropogenic climate change, yet there is little evidence to support those claims.

For one thing, there is no observable upward trend in the number of “hot” days between 1895 and 2017; 11 of the 12 years with the highest number of such days occurred before 1960. Since 2005, NOAA has maintained the U.S. Climate Reference Network, comprising 114 meticulously maintained temperature stations spaced more or less uniformly across the lower 48 states, along with 21 stations in Alaska and two stations in Hawaii. They are placed to avoid heat-island effects and other such distortions as much as possible. The reported data show no increase in average temperatures over the available 2005-2020 period. In addition, a recent reconstruction of global temperatures over the past 1 million years — created using data from ice-sheet formations — shows that there is nothing unusual about the current warm period.

Rising sea levels are another frequently cited example of impending climate crisis. And yet sea levels have been rising since at least the mid-19th century. This rise is tied closely with the end of the Little Ice Age that occurred not long before, which led to a rise in global temperatures, some melting of sea ice, and a thermal expansion of sea water. There is some evidence showing an acceleration in sea-level rise beginning in the early 1990s: Satellite measurements of sea levels began in 1992 and show a sea-level rise of about 3.2 millimeters per year between 1993 and 2010. Before 1992, when sea levels were measured with tidal gauges, the data showed an increase of about 1.7 millimeters per year on average from 1901 to 1990.

But because the datasets are from two different sources — satellite measurements versus tidal gauges — they are not directly comparable, and therefore they cannot be interpreted as showing an acceleration in sea-level rises. Moreover, the period beginning in 1993 is short in terms of global climate phenomena. Since sea levels have risen at a constant rate, remained constant, or even fallen during similar relatively short periods, inferences drawn from them are problematic. It is of course possible there has been an acceleration in sea-level rise, but even still, it would not be clear whether such a development stemmed primarily from anthropogenic or natural causes; clearly, both processes are relevant.

A study of changes in Arctic and Antarctic sea ice yields very different inferences. Since 1979, Arctic sea ice has declined relative to the 30-year average (again, the degree to which this is the result of anthropogenic factors is not known). Meanwhile, Antarctic sea ice has been growing relative to the 30-year average, and the global sea-ice total has remained roughly constant since 1979.

Extreme weather occurrences are likewise used as evidence of an ongoing climate crisis, but again, a study of the available data undercuts that assessment. U.S. tornado activity shows either no increase or a downward trend since 1954. Data on tropical storms, hurricanes, and accumulated cyclone energy (a wind-speed index measuring the overall strength of a given hurricane season) reveal little change since satellite measurements of the phenomena began in the early 1970s. The number of wildfires in the United States shows no upward trend since 1985, and global acreage burned has declined over past decades. The Palmer Drought Severity Index shows no trend since 1895. And the IPCC’s Fifth Assessment Report, published in 2014, displays substantial divergence between its discussion of the historical evidence on droughts and the projections on future droughts yielded by its climate models. Simply put, the available data do not support the ubiquitous assertions about the causal link between greenhouse-gas accumulation, temperature change, and extreme weather events and conditions.

Unable to demonstrate that observed climate trends are due to anthropogenic climate change — or even that these events are particularly unusual or concerning — climate catastrophists will often turn to dire predictions about prospective climate phenomena. The problem with such predictions is that they are almost always generated by climate models driven by highly complex sets of assumptions about which there is significant dispute. Worse, these models are notorious for failing to accurately predict already documented changes in climate. As climatologist Patrick Michaels of the Competitive Enterprise Institute notes:

During all periods from 10 years (2006-2015) to 65 (1951-2015) years in length, the observed temperature trend lies in the lower half of the collection of climate model simulations, and for several periods it lies very close (or even below) the 2.5th percentile of all the model runs. Over shorter periods, such as the last two decades, a plethora of mechanisms have been put forth to explain the observed/modeled divergence, but none do so completely and many of the explanations are inconsistent with each other.

Similarly, climatologist John Christy of the University of Alabama in Huntsville observes that almost all of the 102 climate models incorporated into the Coupled Model Intercomparison Project (CMIP) — a tracking effort conducted by the Lawrence Livermore National Laboratory — overstate past and current temperature trends by a factor of two to three, and at times even more. It seems axiomatic to say we should not rely on climate models that are unable to predict the past or the present to make predictions about the distant future.

The overall temperature trend is not the only parameter the models predict poorly. As an example, every CMIP climate model predicts that increases in atmospheric concentrations of greenhouse gas should create an enhanced heating effect in the mid-troposphere over the tropics — that is, at an altitude over the tropics of about 30,000-40,000 feet. The underlying climatology is simple: Most of the tropics is ocean, and as increases in greenhouse-gas concentrations warm the Earth slightly, there should be an increase in the evaporation of ocean water in this region. When the water vapor rises into the mid-troposphere, it condenses, releasing heat. And yet the satellites cannot find this heating effect — a reality suggesting that our understanding of climate and atmospheric phenomena is not as robust as many seem to assume.

The poor predictive record of mainstream climate models is exacerbated by the tendency of the IPCC and U.S. government agencies to assume highly unrealistic future increases in greenhouse-gas concentrations. The IPCC’s 2014 Fifth Assessment Report, for example, uses four alternative “representative concentration pathways” to outline scenarios of increased greenhouse-gas concentrations yielding anthropogenic warming. These scenarios are known as RCP2.6, RCP4.5, RCP6, and RCP8.5. Since 1950, the average annual increase in greenhouse-gas concentrations has been about 1.6 parts per million. The average annual increase from 1985 to 2019 was about 1.9 parts per million, and from 2000 to 2019, it was about 2.2 parts per million. The largest increase that occurred was about 3.4 parts per million in 2016. But the assumed average annual increases in greenhouse-gas concentrations through 2100 under the four RCPs are 1.1, 3.0, 5.5, and an astounding 11.9 parts per million, respectively.

The studies generating the most alarmist predictions are the IPCC’s Special Report on Global Warming of 1.5°C and the U.S. government’s Fourth National Climate Assessment, both of which were published in 2018. Both assume RCP8.5 as the scenario most relevant for policy planning. The average annual greenhouse-gas increase under RCP8.5 is over five times the annual average for 2000-2019 and almost four times the single biggest increase on record. Climatologist Judith Curry, formerly of the Georgia Institute of Technology, describes such a scenario as “borderline impossible.”

RCP6 is certainly more realistic. It predicts a temperature increase of 3 degrees Celsius by 2100 in the average of the CMIP models. But on average, those CMIP models overstate the documented temperature record by a factor of at least two. Ultimately, models with a poor record of successfully accounting for past data and highly unrealistic future greenhouse-gas concentrations should not be considered a reasonable basis for future policy formulation.

### 1NC—A2: Spratt

#### We’re gonna blow past 2 degrees

Thomsen-Cheek 21 (Kira Thomsen-Cheek, aka SninkyPoo, Communications Manager focusing on healthcare, IT and HR, University of Washington Medicine ICD-10 Program, BA Michigan State University, “Climate Code Red: We Have 5.5 Years.” Daily Kos, 8-13-2021, https://www.dailykos.com/stories/2021/8/13/2045542/-Climate-Code-Red-We-Have-5-5-Years)

On August 9th, Greta Thunberg tweeted:

According to the new IPCC report, the carbon budget that gives us the best odds of staying below 1,5°C runs out in less than 5 and a half years at our current emissions rate. Maybe someone should ask the people in power how they plan to “solve” that?

The people in power who could make the biggest difference – the leaders of the countries with the highest percentage of global emissions – are presidents Joe Biden and Xi Jinping.

Under President Biden, the infrastructure bills currently making their way through the congressional sausage factory are woefully insufficient to cope with the need to reduce carbon emissions enough –or swiftly enough – to meet the US’s burden under the Paris Agreement. Biden’s stated goal is to cut the nation’s emissions by at least 50 percent by the end of this decade.

That is a worthy aim, but it is not enough. The United States is responsible for only 15% of global emissions annually, and per the IPCC report, our global carbon budget does not last until the end of this decade. It lasts until about 2027.

Even the $3.5 trillion dollar plan largely written by Bernie Sanders (and crafted in response to the known reality that Republicans would force Dems to water down the first plan) is unlikely to include enough action on, or money for, the rapid slashing of emissions and radical retooling of the economy that will be required to keep us under the 1.5°target.

As for the rest of the world? China is responsible for 28% of current annual global emissions – almost twice our rate. Russia produces 5% of the world’s annual emissions, while India produces 7%. Every other country on Earth, lumped together, produce the remaining 21%.

While President Xi Jinping may have talked a good story at this past April’s virtual climate summit, his stated goals are, as with President Biden’s, woefully insufficient.

"China will strive to peak carbon dioxide emissions before 2030 and achieve carbon neutrality before2060," the president said. "China has committed to move from carbon peak to carbon neutrality in a much shorter time span than what might take many developed countries, and that requires extraordinary hard efforts from China. We will strictly control coal-fired power generation projects. We will strictly limit the increase in coal consumption over the 14th five-year-plan period and phase it down in the 15th five-year-plan period."

Unless I am missing something, that was substantially the same as China’s position in 2020. The website Climate Action Tracker categorized China’s climate response then as “highly insufficient,” and consistent with global warming within 3°C and 4°C by 2100 – i.e., more than double the 1.5° that is now generally agreed upon as the upper “acceptable” limit.

#### That triggers Spratt

MSU = Blue

David Spratt 19, Research Director for Breakthrough National Centre for Climate Restoration, Ian Dunlop, member of the Club of Rome, formerly an international oil, gas and coal industry executive, chairman of the Australian Coal Association, May 2019, “Existential climate-related security risk: A scenario approach,” https://docs.wixstatic.com/ugd/148cb0\_b2c0c79dc4344b279bcf2365336ff23b.pdf

An existential risk to civilisation is one posing permanent large negative consequences to humanity which may never be undone, either annihilating intelligent life or permanently and drastically curtailing its potential.

With the commitments by nations to the 2015 Paris Agreement, the current path of warming is 3°C or more by 2100. But this figure does not include “long-term” carbon-cycle feedbacks, which are materially relevant now and in the near future due to the unprecedented rate at which human activity is perturbing the climate system. Taking these into account, the Paris path would lead to around 5°C of warming by 2100.

Scientists warn that warming of 4°C is incompatible with an organised global community, is devastating to the majority of ecosystems, and has a high probability of not being stable. The World Bank says it may be “beyond adaptation”. But an existential threat may also exist for many peoples and regions at a significantly lower level of warming. In 2017, 3°C of warming was categorised as “catastrophic” with a warning that, on a path of unchecked emissions, low-probability, high-impact warming could be catastrophic by 2050.

The Emeritus Director of the Potsdam Institute, Prof. Hans Joachim Schellnhuber, warns that “climate change is now reaching the end-game, where very soon humanity must choose between taking unprecedented action, or accepting that it has been left too late and bear the consequences.” He says that if we continue down the present path “there is a very big risk that we will just end our civilisation. The human species will survive somehow but we will destroy almost everything we have built up over the last two thousand years.”11

Unfortunately, conventional risk and probability analysis becomes useless in these circumstances because it excludes the full implications of outlier events and possibilities lurking at the fringes.12

Prudent risk-management means a tough, objective look at the real risks to which we are exposed, especially at those “fat-tail” events, which may have consequences that are damaging beyond quantification, and threaten the survival of human civilisation.

Global warming projections display a “fat-tailed” distribution with a greater likelihood of warming that is well in excess of the average amount of warming predicted by climate models, and are of a higher probability than would be expected under typical statistical assumptions. More importantly, the risk lies disproportionately in the “fat-tail” outcomes, as illustrated in Figure 1.

---their ev ends---

This is a particular concern with potential climate tipping-points — passing critical thresholds which result in step changes in the climate system that will be irreversible on human timescales — such as the polar ice sheets (and hence sea levels), permafrost and other carbon stores, where the impacts of global warming are non-linear and difficult to model with current scientific knowledge.

Recently, attention has been given to a “hothouse Earth” scenario, in which system feedbacks and their mutual interaction could drive the Earth System climate to a point of no return, whereby further warming would become self-sustaining. This “hothouse Earth” planetary threshold could exist at a temperature rise as low as 2°C, possibly even lower. 13

## Adv---State Action

### 1NC – AT: Populism

#### Federal antitrust enforcement is just as arbitrary, politicized, and doctrinally incoherent as state governments’ protection efforts

Waller 20 (Spencer Weber Waller, John Paul Stevens Chair in Competition Law, Professor, and Director of the Institute for Consumer Antitrust Studies, at Loyola University Chicago School of Law; and Jacob E Morse, JD candidate at Loyola University Chicago School of Law; “The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason,” Competition Policy International, 7-16-2020, https://www.competitionpolicyinternational.com/the-political-misuse-of-antitrust-doing-the-right-thing-for-the-wrong-reason/)

Introduction

The increased importance of antitrust as a campaign issue and a political conversation raises long-standing troubling issues of whether antitrust enforcement (or non-enforcement) can, and is, being used for partisan political purposes. First, there were long standing rumors of White House direction to challenge the AT&T-Time Warner merger. Second, the President and other key officials have alleged that social media and tech giants have exhibited a political bias against conservative messages and that antitrust was one way to deal with such alleged abuses. Third, there have been press reports that the head of the Antitrust Division lobbied members of Congress in connection with the settlement of the Sprint-T–Mobile merger investigation and personally sought to broker the divestiture that was accepted to allow the transaction to move forward.1

Most recently, Congress also has heard recent testimony from a whistleblower that the Attorney General directed burdensome second requests, over the objection of career staff, to mergers posing few competitive risks in the cannabis industry out of a personal dislike for the industry.2 These second requests represented 29 percent of the total second requests during the fiscal year in question.3 The whistleblower also raised concerns about the Division’s now-closed investigation — also over the objections of career staff — of car companies lobbying the state of California to maintain state emissions control at a level in excess of what the administration sought to impose at the federal level.4

This essay begins a long overdue conversation about how the legal system should deal with issues of personal animus or political favoritism in the enforcement of the antitrust laws.5 We take no position on the merits of any of the current controversies, but instead focus on the broader issue of how animus and bias in the broadest sense should be dealt with, both when cases with some potential merit are brought against perceived enemies and when cases with some potential merit are declined to protect perceived allies

We begin with distinguishing these situations of bias and animus from those of outright corruption and when antitrust considerations are set aside in favor of broader foreign policy and national interests. We then look at the limited tools within antitrust law to deal with issues of bias and political favoritism and survey related areas of the law which have been dealing with these issues more directly throughout their history.

A. Distinguishing Outright Corruption and Legitimate National Interest

The types of political bias in the news appear to be different from issues of outright corruption. Issues of bribery and quid pro quo corruption surfaced in the 1970s as an issue in the Watergate scandal when illegal campaign contributions were being used in part to influence antitrust merger decisions of the Nixon Justice Departments.6 Congress reacted in the post-Watergate era by passing the Tunney Act requiring all consent decrees settling government antitrust litigation by reviewed by a federal district court judge to determine whether the settlement was in the public interest.7

Similar troubling issues also arose in the Johnson Administration. As documented from transcripts of recorded calls and discussions in the Oval Office, President Johnson threatened to block a merger involving a leading Houston bank unless the head of the bank helped secure the endorsement of the leading Houston newspaper for Johnson’s 1964 campaign.8 Neither example requires sophisticated analysis to condemn on moral or legal grounds.

At the opposite end of the spectrum, it may be political, but hardly immoral or illegal, to refrain from an instance of antitrust enforcement because it threatens the broader national interest. This is the premise of virtually every immunity doctrine in antitrust law where the overall societal value of labor unions, agricultural cooperatives, certain regulated industries, export trading companies, certain research and development joint ventures, cooperatives activities to ensure adequate annual supplies of flu vaccines, and other forms of joint activities are deemed more important by Congress than the promotion of competition otherwise mandated by the antitrust laws.9 Whether the balance was correctly struck by Congress or the judiciary is a very different question from whether the right thing was done for an improper political motive.

A similar calculus by the executive branch of the value of the overall national interest at the expense of antitrust enforcement in a specific matter is an exercise that may be political, but rarely immoral or unlawful. Few would be interested in the bringing of an antitrust case that risked starting an armed conflict with a trading partner. A decision not to prosecute the members of the OPEC cartel, or private firms carrying out its bidding, may be political and may be prudent or imprudent, but it is neither immoral nor unlawful on its own.10

For example, one can question the correctness of President Truman’s decision to limit an investigation of middle eastern oil companies to a civil proceeding because of the political needs of the Cold War, or President Reagan’s decision to not bring criminal antitrust charges against various foreign firms in connection with the demise of Laker Airlines because of foreign policy concerns and the diplomatic efforts of the British Prime Minister.11 All are political in any normal sense of the word, but none are corrupt, immoral, or unlawful without more.

B. Bias, Animus, and Prosecutorial Discretion in Antitrust

The harder question is what to do when a public competition agency brings a non-frivolous antitrust investigation or case to punish a perceived political opponent or refrains from bringing a non-frivolous, but risky, case against a perceived political supporter. As outlined above, these are not hypothetical questions or thought experiments. Press reports abound that then-Candidate Trump and President Trump expressed his opposition to the proposed AT&T-Time Warner merger as well as his dislike for the coverage he received from Time Warner’s CNN news network.12 Subsequently, the Antitrust Division unsuccessfully challenged that merger in the courts using valid, but unusual, theories that the Division had rarely used to seek to block a merger outright.13

Similarly, both Candidate Trump and President Trump expressed concern over the power of Amazon (and other tech companies) and his dislike for Jeff Bezos the founder of Amazon and the owner of the Washington Post, a frequent critic of Trump.14 As of June 2020, Amazon remains under antitrust investigation by the Federal Trade Commission.15 Separate reports indicated that the Attorney General and his deputy were personally directing and pushing an investigation into Google, which is reportedly entering its final phase.16

This is a particular concern for public rather than private enforcement. The public antitrust agencies in the United States have powers and resources far in excess of private litigants in civil litigation. Only the U.S. Department of Justice (through the Antitrust Division or its other Divisions) can empanel a grand jury or use the resources of the FBI, IRS, and other law enforcement agencies to investigate a potential criminal case. Only the government can compel testimony before the grand jury through the granting of immunity, or grant amnesty or leniency to a business entity and its employees. Only the government can issue a criminal information or seek an indictment from a grand jury. Only the government can arrest a defendant and compel them to stand trial which could result in lengthy imprisonment for individuals and substantial fines for business entities and individuals.

Even on the civil side, the powers and resources of the government normally dwarf those of most individuals and businesses. The FTC and the Antitrust Division each have hundreds of professionals dedicated to antitrust enforcement and broad pre-complaint investigative powers that far exceed the limited pre-complaint discovery available to a private litigant.17

Antitrust Division and DOJ Policy

There are two main internal policy manuals and guidelines that govern the investigation and prosecution of criminal activity by the Antitrust Division and the DOJ more generally. All condemn prosecutions motivated by political considerations. All are rather anodyne, and none are binding if action is taken and none would suffice to address if the Division or the DOJ as a whole refrained from action on political grounds.

The introduction to the Justice Department manual begins with a ringing condemnation of political influence. It states:

“The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department’s investigatory and prosecutorial powers be exercised free from partisan consideration.”18

The Principles of Federal Prosecution section of the Justice Department also states that:

“In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person’s race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs;….”19

The Antitrust Division Manual contains several references to past litigation where the question of political considerations was considered by the court. One section covers objections to CIDs because of government motives such as political motivation and states:

“[I]t has been held that a CID may be quashed if it is issued for the purpose of intimidating or harassing the recipient. In Chattanooga Pharm. Ass’n v. United States Dep’t of Justice, 358 F.2d 864 (6th Cir. 1966), the Government declined to answer the recipient’s allegations that the purpose of the CID was to intimidate and harass the recipient into terminating a pending suit for enforcement of a state fair trade act. Since the Government did not respond, the court held that the allegations were admitted and set aside the CID.”20

The Manual further discusses grounds for discovery of improper motives behind a subpoena stating:

“Recipients have challenged CIDs and asked for discovery on the grounds that they were allegedly issued in response to outside political interference and pressure or to pay off a political debt and were not in a bona fide attempt to determine whether a violation occurred. In In re Cleveland Trust Co., 1972 Trade Cas. (CCH) ¶ 73,991, at 92,122 (N.D. Ohio 1969), the court applied grand jury standards applicable to issuance of a subpoena duces tecum to hold that the recipient was entitled to certain discovery to establish that the investigation was not a bona fide attempt to ascertain an antitrust violation.”21

Motivation in Noerr-Pennington and Sham Litigation

Antitrust law has rarely engaged with the question of bias or animus in the bringing of a complaint. One area that touches on this question is the sham litigation exception to Noerr-Pennington immunity. The Noerr-Pennington doctrine hold that petitioning any branch of the government, including filing litigation, is immune from the antitrust laws as beyond the scope of the Sherman Act.22

The Supreme Court has also established an exception for the filing of baseless litigation where no special antitrust immunity would apply.23 Unfortunately, the Court has spoken in two very different ways about the nature of the sham litigation doctrine. In City of Columbia, the Court stated: “The sham exception to Noerr encompasses situations in which persons use the governmental process – as opposed to the outcome as an anticompetitive weapon.”24 This suggests an analogy to the common law of abuse of process. However, two years later the Court spoke in terms more akin to the notion of malicious prosecution stating:

“First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. … Only if the challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation, which must be a subjective intent to abuse the governmental process in order to interfere with a competitor’s business.”25

The closest the question of political bias or animus has directly come in an antitrust decision action was the previously mentioned ATT-Time Warner litigation, where the defendants sought discovery on potential communications between the White House and the Justice Departments about political influence in the decision to challenge the merger. There, the court denied the requested discovery request holding that “defendants have not made a ‘credible showing’ that they have been ‘especially singled out’ [by the DOJ].”26 Even it turned out that there were no such communications,27 how would one ever know whether officials eager to please their bosses brought a plausible antitrust (or other kind of case) because they believed it would make the White House happy? And what should one do (or conclude) if such information became available?

C. Analogies from Other Areas of the Law

The law deals in many areas with these questions of purpose versus effect, objectively baseless claims versus claims with evidentiary and factual merit but improper purpose, and cases where these issues of mixed motives and bases are intertwined.28 These areas provide mixed signals how best to approach questions of political bias and personal animus in the antitrust realm.

Selective Prosecution

A defendant in a criminal case has a very narrow window to successfully establish a claim of selective prosecution. A selective prosecution claim is not a defense, but an independent assertion that the prosecutor has brought a charge for reasons forbidden by the Equal Protection Clause of the Constitution. U.S. v. Armstrong required that a defendant claiming selective prosecution must establish both that others similarly situated have not been prosecuted and that the government’s selection was motivated by the type of invidious intent prohibited by the Equal Protection Clause.29 This normally involves a decision to prosecute based on prohibited factors such as race, religion, or other arbitrary classification in the constitutional sense.30

The Armstrong Court held that to obtain discovery of information relevant to a selective prosecution claim, the defendant must produce “some evidence tending to show” the existence of discriminatory effect and discriminatory intent including that “similarly situated defendants of other races could have been prosecuted but were not.”31 This chicken and egg problem dooms most selective prosecution claims, including the attempt by the defendants in the ATT-Time Warner merger challenge to seek discovery about the potential political motivations of the government suing to block this particular transaction. 32

Despite its superficial appeal, selective prosecution, or selective enforcement in a civil or regulatory action, remains an unappealing road in most antitrust litigation. Courts are reluctant to interfere with the special province of the prosecutor or enforcement agency. Claims of political bias would then have to shoehorned into one or more of the protected categories under the Equal Protection Clause. The defendants would have to establish most of the facts necessary for the claim before obtaining disclosure or discovery on this topic from the government in litigation, a burden even well-heeled defendants like AT&T and Time Warner could not meet. Finally, even the most egregious of political favoritism would do nothing to attack a biased decision not to enforce the antitrust laws to benefit an ally.

Civil Procedure Analogies

Civil procedure provides another method of dealing with such questions. Federal Rule of Civil Procedure (FRCP) 11 requires attorneys to sign pleadings, motions, and most other writings, attesting that they have made an investigation reasonable under the circumstances and certify that the pleadings and other matters have a reasonable basis in both law and fact and are not being brought for an improper purpose.33 Similar provisions dealing with discovery requests go even further and require written certification that each request is consistent with the federal rules of civil procedure, warranted by existing law or by a nonfrivolous argument for changing the law and are:

“(i) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(ii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”34

The limitations of FRCP 11 are also well known. The provision includes a 21-day safe harbor that allows a party to avoid violating the rule by withdrawing or modifying the pleading or other written submission.35 The provision only states that the court “may” impose “appropriate” sanctions for violations of the rule.36 Moreover, sanctions are limited to what is sufficient to deter repeated violations by the party or those in similar circumstances.37 The court also has wide discretion as to the type of sanctions that can be imposed.38

Professional Responsibility

The model rules of professional responsibility also address these types of issues. MRPC 3.1 requires a meritorious basis for bringing or defending litigation.39 At the same time, MRPC 4.4a states:

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”40

These model rules only apply to members of the bar and would not apply to sanction a non-lawyer professional at either of the antitrust agencies. While the content of these rules is helpful, they only allow for the subsequent initiation of disciplinary proceedings with the relevant state bar authorities and those courts where the attorney in question is admitted to practice and provide little comfort to the litigants in the moment of responding to improperly motivated proceedings.

Tort Law

In tort law, a similar distinction plays out in the differences between the torts of malicious prosecution and abuse of process. Malicious prosecution is usually defined as the bringing of a prior civil or criminal legal action without probable cause, and with malice, that resulted in harm to the defendant in the original action.41 No amount of malice is sufficient if the original claim has merit.

In contrast, the tort of abuse of process does not require proof of a lack of probable cause in the prior litigation. In general, an abuse of process requires proof that a person deliberately misused a prior court proceeding for an improper collateral purpose, regardless of whether the original civil or legal case had probable cause.42 One common example would be a perfectly appropriate case brought at least in substantial part to harass the defendant, run up his litigation costs, damage his reputation, or pursue improper lines of discovery to obtain information unrelated to the otherwise meritorious suit.

Administrative Law

Administrative law requires an agency to support its decision with substantial evidence and prohibits arbitrary or capricious decisions.43 Courts will grant agencies substantial discretion in deciding complex mixed questions of law and fact under this standard.44 However, both the substantial evidence and arbitrary and capricious tests normally turn on a matching of the evidence in the record of the agency decision with the outcome, rather than a parsing of the motive behind the decision.

The Supreme Court has allowed a narrow role for motive in holding that a proven pretext for an agency decision may be grounds for overturning final agency action.45 The Court rejected most attempts to inquire into the motive behind an agency decision, holding a court may not set aside under the APA an agency’s policymaking decision solely because the decision might have been influenced by political considerations or prompted by an Administration’s priorities.46 The Court noted that agency policymaking is not a rarified technocratic process, unaffected by political considerations or the presence of presidential power, and such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, national security concerns, and other considerations.47

Nonetheless, the Court found a narrow exception to the general rule against judicial inquiry into the mental processes of administrative decisionmakers, such an inquiry may be warranted and may justify extra-record discovery, on a strong showing of bad faith or improper behavior.48 It therefore remanded the case regarding questions about citizenship on the 2020 Census back for further proceedings in the district court stating that the question concerning citizenship status could not be adequately explained in terms of the proffered reason.49

Employment Law

Employment law has its own unique approach to the question of whether an employee was fired for permissible reasons, such as job performance, or for an impermissible reason such as of race, ethnicity, gender, sexual orientation, or some combination of both. Title VII of the Civil Rights Act prohibits discrimination “because of” an unlawful discriminatory factor.50 The so-called McDonnell-Douglas test adopted a burden shifting approach to deal with situations where an employee asserts she was treated less favorably for an unlawful reason and the employer contends that the treatment was based on a permissible factor.51

In McDonnell-Douglas, the plaintiff alleged that he was not hired because he was African American, while the company contended that the decision was a result of the plaintiff’s participation in a prior disruptive protest on company property. The Court held unanimously that the plaintiff must first establish a prima facie case of discrimination. This can include direct and indirect evidence that which he can satisfy by showing that: (i) she belongs to a racial minority (or other protected group); (ii) she applied and was qualified for a job the employer was trying to fill; (iii) though qualified, she was rejected; and (iv) thereafter the employer continued to seek applicants with complainant’s qualifications.52

The defendant (employer) must then produce evidence of a legitimate non-discriminatory reason for its actions.53 If this occurs, then there is no presumption of discrimination. The plaintiff must then be afforded a fair opportunity to present additional facts to show discrimination. The plaintiff may do so either by showing that the defendant’s explanation is insufficient, and therefore a pretext for discrimination, or by otherwise proving that the defendant’s relied on one or more of unlawful discriminatory parameters.54

Civil Rights

In civil rights and constitutional litigation, the Supreme Court has wandered from approach to approach. In Mt Healthy v. Doyle, the Supreme Court considered whether a public school teacher could be fired or otherwise disciplined for constitutionally protected speech, where the same action might have taken place for other unprotected activities.55 Here, the Court adopted a different type of burden shifting approach from that in McDonnell-Douglas. In order to prevail, the plaintiff must first prove that the activity they were allegedly disciplined for was indeed protected speech.56 Then the burden shifts to the defendant who can prevail if it can show by a preponderance of the evidence that the adverse action would have occurred anyway, even if the protected activity had never happened.57

In cases relating to pretextual traffic stops of defendants, the Supreme Court simply rejected any such burden shifting. In Whren v. United States, the Court held in a unanimous decision that if there is probable cause for a traffic stop there is no further inquiry into whether the stop was a pretext for other unlawful purpose.58

International Antitrust Norms

One of the few attempts within the antitrust community to grapple with these issues has come from the Trump Administration itself. The Antitrust Division has devoted substantial resources toward the development of a Multilateral Framework on Procedures in Competition Law Investigation and Enforcement through the International Competition Network (“MFP”). The MFP identifies what the Justice Department terms universal due process principles that are widely accepted across the globe, including commitments regarding non-discrimination, transparency and predictability, proper notice, access to information, meaningful and timely engagement, the opportunity to defend, timely resolution of proceedings, confidentiality protections, avoidance of conflicts of interest, access to counsel and privilege, written enforcement decisions and public access to decisions, and availability of independent review of enforcement decisions.59

The closest these principles come to addressing the questions of political influence on independent competition agencies comes in its conflict of interest principles. This section states:

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.60

It would be both interesting and ironic if an exercise designed to reign in the discretion of enforcement agencies around the world would have a similar salutary effect in the United States.

D. Beginning to Grapple with Political Bias

These limited examples from inside the antitrust arena, and other areas of the law, provide a smorgasbord of options for beginning to think about how to deal with these issues in the antitrust context. The task is complicated by the presence of two separate but connected stages where these issues arise. The first is the general issue of prosecutorial discretion and how potential issues of bias should be handled by a district court once the Antitrust Division or FTC file a case. The second is the even more complicated issue of dealing with politically charged decisions not to proceed.

The first stage has the best existing framework for dealing with these sorts of issues. As discussed above, the combination of the vigorous application of FRCP 11 and the rules of professional responsibility provide two avenues for asserting that a politically motivated civil case was brought for an improper purpose. However, the existing mechanisms do not address the chicken and egg problem of how to document bad motives if denied discovery to the information that would verify the assertion of bias.

The decision to settle a matter has some procedural protections from this type of political influence. The Tunney Act requires a public interest showing before a settlement can be accepted by the court.61 However, the Microsoft litigation has made this requirement more of a formality by focusing on limiting the inquiry to matching the nature of the relief to the civil complaint actually filed, rather than the scope of the case that should have been filed or the reasons why the agency acted or refrained from acting.62

The issue of a decision not filed because of political considerations is one where US law is silent, but EU law provides a partial answer. There is no mechanism in current US law for judicial review of a decision not to proceed with a civil or criminal matter. In general, there is no ability to challenge an agency’s exercise of its discretion not to bring an action.63 This latitude is inherent in the tradition notion of agency discretion. Prosecutorial discretion remains the great unanswered question of administrative law.64

Civil antitrust cases are brought by two different entities: the FTC, bound by the Administrative Procedures Act, and the Antitrust Division of the Justice Department, which is not. In neither case is the agency obliged to disclose the reasons behind not bringing a case although from to time both do so on an occasional basis.65 Likewise, in neither case can affected parties challenge the decision not to proceed.

Asa far back as 1969, Professor Kenneth Culp Davis in his book Discretionary Justice challenged us to do better.

In prescient discussions of both the FTC and the Antitrust Division, he argued that:

“Apart from the guidelines program … the Antitrust Division can move toward greater clarification of its prosecution policies by announcing findings and reasons whenever it takes action of any kind that is based upon significant policy. When it prosecutes a case, when it decides not to prosecute, when it decides to dismiss or to nol pros, when it enters into a consent arrangement, and when it grants a clearance, it can and should state publicly the policy reasons for its actions, and the policy statements should be treated as precedents which normally will not be retroactively changed.”66

Not only did he include the FTC in proposing these important safeguards, he also highlighted the issue of inappropriate political influence as one of the main dangers requiring change.67

We can also strive for a system akin to that in place in the EU and similar administrative type systems in other jurisdictions. Any determination of the European Commission, whether to proceed or not to proceed with a matter, is an official decision requiring a statement of reasons and which can be challenged by an affected party.68 While the Commission’s decisions are granted substantial deference, they are not immune from judicial scrutiny.69 Adopting such an approach would institute such long needed reforms for both enforcement agencies and begin the process of dealing with this aspect of the potential political misuse of antitrust nonenforcement.

Conclusion

Antitrust has always been political in nature. How could it not be? It stems from broad legal commands dealing with how governments and private individuals can challenge different types of market behavior. Antitrust has reentered the political electoral arena, general mainstream media, and everyday discourse. Once mostly the domain of technocrats, antitrust issues have been proposed and debated by Presidential candidates, pundits, journalists, and voters alike. There are also a flurry of serious proposals and investigations that would make significant changes to the current system if adopted.

Part of that engagement has been the exploration of the potential political misuse of antitrust investigations and enforcement for political motivations and other types of animus and bias. The changing institutions and norms in the United States holding back authoritarian tendencies have begun to erode for antitrust enforcement and other aspects of law enforcement. There is real reason to be concerned that the enforcement agencies are consciously or unconsciously beginning to tailor aspects of their decision making to the stated, or perceived, political needs of the White House. Other areas of the law have been dealing with these issues far longer and provide potential solutions for consideration in the antitrust field. Regardless of which combination of tools we use to address these concerns, it is urgent that we start this discussion.

#### Their Florida ev’s ONLY thumpers, NOT an internal link from interstate spillovers to populism:

#### 1 – it’s about the divergence between the drivers of economic divide between urban and rural populations – within states as much as between them – and the wholly different drivers of the political divide between those areas – meaning even solving the economic divide would be insufficient to solve the political dynamic that’s already geographically entrenched

#### 2 – it’s contextualized to Trump policies on immigration and r&d and education spending – which all thump, since Biden hasn’t fixed those yet – OR he inevitably solves their impact

#### 3 – it explicitly says this CANNOT and WILL NOT be solved – remember when they pretend otherwise that they DO NOT FIAT economic redistribution, they merely remove one small barrier to doing so, but CANNOT overcome lack of political will

Richard Florida 18, professor at the University of Toronto's School of Cities and Rotman School of Management and a distinguished visiting fellow at New York University’s Schack Institute of Real Estate, “America's Polarization Threatens to Undo Us,” Bloomberg CityLab, 1/25/18, https://www.citylab.com/equity/2018/01/americas-polarization-threatens-to-undo-us/551483/

On top of America’s long-running political divide between red and blue states, and its widening economic divide between the rich and the poor, there is a troubling gap between its geographic winners and losers. The United States is growing spatially more unequal, in ways that are ripping the country apart and threaten to undermine prosperity for all of us.

New data released earlier this week by Mark Muro and Jacob Whiton of the Brookings Institution’s Metropolitan Policy Program get to the heart of the matter. Bigger cities are prospering more than smaller cities, and much, much more than rural areas. And the trends are accelerating.

Between 2010 and 2016, the 53 largest metropolitan areas accounted for two-thirds of growth in economic output and almost three-quarters of job growth, despite making up just 56 percent of the country’s population. Between 2014 and 2016, these same metros accounted for 72 percent of economic growth and 74 percent of job growth.

On the flip side, small metros—those with fewer than 250,000 people—saw their share of the nation’s economic output shrink by 6.5 percent between 2010 and 2016. Rural areas saw net population decline over this same period, and in 2015, saw their modest rate of employment growth actually decrease.

The political repercussions of these trends are profound. The growing divide between large, dense, diverse winners in the knowledge economy and the rest of the country has fueled the populist political climate that landed Donald Trump in office and put conservative Republicans in control of a large share of governors’ mansions and state legislatures. As my Atlantic colleague Ron Brownstein points out in a recent essay for CNN, the voters who put this cast of characters in power are overwhelmingly from economically lagging areas.

Trump won an overwhelming share of U.S. counties, 2,600 of them, five times more than Clinton. But Clinton’s seemingly meager 500 counties accounted for 72 percent of the nation’s growth in economic output and two-thirds of its job growth between 2014 and 2016. Indeed, Clinton won 79 of the 100 counties that saw the greatest net economic growth over that period, and 76 of the top 100 in job growth.

The rub is that the declining parts of America now control our politics, and not just nationally, but also in the states. As Brownstein sums up: “The nation is poised for even greater tension between an economic order that increasingly favors the largest places—and a political dynamic that, for now, sublimates them to the smaller places that are economically falling behind.”

Far from Making America Great Again, Trump and the GOP are putting into place a backward-looking economic and social policy that threatens to undermine the key pillars of American innovation and economic prosperity. They are curtailing immigration and excluding global talent; slashing federal spending for research and development; lashing out at gay and women’s rights; cutting back on spending for state universities; and making efforts to undermine and preempt cities.

Once America’s innovative engine is dismantled, and talented people start to go elsewhere, it will be hard to put it back together again. For the first time in a very long time—perhaps since the Civil War—America’s divides threaten to put it on the wrong side of history.

Moreover, cities are not immune to this populist backlash, no matter how much they think they are. Back when Trump was making reality TV shows and venting about Barack Obama’s birth certificate, Rob Ford was elected mayor of Toronto, one of the fastest-growing, most technologically advanced, diverse and socially progressive places on the planet. He was elected by a multicultural, suburban populist coalition that felt it was being left behind by a small group of downtown urban elites. As I said then, if Ford could happen in Toronto, more and worse are likely to follow. Trump is not likely to be the end of this trend. It may even take root in U.S. cities.

That’s because the dynamics underlying the rise of populism are broad and encompassing. They are ricocheting through places like Toronto and much of Europe (notably the U.K. with Brexit), as well as the United States. Recent studies find a hauntingly similar divide between urban and rural areas across the U.K. The political scientists Ronald Inglehart and Pippa Norris painstakingly document how such spatial inequality sowed the seeds of a backlash from lagging places and rural areas across Europe and much of the advanced world.

This spatially-induced backlash manifests more along cultural and political lines than economic ones. Study after study has shown that the great majority of populist voters, including Trump voters, are working-class or middle-class, and even affluent. What distinguishes them is that they are concentrated in places that are falling behind. Their political backlash takes the form of a cultural turn against the values that cities have come to represent, especially openness, diversity, tolerance, and inclusion.

Although there are policies that could help mitigate these trends, the depth of the spatial divide in the United States means that none of them are very feasible politically. One way to lessen it would be via federal strategies to redistribute economic activity across more places. But there is no way that is happening with Trump and the Republicans in power. Not only are they committed to serving the interests of the rich, they have also risen to power by exploiting our country’s divisions. The last thing they would want to do is heal them.

#### Culture war, NOT political economy, is the cause

Margalit 19 – Professor of Political Science at Tel Aviv University. Yotam Maraglit, December 20 2019, “Economic causes of populism: Important, marginally important, or important on the margin,” Vox EU, https://voxeu.org/article/economic-causes-populism

I contend that the economic-centric accounts, even in their more nuanced versions, tend to overstate the role of economic insecurity as an explanation of populism's electoral success. In a recent article (Margalit 2019) I discuss several reasons why the focus on economic causes deserves more critical assessment, but here I shall mention two.

First, the claim that economic insecurity is important in understanding the electoral success of populism conflates what I define as ‘outcome significance’ and ‘explanatory significance’. Consider the Brexit vote, which was decided by a margin of less than four percentage points. Economic insecurity and displacement caused by globalisation may well have shifted the vote by a few points, enough to tip the referendum in favour of the ‘Leave’ camp. The outcome significance – transforming loss to victory – was therefore high. However, the overall phenomenon to be explained is why 52% of the electorate voted to leave the EU. The swing of a few percentage points hardly amounts to ‘explaining’ the phenomenon of the overall electoral backing for Brexit. Put differently, the explanatory significance of that factor is low.

The broader point this example illustrates is that a certain factor can have major consequences for the phenomenon of interest, without being a major explanation for that phenomenon. Yet this distinction seems to get muddled in the debate over populism’s causes. This can also be seen with other examples commonly used to demonstrate the importance of economic factors in shaping the populist vote.

In explaining Donald Trump’s electoral victory in 2016, analysts have often cited his alleged appeal to globalisation’s losers, helping him crack the Democrats’ ‘blue wall’ in Pennsylvania, Wisconsin, and Michigan. Analysis by Autor et al. (2016) gives credence to this argument in terms of outcome significance, by finding that the adverse effects of the massive import shock from China accounted for a vote share of several percentage points, sizable enough to flip these states in favour of Trump. Their estimates indicate that if the import shock had been half of what it was, the margin in favour of the Republicans in Pennsylvania would have shrunk by 1.7 percentage points and the Democrats would have won the state by 0.5%. Likewise, the simulation indicates that the electoral impact would also have been sizable enough in Wisconsin and Michigan (2.2 and 1.8 points, respectively) to overturn the Electoral College results. It may therefore be correct that, without the impact of the China shock, Trump would have lost.

But the magnitudes of the estimated effects indicate that we are dealing with fairly small additions to a much larger electoral phenomenon. Examination of the empirical evidence regarding an array of other European countries reveals a similar pattern: shocks that increase the economic insecurity of voters affect the electoral outcome on the margin, yet the overall explanatory significance for the level of support for populists is modest (e.g. Colantone and Stanig 2018a, 2018b, Dippel et al. 2015, Malgouyres 2017). In some instances, this effect is consequential in differentiating between loss and victory, but that is not always the case. For example, in proportional representation systems, support for populists – particularly far right parties – affects the distribution of votes within the ideological bloc, but has little bearing on the overall division of votes between the competing blocs. In ‘first past the post’ systems, where districts often lean heavily towards one party, support for the populists is too small to meaningfully affect the vote.

Moreover, individual-level studies of the vote for populist parties consistently find that variables that capture labour market standing or economic insecurity explain only a small fraction of the variation of interest (Guiso et al 2017, Gidron and Hall 2017). While variables capturing these explanations are mostly statistically significant, one must not overlook the fact that their usefulness in accounting for the broader question of who supports the populists is, in fact, very limited.

A second issue with attributing a central role for the economic causes has to do with immigration, often the most salient issue for populist parties and voters. In describing immigration as an ‘economic cause’ of populism, there is a need to distinguish between two questions: Is immigration in itself economic-driven? And are the economic effects of immigration – whether real or perceived – a major cause of the populist vote? On the first question, there is ample evidence that, indeed, immigration to the West is largely instigated by economic forces (poverty, lack of jobs opportunities, wage differentials). But on the second question, the weight of the evidence clearly indicates that Western voters' concerns regarding immigration have little to do with its impact on their material standing or level of economic insecurity. This conclusion comes up in both observational studies and studies employing a range of survey-experimental methods including list, vignette, and conjoint designs (e.g. Sniderman 2004, Janus 2010, Bansak et al. 2017; see Haimmueller and Hopkins 2014 for a review of the evidence). Even when examining cases where the labour market threat posed by immigrants is most direct, the effects on natives' attitudes are very limited (Hainmueller et al. 2015, Malhotra et al. 2013). Thus, while immigration is often a major concern of populist voters, treating it as an economic driver of populism in this latter sense seems misguided.

What, then, explains the populist appeal? Out of space limit, I will note only that structural, long-term social changes strike me as central to understanding the resentment underlying much of its appeal. By this account, structural changes – such as increased access to higher education, urbanisation, and growing ethnic diversity – have led to significant progressive cultural shifts. These changes, and the perceived displacement of traditional social values, have caused a sense of resentment among segments of the population in the West, particularly among white men, older people, conservatives, and those with less formal qualifications (see Inglehart and Norris 2019 for an extensive exposition of this view). Increased exposure to foreign influences that comes with globalisation and, even more so, the effects of waves of immigration have exacerbated the sense of a cultural and demographic threat. With gradual generational change, these formerly predominant majorities have increasingly felt their social standing erode, buying into the populist nostalgia for a ‘golden age’ when there was cultural homogeneity and traditional values and a strong national identity prevailed. They have also grown receptive to populist charges against a disconnected elite that has turned its back on them and the values they hold dear.

There’s an obvious, and understandable, reluctance to accept such ‘soft’ explanations. Cultural explanations of populism can be harder to measure or identify causally. Yet that of course doesn’t mean that a cultural explanation is incorrect. One should be careful not to equate quantifiability with importance.

Note, though, that the cultural account does not dismiss the role of economic factors. In addition to the electoral impact of the causes noted earlier (e.g. trade, automation), hard economic times also tend to undermine the perceived competence of the economic and political elites, and thus help fuel popular distrust in them. It is therefore likely that the financial crisis contributed to the populist wave, as some have suggested (Algan et al. 2017, Mian et al. 2014). But given the weak empirical association between measures of economic insecurity and support for populism, we should view the crisis as more of a trigger than a root cause of widespread populist support.

#### No impact to populism

Ferguson 16 [Niall; autumn 2016; Senior Fellow at Stanford University’s Hoover Institution, Senior Fellow of the Center for European Studies at Harvard University, and Visiting Professor at Tsinghua University in Beijing, “Populism as a Backlash against Globalization - Historical Perspectives,” <https://www.cirsd.org/en/horizons/horizons-autumn-2016--issue-no-8/populism-as-a-backlash-against-globalization>]

Let me conclude with a note of qualified optimism. Because populism is not fascism, populist victories should not be construed as harbingers of war—if anything, the opposite is true. In the 1870s and 1880s, populists did achieve significant reductions in globalization: not only immigration restrictions, but also higher tariffs. But they did not form many national governments, and they did not subvert any constitutions. Nor were populists much interested in starting wars; if anything, they lent towards isolationism and viewed imperialism as just another big business racket. In most countries, the populist high tide was in the 1880s. What came next—in many ways as a reaction to populism, but also as an alternative set of policy solutions to the same public grievances—was Progressivism in the United States and socialism in Europe. Perhaps something similar will also happen in our time. Perhaps that is something to look forward to. Nevertheless, we would do well to remember that World War I broke out during the progressive not the populist era. The world today is, as I observed at the outset, in much less turmoil than one might infer from television news. Nevertheless, the economic and social consequences of globalization and the most recent financial crisis sowed the seeds for the populist backlash that we now see. Populists are not fascists. They prefer trade wars to actual wars; administrative border walls to more defensible fortifications. The maladies they seek to cure are not imaginary: uncontrolled rising immigration, widening inequality, free trade with “unfree” countries, and political cronyism are all things that a substantial section of the electorate have some reason to dislike. The problem with populism is that its remedies are wrong and, in fact, counterproductive. What we most have to fear—as was true of Brexit—is not therefore Armageddon, but something more prosaic: an attempt to reverse certain aspects of globalization, followed by disappointment when the snake oil does not really cure the patient’s ills, followed by the emergence of a new and ostensibly more progressive set of remedies for our current malaise. The “terrible simplifiers” may have their day then. But they will end up yielding power to well-intentioned complicators, those more congenial to educated elites, but probably every a bit as dangerous, if not more so.

### 1NC---Health Insurance

#### No risk of bioterror – even weaponized pathogens can’t be dispersed

Kolssak 15

12 October 2015 Spencer Kolssak writes about domestic and international terror threats for the Patrick Henry Inteligencer. The Intelligencer‘s mission is to expand public understanding of crucial matters in national security, intelligence, and international relations. The Intelligencer is a student-led special project sponsored by Patrick Henry College’s Strategic Intelligence (SI) program. http://phcintelligencer.com/2015/10/12/bioterrorism-neither-likely-nor-practical/

Past Bioterrorism Attempts The record of attempted use of biological weapons is very limited. Most nations ended their offensive biological weapons programs with the ratification of the Biological Weapons Convention in 1972. The United States ceased its programs in 1970, but continued biological weapons research for defensive purposes. In April 1979, 68 people died in Sverdlovsk, Russia, as a result of an anthrax leak from a Soviet bioweapons facility. In 1995, the Iraqi government admitted that it had a program to research and produce weaponized anthrax.7 The anthrax attacks of 2001, dubbed “Amerithrax”, are the most famous example of a biological weapons attack.1 Letters sent through the mail laden with dried anthrax spores killed five people and sickened seventeen.1 The genetic strain used in the attack was specially engineered, demonstrating that the perpetrator had access to US bioweapons research facilities.7 The investigation eventually centered on Bruce Ivans, a US scientist. Ivans took his own life before federal investigators could bring formal charges.8 Perhaps even more relevant are the failed bioterror attacks by the Japanese cultist group, Aum Sinrikyo. In the late 1980s, Aum spent millions of dollars and employed a team of trained scientists to engineer advanced biological agents. They experimented with botulinum toxin, anthrax, cholera, and even Q fever in hopes of producing enough biological agent to trigger a global Armageddon.9 Aum had access to **far more scientific resources** than any modern Islamist terror group. In April 1990, the group used a fleet of trucks equipped with aerosol sprayers to disperse liquid botulinum on the Imperial Palace, the National Diet of Japan, the US Embassy in Tokyo, and two US naval bases in Narita. No casualties resulted; no one outside the cult even knew that the terrorist attacks had taken place.9 Three years later, in June and August of 1993, Aum decided to switch to anthrax as its biological agent. This time, in addition to its fleet of trucks, the group used aerosol sprayers mounted on its headquarters building to create a cloud of anthrax over Tokyo. Again, the attacks were unsuccessful and went unnoticed. It was only after a successful 1995 subway attack using Sarin nerve gas (a chemical agent) that investigations discovered the 1990 and 1993 attacks.9 Hollywood Has it Wrong The historical record demonstrates that weaponized biological agents have been used infrequently and ineffectually. Terrorists want to spread destruction by any means they can. **If bioterrorism really was effective, more terrorist groups likely would have used pathogens as weapons by now**. The absence of widespread bioterrorism helps to show the gap between current misconceptions and reality. One gram of anthrax contained within one of the letters in 2001 had enough spores to kill thousands of people. Combined, the amount of anthrax used in the attacks could have killed millions.10 Yet the attacks only killed five. Even though the anthrax terrorist had enough biological agent to kill millions, he did not have the capability to distribute his weapon effectively. As the Aum Shinrikyo biological attacks demonstrated, even a sophisticated group of scientists working to incite global Armageddon can find it difficult to actually execute biological attacks. Terrorists have to overcome a number of challenges in order to effectively convert biological agents into weapons of mass destruction. The use of a pathogen as a biological agent depends on the group’s ability to isolate a virulent strain, weaponize it, and then distribute it. If the group could successfully isolate a dangerous genetic strain, it would then turn to two possible methods of distribution: aerosolized spray and human carriers.11 Most non-state actors do not possess the technology necessary to refine the aerosol method. Wind patterns and humidity can render such an attack ineffective. The human carrier method is less expensive but also has a number of problems. It requires the pathogen to be a contagion. Once the carrier is infected, he must be mobile while contagious and cannot be visibly ill—a situation that is unlikely with serious diseases like Ebola.11 All other possible means of delivering a biological agent are fraught with even more problems. Each potential biological agent also has individual reasons why it would not make an effective weapon of terror. Ebola is only transmitted through direct contact with the bodily fluids of someone infected with the disease.12 Anthrax is not easily transmitted across individuals and is unlikely to spark an epidemic. Anthrax can also be treated by readily available antibiotics if noticed in time.9 Even incredibly deadly biological agents like ricin and botulinum are hard to use in mass attacks due to the difficulty in converting them into a weaponized form that can be readily dispersed.

#### Omicron proves burnout

#### Disease won’t cause extinction

Farquhar 17 – Sebastian Farquhar, Leader of the Global Priorities Project (GPP) at the Centre for Effective Altruism, et al., “Existential Risk: Diplomacy and Governance”, <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>

1.1.3 Engineered pandemics

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic. One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

#### U.S. competitiveness is high and resilient

Rodriguez 16 (Michelle Drew, Michelle leads many of Deloitte’s Manufacturing Competitiveness research efforts as part of her role as the Manufacturing Leader for Deloitte’s Center for Industry Insights. She is an accomplished professional with 15 years of strategic and operational experience, having worked directly in the automotive industry as well as currently serving as an advisor to global manufacturing executives. She and her team have worked on a number of efforts that explored the future trends impacting the manufacturing industry, from the boardroom to the shop floor. She has most recently authored multiple research studies on the topic of manufacturing. The foundation of the research Michelle leads is based on dozens of interviews with CEOs, CTOs, governmental leaders, university presidents, national laboratory leaders, and labor union leaders as well as collaboration with organizations such as World Economic Forum, Council on Competitiveness, NAM, and The Manufacturing Institute. She has a MBA from the University of Michigan (Ross School of Business) and also holds a Bachelor of Science in Mechanical Engineering from the University of Wisconsin. “Innovation drives competitiveness. But what drives innovation?” 7/25/16 <https://innovation-in-manufacturing.deloitte.com/2016/07/25/innovation-drives-competitiveness-but-what-drives-innovation/>)

Research shows advanced manufacturing is more essential than ever to economic competitiveness and prosperity. But what is involved in driving, sustaining, and applying the innovation that makes a company or country a leader in advanced manufacturing? In this post, I’ll explore the drivers that make the US a leader in innovation. Research and development (R&D) certainly plays a role, but the real key may be an intangible one: the innovation ecosystem. The US innovation ecosystem has evolved significantly over the last century, transitioning from business monopolies dominating R&D early last century, assertive government sponsorship mid-century, to the current environment, within a globally connected world in which small and big businesses collaborate with universities, venture capitalists, and research institutions to drive the innovation ecosystem. Meanwhile, the technological focus of R&D has followed a similar arc, shifting from the creation of physical to digital products, to the more recent formation of new business models that combine the physical and digital worlds to create and capture new forms of value. With capital, intellectual property, and talent flowing across borders with limited constraints, the United States faces fundamental questions of great importance to the future of its innovation ecosystem: How can it best cultivate the potential of advanced technologies to spur competitiveness? Can the United States continue to lead given the research spend and talent within other nations? No one entity houses all the brightest people or best ideas – the answer lies with looking outside your traditional walls. Insights from our recent Advanced Technologies Initiative: Manufacturing and Innovation study indicated that, when it comes to tangible factors such as R&D spend, **the U**nited **S**tates **is a clear leader**. We spend more on R&D in raw dollars than any other nation.2 We account for about one-third of the globe’s R&D spending. In comparison, the next-largest share is China’s, at less than one-quarter of the global total. The other eight in the top 10 barely surpass the US share when all combined. This strong set of R&D capabilities reaches across many industries. In a recent global study3 that assessed R&D leadership in 10 top sectors, the United States was ranked number one for seven of those 10 sectors. But we may not stay in the lead for long. Other countries are ramping up their spending. Some with far smaller R&D footprints—like Japan and South Korea—already outpace us in two measures of R&D intensity: spend as a percentage of GDP and researchers per million inhabitants. As the graphic below shows, from 2000 through 2013, South Korea, China, and Taiwan dramatically expanded their R&D intensity in both respects, while the United States made little change over the same period. And what about the US’s global lead in raw-dollar R&D spending? Experts predict China is on a pace to pass us by 2019.4 China already focuses more of its R&D on commercializing new technologies, while the US focuses a significant core on basic and applied research.5 The “secret sauce” of innovation R&D spend alone isn’t a defensible advantage for the US. Other countries can—and do—increase their investments. And someday in the not too distant future they may very well surpass us. **Does that mean we’ll lose our leadership? No.** The **enduring strength of US innovation**, or of any nation’s capacity to invent, is more complicated than the number of dollars spent on R&D alone. What matters is the innovation ecosystem–the complex collaboration between private business, government, academia, finance, independent research, and other functions to bring new products and services to market. An effective innovation ecosystem marshals top talent, allows ideas to flow, and lowers barriers to breakthroughs. The US’ entrepreneurial spirit and substantial funding from venture capital firms are **huge competitive advantages and key differentiators** for the country. It remains the center for “disruptive innovation” thanks to its research infrastructure and low barriers to entrepreneurs and start-ups. It’s also **more resilient with the sum being greater than the** individual **parts.** That’s one of the hidden strengths of what the US brings to the challenge: Key stakeholders within our ecosystem have evolved over time to become less siloed and more collaborative. With the increasing pace of digitalization across the manufacturing industry, its innovation ecosystem has become a more closely connected system with stronger linkages between government, small business, big business, universities, venture capitalists, and research institutions that leverage and benefit from the deeper knowledge and connectivity between each other. What’s next? The US innovation ecosystem must continue to evolve to maintain our competitive position. To stay ahead, key players in the ecosystem should regularly analyze our relative position within the global innovation environment, identify challenges, and capitalize on our strengths. For example, the US is a pioneer in basic and applied research. That’s long been a strength. But spending in these areas has stagnated over the last decade and the government contribution has shrunk as a percentage of the overall federal budget. This puts research performed at government-sponsored institutions at potential risk. Executives indicated that as basic and early applied research takes more time to deliver results in terms of tangible products and technologies, and how/when/where the learnings will be precisely applied aren’t known, it thereby makes it more difficult for shorter term sector specific businesses to nurture it properly. To keep our competitive edge, the government needs to maintain investment levels in the basic and early applied research to ensure a strong foundation for future success. While many other economies across the globe have increased their government R&D support, how should the innovation ecosystem respond? We need to focus on building efficient and effective collaboration and tech transfer mechanisms between basic and applied research as well as through to scale-up commercialization. The health, adaptability, and success of a nation’s innovation ecosystem ultimately determines its competitiveness. When the ecosystem works, **there is a continuous and self-reinforcing cycle** in which breakthroughs bring new technologies and products to market, sales and profits increase, and companies invest more in R&D. Our nation’s success hinges on the ability of industry, government, and research labs to work together and engage in ongoing dialogue about creating an environment in the US that continues to promote competitive R&D work and innovations in advanced manufacturing.

# 2NC---Districts R4

## CP---FERC

### 2NC---Condo---Short

## 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.

### 2NC---Solvency---AT: Threat Fails

#### The effect is identical to rulemaking---business will behave as if it were binding and comply

Roberta Romano 19, Sterling Professor of Law at Yale Law School and Director of the Yale Law School Center for the Study of Corporate Law, JD from Yale Law School, MA from the University of Chicago, BA from the University of Rochester, Research Associate of the National Bureau for Economic Research, Fellow of the American Academy of Arts and Sciences and the European Corporate Governance Institute, Recipient of William & Mary Law School’s Marshall-Wythe Medallion, “Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance”, Yale Journal on Regulation, Volume 36, Issue 1, 36 Yale J. on Reg. 273, Lexis

The choice between notice-and-comment rulemaking and guidance is also frequently presented as a tradeoff between regulatory flexibility and effectiveness, on the view that the greater flexibility of guidance compared to notice-and-comment rules is offset by guidance not being legally binding. Although the formal distinction is technically accurate, as numerous commentators have noted, the reality is otherwise, rendering the ostensible distinction quite misleading. As one leading casebook puts it well:

If you are a regulated party, and the agency issues an interpretive rule or policy statement indicating its present view of the law, you will probably make serious efforts to comply with that rule even if it is not formally binding. At a minimum, the rule alerts you to the kind of conduct that the agency regards as worthy of prosecution; at a maximum, the rule may effectively dictate how the agency will [\*283] conduct its prosecutorial adjudications. The *practical effect* of such rules on regulated parties may be hard to distinguish from the practical effect of legislative rules.

The unvarnished reality that firms will behave as though guidance pronouncements are, in fact, binding rules is particularly applicable to financial institutions, the focus of this Article's analysis, given the repeated interaction between financial firms and regulators. This interaction facilitates regulators' ability to retaliate on numerous dimensions through supervision and examination, in addition to their ability to bring enforcement actions for noncompliance with a specific policy. Moreover, the licensing feature of financial regulation (i.e., regulators can shut down a bank's lines of business, as well as a bank itself) is a powerful inducement for financial institutions to comply with, rather than challenge, guidance pronouncements.

As a consequence, by using guidance strategically instead of notice-and-comment rulemaking, particularly in the financial-entity regulatory context, an agency can obtain the benefit of a rule (regulated entities' compliance), without incurring the procedural costs that are legally supposed to accompany the imposition of obligations on private parties under requirements imposed on regulatory decisionmaking by Congress and courts in order to protect the public and regulated entities from arbitrary and capricious decisions. A critical issue, then, is an empirical one: to what extent can an agency shape its agenda to impose rule-like constraints on conduct while avoiding the procedural protections that are supposed to accompany such activity? But consideration of that inquiry is [\*284] not independent of another feature of administrative governance--namely, agency design, the degree to which an agency's structure is insulated from political accountability.

#### Threats of enforcement empirically work and is perceived as credible.

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

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

#### The deterrent effect alone solves, even if it is not prioritized or widespread.

Hayes 21 (Stephen Hayes, J.D., Partner at Relman Colfax; Kali Schellenberg, Attorney at Relman Colfax; “DISCRIMINATION IS "UNFAIR" Interpreting UDA(A)P to Prohibit Discrimination;” April 2021, Student Borrower Protection Center, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832022>, TM)

The federal agencies with administrative authority over the unfairness laws should also pursue complementary regulatory actions. First, they could issue guidance or interpretive rules that do not require notice-and-comment rulemaking in which they formally adopt this construction and advise entities of how the agencies intend to exercise their supervisory and enforcement authorities in this area.102 That type of announcement has the benefit of reminding entities of their non-discrimination obligations and obviating any potential fair-notice defense that an entity might attempt in future supervision or enforcement actions. This type of clarification also facilitates enforcement of the Dodd-Frank Act by state attorneys general and enforcement agencies that might be reluctant to be first movers advancing the unfairness-discrimination application.103 And, this guidance can play an important deterrent effect: notice of this application can prompt entities to adopt and extend policies, procedures, and compliance systems designed to mitigate risks, even if enforcement is not prioritized or widespread.

#### Section 5 has a better deterrent effect than private litigation---our ev is comparative.

Melamed ’16 A. Douglas Melamed - Professor of the Practice of Law, Stanford Law School – “PREPARED STATEMENT For the SENATE COMMITTEE ON THE JUDICIARY SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS on SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT” - April 5, 2016 #E&F - https://www.judiciary.senate.gov/imo/media/doc/04-05-16%20Melamed%20Testimony.pdf

(2) Some have emphasized that only the FTC can enforce Section 5 and that the only remedy for Section 5 is a “cease and desist” order issued by the FTC. Because there are no treble damages for Section 5 violations, it is suggested, there should be no fear that businesses will be unfairly punished for engaging in conduct that they did not understand to be unlawful or that businesses will be deterred from engaging in procompetitive conduct for fear of violating an ambiguous Section 5. Of course, if that were true, the prospect of standalone Section 5 enforcement would also not deter anticompetitive conduct.

There are two problems with this argument. First, the premise that remedies for violating Section 5 are inconsequential is incorrect. The FTC has for decades taken the position that its authority to issue “cease and desist” orders permits it to enter broad injunction orders that require parties to take a wide range of actions to rectify alleged harm and to ensure that they will not engage in the future in what the FTC regards as conduct similar to that alleged to have violated Section 5. Businesses sometimes find the prospect of such intrusive or sweeping restrictions on how they conduct their business to be far more worrisome than the prospect of treble damage liability.

### 2NC---Solvency---AT: Immunity Shields

#### The filed rate doctrine merely caps damages for private litigation, BUT does NOT provide immunity from government antitrust suits

Buretta et al 21 (John D. Buretta, Partner, Litigation, at Cravath, Swaine & Moore, LLP, former Principal Deputy Assistant Attorney General and Chief of Staff, Criminal Division, U.S. Department of Justice, JD Georgetown University Law Center; and John Terzaken, Global Co-Chair of Simpson Thacher’s Antitrust and Trade Regulation Practice; “Chapter 29 UNITED STATES,” in *The Cartels and Leniency Review*, Ninth Edition, eds. John Buretta and John Terzaken, Simpson Thacher & Bartlett LLP, March 2021, https://www.stblaw.com/docs/default-source/publications/cartelsleniencyreview\_2021.pdf)

i Immunities

A number of industries, including insurance and freight railways, are expressly granted immunity by statute from application of the antitrust laws. Separately, implied immunity exists where application of the antitrust laws would be ‘repugnant’ to a ‘pervasive’ federal regulatory scheme, as for instance with the sale of securities.16 The state action doctrine similarly exempts actions taken pursuant to a state regulatory scheme,17 whether such an action was taken by the state itself or by non-state actors with delegated authority to act or regulate anticompetitively.18 Finally, certain activities and agreements related to labour and collective bargaining are exempt.19

Federal statutes give some regulatory agencies the exclusive right to set rates for the utilities they regulate, including railways and electricity suppliers. These rates are often based on market data submitted by the utilities themselves. The filed rate doctrine both protects consumers by mandating that only the agency-set rate may be charged, and seeks to avoid conflict between different branches of government by protecting such rates from collateral challenge by consumers under antitrust law.20 Strictly speaking, because this bar applies only to private suits for damages, and not to government antitrust suits or to private suits for injunctive relief, the filed rate doctrine is not an immunity but simply a limitation on damages.21 The filed rate doctrine will not bar private suits where the agency-set price would have been different but for the submission of incorrect data by the regulated entity.22

Noerr-Pennington, named after two Supreme Court cases,23 is a judge-made doctrine that attempts to harmonise the goals of competition policy with the First Amendment rights of private citizens under the US Constitution. Noerr-Pennington limits enforcement of the antitrust statutes against certain acts that attempt to influence government processes, including various forms of lobbying, statements made in litigation and submissions to regulatory agencies. The implications of Noerr-Pennington for cartels would seem to be limited, since cartelists generally seek to hide their conduct from the government rather than petition in support of it. To the extent that cartel members seek to use government processes to influence prices or output, however, that conduct may implicate Noerr-Pennington. Note, however, that the doctrine contains a ‘sham’ exception, of which the contours are not entirely clear, that covers acts of fraud – bribery, among others – that wilfully distort that process.24 Fraud committed on the US Patent Office, for example, is not exempted by Noerr-Pennington. 25 And, even if such an act of petitioning the government were exempted, any underlying agreement to fix prices or output would not be.

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

#### Guidance avoids politics AND 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.

#### Interest groups won’t fight it.

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.

## Rates

### 2NC – AT: Blackouts – !/D

#### Intervention solves---it wont cascade

Marciano, utilities worker and researcher, 16

(Chris, “Could terrorists shut down the United State's entire power grid?”, https://www.quora.com/Could-terrorists-shut-down-the-United-States-entire-power-grid)

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

#### Grid’s resilient AND no cascades.

Selena Larson 18, Cyber Threat Intelligence Analyst at Dragos, Inc., “Threats to Electric Grid are Real; Widespread Blackouts are Not”, 8/6/2018, https://dragos.com/blog/industry-news/threats-to-electric-grid-are-real-widespread-blackouts-are-not/

The US electric grid is not about to go down. Though it’s understandable if someone believed that. Over the last few weeks, numerous media reports suggest state-backed hackers have infiltrated the US electric grid and are capable of manipulating the flow of electricity on a grand scale and cause chaos. Threats against industrial sectors including electric utilities, oil and gas, and manufacturing are growing, and it’s reasonable for people to be concerned. But to say hackers have invaded the US electric grid and are prepared to cause blackouts is false. The initial reporting stemmed from a public Department of Homeland Security (DHS) presentation in July on Russian hacking activity targeting US electric utilities. This presentation contained previously-reported information on a group known as Dragonfly by Symantec and which Dragos associates to activity labeled DYMALLOY and ALLANITE. These groups focus on information gathering from industrial control system (ICS) networks and have not demonstrated disruptive or damaging capabilities. While some news reports cite 2015 and 2016 blackouts in Ukraine as evidence of hackers’ disruptive capabilities, DYMALLOY nor ALLANITE were involved in those incidents and it is inaccurate to suggest the DHS’s public presentation and those destructive behaviors are linked. Adversaries have not placed “cyber implants” into the electric grid to cause blackouts; but they are infiltrating business networks – and in some cases, ICS networks – in an effort to steal information and intelligence to potentially gain access to operational systems. Overall, the activity is concerning and represents the prerequisites towards a potential future disruptive event – but evidence to date does not support the claim that such an attack is imminent. The US electric grid is resilient and segmented, and although it makes an interesting plot to an action movie, one or two strains of malware targeting operational networks would not cause widespread blackouts. A destructive incident at one site would require highly-tailored tools and operations and would not effectively scale. Essentially, localized impacts are possible, and asset owners and operators should work to defend their networks from intrusions such as those described by DHS. But scaling up from isolated events to widespread impacts is highly unlikely.

### 2NC – AT: Renewables – FERC Solves

#### AND, it’s NOT just wholesale markets, but retail too!

FERC 20 (Federal Energy Regulatory Commission, September 17, 2020, “FERC Opens Wholesale Markets to Distributed Resources: Landmark Action Breaks Down Barriers to Emerging Technologies, Boosts Competition” <https://www.ferc.gov/news-events/news/ferc-opens-wholesale-markets-distributed-resources-landmark-action-breaks-down>) MULCH

The Federal Energy Regulatory Commission (FERC) today approved a historic final rule, Order 2222, enabling distributed energy resource (DER) aggregators to compete in all regional organized wholesale electric markets. This bold action empowers new technologies to come online and participate on a level playing field, further enhancing competition, encouraging innovation and driving down costs for consumers.

DERs are located on the distribution system, a distribution subsystem or behind a customer meter. They range from electric storage and intermittent generation to distributed generation, demand response, energy efficiency, thermal storage and electric vehicles and their charging equipment.

The final rule enables these resources to participate in the regional organized wholesale capacity, energy and ancillary services markets alongside traditional resources. Multiple DERs can aggregate to satisfy minimum size and performance requirements that they might not meet individually.

“Today FERC broke new ground towards creating the grid of the future by knocking down barriers to entry for emerging technologies,” FERC Chairman Neil Chatterjee said, lauding the order. “With this final rule on DERs, we build on the significant progress already made through Order 841 and expand our ability to harness the full potential of these flexible resources. By relying on simple market principles and unleashing the power of innovation, this order will allow us to build a smarter, more dynamic grid that can help America keep pace with our ever-evolving energy demands. I am honored to be at the helm of the agency as we bring this critical rule across the finish line and continue to navigate our nation’s energy transition.”

“I thank Chairman Chatterjee for working with me and my team to help get this much-anticipated final rule over the finish line,” FERC Commissioner Rich Glick said, praising the order. “The rule will enhance grid reliability, expand market competition and reduce consumer electric costs.”

Under the new rule, regional grid operators must revise their tariffs to establish DER aggregators as a type of market participant, which would allow them to register their resources under one or more participation models that accommodate the physical and operational characteristics of those resources.

The new rule builds off the DC Circuit Court’s recent ruling on Order 841, in which the court affirmed FERC’s exclusive jurisdiction over wholesale markets and the criteria for participation in them. Order 2222 prohibits retail regulatory authorities from broadly excluding DERs from participating in regional markets. However, the new rule prohibits regional grid operators from accepting bids from the aggregation of customers of a small utility unless the relevant retail regulatory authority for that utility allows such participation. The final rule also respects retail regulators’ current ability to prohibit retail customers’ demand response from being bid into regional markets by aggregators.

### 2NC – AT: Renewables – Global Solves

#### Their ev never says US key – everybody else solves

Miyazu 22 (Hina Miyazu, Shibuya Data Count, provides market research reports to various business professionals across different industry verticals, “Distributed Energy Generation Market Size, Demand, Outlook, Trends, Revenue, Future Growth Opportunities,” MarketWatch, 1-3-2022, <https://www.marketwatch.com/press-release/distributed-energy-generation-market-size-demand-outlook-trends-revenue-future-growth-opportunities-2022-01-03#:~:text=%22Global%20Distributed%20Energy%20Generation%20Market,the%20forecast%20period%202020%2D2027>.)

"Global Distributed Energy Generation Market is valued at approximately USD 243 billion in 2019 and is anticipated to grow with a healthy growth rate of more than 11.5% over the forecast period 2020-2027. The distributed energy generation (DEG) is a kind of decentralized system used to produce electricity energy and is served to homes, businesses, and industrial areas. These systems are frequently performed their functions through using technologies, such as solar power and fuel cells. More often, distributed energy generation systems are utilized to offer as substitute or addition to the conventional electric power system, and they deliver small-scale electricity generation (usually in the range of 1 kW to 10,000 kW). Distributed energy can be derived from both renewable and non-renewable sources. Furthermore, the deployment of distributed energy generation system also becomes more significant in many countries, with the legislative package on the new electricity market. For instance, the European Commission's has developed a new legislative policy within the Clean Energy Package. As such, the revised Electricity Regulation, which will enter into force on 1st January 2020, opens up opportunities for electricity wholesale markets to renewables, and energy storage. This, in turn, is expected to accelerate the installation of distributed energy generation system in the region. Moreover, the rise in investments in renewable energy projects and smart grid infrastructure, along with growing government focus on reduction of carbon footprint level and usage of cleaner energy resources are the few factors responsible for the high CAGR of the market during the forecast period. For instance, in 2020, the Korean government planned to invest 11 trillion won (USD 9 billion) in renewable energy projects for the upcoming three years. Whereas, Southeast Asian countries will invest USD 9.8 billion in smart grid infrastructure from 2018 to 2027. This, in turn, is likely to strengthen the demand for distributed energy generation, thereby contributing to the market growth around the world. However, the regulatory issues associated with distinct distributed energy resources is one of the prime the few factors restraining the market growth over the forecast period of 2020-2027.

The regional analysis of the global Distributed Energy Generation market is considered for the key regions such as Asia Pacific, North America, Europe, Latin America, and Rest of the World. Asia-Pacific is the leading/significant region across the world in terms of market share owing to the rising renewable energy generation capacity, along with the growing investment & deployment of smart grid and microgrid in the region. Whereas Asia-Pacific is also anticipated to exhibit the highest growth rate / CAGR over the forecast period 2020-2027. Factors such as the stringent government norms concerning environment safety and emission, coupled with the presence of significant number of market players across the developing nations, such as China and India, are the few factors creating a lucrative opportunity for the growth of the Distributed Energy Generation market in the Asia-Pacific region.

#### Everybody else is already doing it

Allnutt 20 (Jason Allnutt, Conformity Assessment Program Specialist for the IEEE Standards Association, “Understanding interconnection of distributed energy resources (DERs),” Energy Storage News, 12-23-2020, https://www.energy-storage.news/understanding-interconnection-of-distributed-energy-resources-ders/)

Adoption of distributed energy resources (DERs) is surging around the world. DERs are bringing unique benefits to the global energy landscape that central-station power plants and long-distance transmission and distribution alone could not. DERs allow for power to be generated when and where it is most needed, and decentralising power production can contribute to a dramatically more secure and resilient facility for electricity delivery. DERs interconnected with the grid position a utility to better manage peak demand, avoid transmission overloads and keep electricity flowing to its customers.

### 2NC – AT: Renewables – AT: Climate !

#### No climate impact---bad studies and adaption.

Nils P. Gleditsch 21, Research Professor at the Peace Research Institute Oslo, “This time is different! Or is it? NeoMalthusians and environmental optimists in the age of climate change,” Journal of Peace Research, pg. 5-6, 2021, SAGE. clarification denoted with brackets.

The most extreme contrarian position is, of course, to deny one or both key conclusions of the IPCC: the reality of global warming or the human contribution to it. However, most environmental optimists accept these two key conclusions but raise other problems with the panel’s discussion of the social effects of climate change and even more so with popular interpretations of the panel reports. For instance, Hausfather & Peters (2020), by no means ‘climate deniers’, decry the common use of choosing the high-risk [scenario] RCP8.59 to illustrate ‘business as usual’ as misleading.

The causal chains from climate change to the proposed effects on human beings are long and complex, and the uncertainty increases every step of the way. In the literature on the social effects of climate change, including the IPCC reports, statements abound that something ‘may’ lead to something else, or that a variable ‘is sensitive to’ another, without any guidelines for how to translate this into probabilities (Gleditsch & Nordås, 2014: 87f). Uncritical use of the precautionary principle, where any remotely possible calamity unwittingly becomes a probable event, is not helpful.

Gleditsch & Nordås (2014: 85) note that while AR5 (IPCC, 2014) did not find strong evidence for a direct link between climate change and conflict, it argued that climate change is likely to impact known conflict-inducing factors like poverty and inconsistent political institutions and therefore might have an indirect effect on conflict. But this assumes that correlations are transitive, which is not generally the case. If A correlates with B and B with C, we know nothing about how A relates to C unless both correlations are extremely high. The strongest case for the climate–conflict link is the effect of interaction between climate change and factors like poverty, state failure, or ethnic polarization. It may be more cost-effective to try to deal with these other risk factors than with global warming itself if the goal is to reduce the ‘risk multiplier’ effect of climate change on armed conflict.

The articles in this special issue do not generally see scarcity by itself as necessarily resulting in strongly negative outcomes. Factors like development, state failure, and previous overload on ecosystems continue to play an important role in that they interact with climate change to produce conflict and other social outcomes. For instance, Ide, Kristensen & Bartusevicˆius (2021) conclude that the impact of floods on political conflict are contingent on other factors such as population size and regime type. Moreover, most of the articles do not assume that scarcities are likely to arise at the global level. They may be regional (mostly in Africa), national, or local. Urban and rural areas may be affected by different scarcities. Climate change may also affect particularly strongly groups that are already at an economic or political disadvantage. The effects can be alleviated and adaptations constructed at these levels.

The argument about how climate change may indirectly impact conflict leans heavily on the negative economic consequences of climate change, but with little or no reference to the research that explicitly deals with this topic. In fact, the relevant chapter in AR5 concluded that for most sectors of the economy, the impact of climate change was likely to be dwarfed by other factors. Tol (2018) finds that the long-term global economic effects are likely to be negative, but that a century of climate change will have about the same impact on the economy as the loss of one year of economic growth. Other economists are more cautious, but the dean of climate change economics, William Nordhaus (2018: 345, 359), estimates that ‘damages are 2.1 percent of global income at 3C warming and 8.5 percent of income at 6C’, while also warning that the longer the delay in taking decisive action, the harsher the necessary countermeasures. Stern (2006) is more pessimistic, based mainly on a lower discount rate (the interest rate used to calculate the present value of future cash flows) as are Wagner & Weitzman (2015). Heal (2017) argues that the Integrated Assessment Models generally used in the assessment of the economics of climate change are not accurate enough to provide quantitative insights and should not be taken as serious forecasts. Yet, all these economists take the basically optimistic view that climate change is manageable with appropriate policies for raising the price on the emission of greenhouse gases. With a chapter heading from Wagner & Weitzman (2015: 17): ‘We can do this’.

This more optimistic assessment of climate change does not assume that the challenge will go away by itself or can be left to the market. A plausible approach, favored by most economists,10 is the imposition of a robust and increasing price on carbon emissions (whether as a carbon tax or through a cap and trade scheme) high enough to reduce the use of fossil fuels and encourage the search for their replacement. More than 25 countries had such taxes by early 2018 (Metcalf, 2019), but generally not at a level seen as necessary for limiting global warming to, say, 2C. This approach relies on the use of the market mechanism, but with targets fixed by public policy. Income from a carbon tax can be channeled back to the citizens to avoid increasing overall taxation. To speed up the transition, funds can also be allocated to the research and development of cheaper and more efficient production of various forms of fossil-free energy, including nuclear power (Goldstein & Qvist, 2019).

The response of the environmental optimists continues to emphasize the role of innovations; technological innovations, such as improvements in battery technology, the key element in the 2019 Nobel Prize in chemistry,11 but also social innovations, as exemplified by the experimental approach to the alleviation of poverty, rewarded in the same year by the Nobel Prize in economics.12

While the most important countermeasures will be directed at the mitigation of climate change, there is also a strong case for adaptation. If sea-level rise cannot be totally prevented, dikes and flood barriers will be cost-effective and necessary, at least in high-value urban areas. If parts of Africa suffer from drought, there will be increased use for new crops that are more suitable for a dry climate, possibly developed in part by GMO technology. Industrialization in Africa can decrease the one-sided reliance on rain-fed agriculture, as it has in other parts of the world, which have moved human resources from the primary sector to industry (and then to services). Continuing urbanization will move millions out of the most vulnerable communities (Collier, 2010). While structural change failed to produce economic growth in Latin America and Africa after 1990, Africa has experienced a turnaround in the new millennium (McMillan & Rodrik, 2014) and there are also potentials for increasing productivity by structural change within agriculture in Africa (McCullough, 2017).

### 2NC – AT: Renewables – AT: Climate Wars !

#### Warming won’t cause global conflict

Dr. Ian Cook 20, Senior Lecturer in Global Politics and Policy at Murdoch University, PhD in Political Theory from the University of Queensland, The Politics of the Final Hundred Years of Humanity (2030-2130), Springer Singapore, Kindle Edition

Yet another problem with the assumption that catastrophic human-caused environment change simply causes civil war, as Salehyan and Hendrix noted, is that violence at the scale of a civil war requires significant resources. In their view, civil wars are more likely to occur in times of relative abundance. While “riots and protests, may emerge from conditions of scarcity,” they argue, “sustaining a militant organization requires considerable planning and resources” (Salehyan and Hendrix 2014, p. 240). Reasons to fight might exist. For this to turn into civil war, however, people “also need the capability to do so, and environmental scarcity may limit such capability, thus undermining the resource base necessary for mobilizing armed violence” (Salehyan and Hendrix 2014, p. 240).

A related debate concerns what Adams and colleagues have claimed to be a sampling bias in studies of the connection between environment change and armed conflict (Adams et al. 2018). Levy accepts the existence of some sampling bias but rejects the view that this bias results in an overstatement of the connection between environment change and conflict. “Knowing that case selection is biased is useful, but not a reason to lower our estimate of the climate’s impact on conflict” (Levy 2018, p. 441).

In responding to Levy’s criticism, authors claiming bias wrote that they did not “deny a link between climate change and conflict in principal. Indeed, some of our own recent work indicates that such a link exists, but it is highly conditional.” Their problem with the research being done in this field was that “sampling biases… increase the risk that such links are overstated, that crucial world regions do not receive sufficient attention and that little knowledge is produced on peaceful adaptation” (Ide et al. 2018, p. 442– 3).

After reviewing the literature on the relationship between climate change and violent conflict, Sakaguchi, Varughese and Auld concluded that the “current literature offers mixed evidence. This makes it difficult to render a definitive statement about the climate-conflict relationship” (2017, p. 640). While they pointed out that just over 60% of the studies they reviewed found “that climate change variables are positively correlated with higher levels of violent conflict,” Sakaguchi, Varughese and Auld also argued that “many subtleties and countertrends underlie this overall pattern” (2017, p. 640). Thus, even though “a majority of reviewed studies envision climate variables influencing conflict through a causal pathway, … these pathways are often theoretically underspecified and have only weak empirical support” (Sakaguchi et al. 2017, p. 641).

As Koubi put it, the research that has been done on this question “provides some evidence that climatic changes could act as a ‘threat multiplier’ in several of the world’s regions. In particular, the extant literature shows that climatic conditions can lead to conflict in agricultural-dependent regions and in combination and interaction with other socioeconomic and political factors” (Koubi 2018, p. 200). After having claimed that, to their knowledge, “no one in the field of climate research has suggested that climate change could be the ‘sole cause’ of war, violence, unrest or migration”, Butler and Kefford recommended “viewing climate change instead as a risk multiplier, influencer or co-factor … In this way of thinking, environmental and ecological factors interact with social determinants, including those that are economic, demographic and political, to produce phenomena such as migration, conflict and famine” (2018, p. 587).

There can be no doubt that conflict will increase during the final hundred years of humanity. But it will result from a complex interaction of socio-political factors and a catastrophically changed environment. It may not go beyond conflict between different groups or between the government and opposition groups and become civil war. This depends on the capacity of those opposition groups. In many cases, they will lack the resources to conduct a civil war. The Syrian war is itself a good illustration of the problem, as the groups opposed to the Syrian government have only been able to conduct the extended civil war in which they have been engaged with the support of outside groups. (Mazzetti and Apuzzo 2016).

The question of whether civil war will break out is something that can only be answered “region by region” and the answer must be based on “knowledge of pre-conflict geographies, such as drivers of resilience and vulnerability” (Farbotko 2018). Sometimes governments may abandon territory and opposition groups can seize control of that land. But it is likely to be land that is suffering worst from the effects of catastrophic human-caused environment change and will not be habitable. To replace an existing government or take control of a region within a country through civil war is no simple thing. It may happen. But it will not happen on the scale that some people have predicted. And it will not happen just because of the weather.

## State Action

### 2NC – AT: Populism – Inevitable

#### Culture war, NOT political economy, is the cause

Margalit 19 – Professor of Political Science at Tel Aviv University. Yotam Maraglit, December 20 2019, “Economic causes of populism: Important, marginally important, or important on the margin,” Vox EU, https://voxeu.org/article/economic-causes-populism

I contend that the economic-centric accounts, even in their more nuanced versions, tend to overstate the role of economic insecurity as an explanation of populism's electoral success. In a recent article (Margalit 2019) I discuss several reasons why the focus on economic causes deserves more critical assessment, but here I shall mention two.

First, the claim that economic insecurity is important in understanding the electoral success of populism conflates what I define as ‘outcome significance’ and ‘explanatory significance’. Consider the Brexit vote, which was decided by a margin of less than four percentage points. Economic insecurity and displacement caused by globalisation may well have shifted the vote by a few points, enough to tip the referendum in favour of the ‘Leave’ camp. The outcome significance – transforming loss to victory – was therefore high. However, the overall phenomenon to be explained is why 52% of the electorate voted to leave the EU. The swing of a few percentage points hardly amounts to ‘explaining’ the phenomenon of the overall electoral backing for Brexit. Put differently, the explanatory significance of that factor is low.

The broader point this example illustrates is that a certain factor can have major consequences for the phenomenon of interest, without being a major explanation for that phenomenon. Yet this distinction seems to get muddled in the debate over populism’s causes. This can also be seen with other examples commonly used to demonstrate the importance of economic factors in shaping the populist vote.

In explaining Donald Trump’s electoral victory in 2016, analysts have often cited his alleged appeal to globalisation’s losers, helping him crack the Democrats’ ‘blue wall’ in Pennsylvania, Wisconsin, and Michigan. Analysis by Autor et al. (2016) gives credence to this argument in terms of outcome significance, by finding that the adverse effects of the massive import shock from China accounted for a vote share of several percentage points, sizable enough to flip these states in favour of Trump. Their estimates indicate that if the import shock had been half of what it was, the margin in favour of the Republicans in Pennsylvania would have shrunk by 1.7 percentage points and the Democrats would have won the state by 0.5%. Likewise, the simulation indicates that the electoral impact would also have been sizable enough in Wisconsin and Michigan (2.2 and 1.8 points, respectively) to overturn the Electoral College results. It may therefore be correct that, without the impact of the China shock, Trump would have lost.

But the magnitudes of the estimated effects indicate that we are dealing with fairly small additions to a much larger electoral phenomenon. Examination of the empirical evidence regarding an array of other European countries reveals a similar pattern: shocks that increase the economic insecurity of voters affect the electoral outcome on the margin, yet the overall explanatory significance for the level of support for populists is modest (e.g. Colantone and Stanig 2018a, 2018b, Dippel et al. 2015, Malgouyres 2017). In some instances, this effect is consequential in differentiating between loss and victory, but that is not always the case. For example, in proportional representation systems, support for populists – particularly far right parties – affects the distribution of votes within the ideological bloc, but has little bearing on the overall division of votes between the competing blocs. In ‘first past the post’ systems, where districts often lean heavily towards one party, support for the populists is too small to meaningfully affect the vote.

Moreover, individual-level studies of the vote for populist parties consistently find that variables that capture labour market standing or economic insecurity explain only a small fraction of the variation of interest (Guiso et al 2017, Gidron and Hall 2017). While variables capturing these explanations are mostly statistically significant, one must not overlook the fact that their usefulness in accounting for the broader question of who supports the populists is, in fact, very limited.

A second issue with attributing a central role for the economic causes has to do with immigration, often the most salient issue for populist parties and voters. In describing immigration as an ‘economic cause’ of populism, there is a need to distinguish between two questions: Is immigration in itself economic-driven? And are the economic effects of immigration – whether real or perceived – a major cause of the populist vote? On the first question, there is ample evidence that, indeed, immigration to the West is largely instigated by economic forces (poverty, lack of jobs opportunities, wage differentials). But on the second question, the weight of the evidence clearly indicates that Western voters' concerns regarding immigration have little to do with its impact on their material standing or level of economic insecurity. This conclusion comes up in both observational studies and studies employing a range of survey-experimental methods including list, vignette, and conjoint designs (e.g. Sniderman 2004, Janus 2010, Bansak et al. 2017; see Haimmueller and Hopkins 2014 for a review of the evidence). Even when examining cases where the labour market threat posed by immigrants is most direct, the effects on natives' attitudes are very limited (Hainmueller et al. 2015, Malhotra et al. 2013). Thus, while immigration is often a major concern of populist voters, treating it as an economic driver of populism in this latter sense seems misguided.

What, then, explains the populist appeal? Out of space limit, I will note only that structural, long-term social changes strike me as central to understanding the resentment underlying much of its appeal. By this account, structural changes – such as increased access to higher education, urbanisation, and growing ethnic diversity – have led to significant progressive cultural shifts. These changes, and the perceived displacement of traditional social values, have caused a sense of resentment among segments of the population in the West, particularly among white men, older people, conservatives, and those with less formal qualifications (see Inglehart and Norris 2019 for an extensive exposition of this view). Increased exposure to foreign influences that comes with globalisation and, even more so, the effects of waves of immigration have exacerbated the sense of a cultural and demographic threat. With gradual generational change, these formerly predominant majorities have increasingly felt their social standing erode, buying into the populist nostalgia for a ‘golden age’ when there was cultural homogeneity and traditional values and a strong national identity prevailed. They have also grown receptive to populist charges against a disconnected elite that has turned its back on them and the values they hold dear.

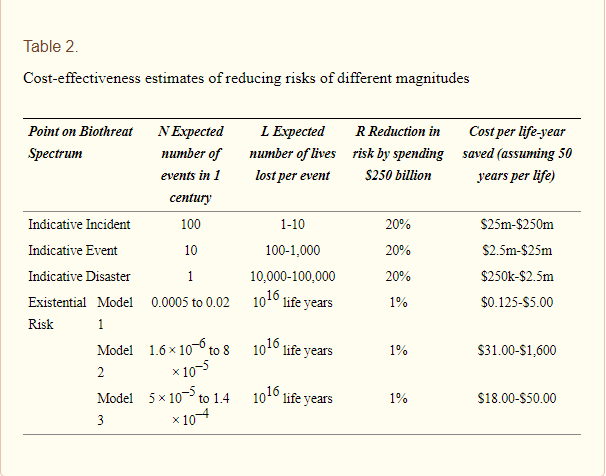
There’s an obvious, and understandable, reluctance to accept such ‘soft’ explanations. Cultural explanations of populism can be harder to measure or identify causally. Yet that of course doesn’t mean that a cultural explanation is incorrect. One should be careful not to equate quantifiability with importance.

Note, though, that the cultural account does not dismiss the role of economic factors. In addition to the electoral impact of the causes noted earlier (e.g. trade, automation), hard economic times also tend to undermine the perceived competence of the economic and political elites, and thus help fuel popular distrust in them. It is therefore likely that the financial crisis contributed to the populist wave, as some have suggested (Algan et al. 2017, Mian et al. 2014). But given the weak empirical association between measures of economic insecurity and support for populism, we should view the crisis as more of a trigger than a root cause of widespread populist support.

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

#### 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: Competitiveness !

#### Manufacturing not key to leadership---military strength, soft power, alliance structures, etc. make it inevitable

Brands 20 (Hal Brands, Distinguished Professor at Johns Hopkins University’s School of Advanced International Studies and scholar at the American Enterprise Institute, “China's Global Power Tops the U.S.? New Measures Say No,” 12/09/20, <https://www.bloomberg.com/amp/opinion/articles/2020-12-10/china-s-global-power-tops-the-u-s-new-measures-say-no?srnd=opinion&sref=nmVx3tQ5&__twitter_impression=true>, TM)

Ever since the U.S. reached the pinnacle of global power after World War II, Americans have worried it wouldn’t remain there. Waves of “declinism” rolled across the country after Sputnik in the late 1950s, the Vietnam War, the oil shocks of the 1970s, the rise of Japan in the 1980s, and the Iraq War and the global financial crisis of the 2000s. Now, amid a global pandemic and at the onset of a long struggle with China, the question of American decline has taken on renewed urgency. The trouble with these debates is that power is as elusive as it is essential: It can be devilishly hard to measure outside of major war. (In war, it’s easy: Who won?) Recently, though, several innovative studies have sharpened our understanding of what power is and how to measure it — studies that are mostly, but not entirely, reassuring for a status-obsessed superpower. Traditionally, measures of power focused on attributes such as population, energy consumption and production of steel or other indicators of industrial strength. In the information age, these indices tell us relatively little about whether a country can get its way in world affairs. It is still common, though, to assess power through blunt measures like gross domestic product or military spending. Analysts who argue that Beijing is overtaking the U.S. habitually note that China’s GDP may soon surpass America’s. But GDP is a snapshot of activity rather than a measure of overall wealth. Some countries that spend massively on military power, such as Saudi Arabia, are quite useless in projecting it. So how can we determine the balance of advantage in a long rivalry? The groundbreaking academic work is giving us better answers. The first category focuses on refining our grasp of economic and military might. Michael Beckley of the American Enterprise Institute (where I am also a fellow) has developed a model that measures net power rather than gross power by accounting for things such as security costs (“the price a government pays to police and protect its citizens”) and production costs (how much it costs, in material and environmental degradation, to build that coal power plant). He finds, not surprisingly, that the U.S. fares far better than China, an authoritarian state with vast internal security costs and a prodigiously wasteful approach to stimulating growth. Similarly, it is critical that American per capita GDP dwarfs China’s, because that means the U.S. has more wealth left over, after it feeds its population, to pursue global influence. Other work has better accounted for the way wealth accrues over time, and found that the U.S. will still have far more overall economic power than China even after China’s GDP eclipses America’s. The second category better captures the reality of “network power.” In a landmark paper published in 2019, Abraham Newman of Georgetown University and Henry Farrell, my colleague at the Johns Hopkins School of Advanced International Studies, argue that the centrality of the dollar to international financial networks — which persists, despite decades of handwringing about its decline — gives the U.S. outsized coercive leverage. Scholars have also affirmed something that policymakers have long understood: America punches far above its own weight in global affairs, because of the network of military, economic and diplomatic partners it leads. China has nothing equivalent. The third category accounts for less tangible forms of power. For decades, analysts have grasped that soft power — the degree of admiration and emulation a country inspires — matters enormously. An intriguing study by Ted Hopf of the National University of Singapore, Bentley Allan of Johns Hopkins and Srdjan Vucetic of the University of Ottawa demonstrates that, even though America’s global favorability ratings have plummeted under President Donald Trump, there remains strong global support for democracy and free-market economic policies. That’s a body blow for an authoritarian, mercantilist China, which, the authors predict, “is unlikely to become the hegemon in the near term.” It also helps explain why European states are systematically turning away from Beijing even amid enormous turbulence in their relations with the U.S.

#### U.S. competitiveness is high and resilient

Rodriguez 16 (Michelle Drew, Michelle leads many of Deloitte’s Manufacturing Competitiveness research efforts as part of her role as the Manufacturing Leader for Deloitte’s Center for Industry Insights. She is an accomplished professional with 15 years of strategic and operational experience, having worked directly in the automotive industry as well as currently serving as an advisor to global manufacturing executives. She and her team have worked on a number of efforts that explored the future trends impacting the manufacturing industry, from the boardroom to the shop floor. She has most recently authored multiple research studies on the topic of manufacturing. The foundation of the research Michelle leads is based on dozens of interviews with CEOs, CTOs, governmental leaders, university presidents, national laboratory leaders, and labor union leaders as well as collaboration with organizations such as World Economic Forum, Council on Competitiveness, NAM, and The Manufacturing Institute. She has a MBA from the University of Michigan (Ross School of Business) and also holds a Bachelor of Science in Mechanical Engineering from the University of Wisconsin. “Innovation drives competitiveness. But what drives innovation?” 7/25/16 <https://innovation-in-manufacturing.deloitte.com/2016/07/25/innovation-drives-competitiveness-but-what-drives-innovation/>)

Research shows advanced manufacturing is more essential than ever to economic competitiveness and prosperity. But what is involved in driving, sustaining, and applying the innovation that makes a company or country a leader in advanced manufacturing? In this post, I’ll explore the drivers that make the US a leader in innovation. Research and development (R&D) certainly plays a role, but the real key may be an intangible one: the innovation ecosystem. The US innovation ecosystem has evolved significantly over the last century, transitioning from business monopolies dominating R&D early last century, assertive government sponsorship mid-century, to the current environment, within a globally connected world in which small and big businesses collaborate with universities, venture capitalists, and research institutions to drive the innovation ecosystem. Meanwhile, the technological focus of R&D has followed a similar arc, shifting from the creation of physical to digital products, to the more recent formation of new business models that combine the physical and digital worlds to create and capture new forms of value. With capital, intellectual property, and talent flowing across borders with limited constraints, the United States faces fundamental questions of great importance to the future of its innovation ecosystem: How can it best cultivate the potential of advanced technologies to spur competitiveness? Can the United States continue to lead given the research spend and talent within other nations? No one entity houses all the brightest people or best ideas – the answer lies with looking outside your traditional walls. Insights from our recent Advanced Technologies Initiative: Manufacturing and Innovation study indicated that, when it comes to tangible factors such as R&D spend, **the U**nited **S**tates **is a clear leader**. We spend more on R&D in raw dollars than any other nation.2 We account for about one-third of the globe’s R&D spending. In comparison, the next-largest share is China’s, at less than one-quarter of the global total. The other eight in the top 10 barely surpass the US share when all combined. This strong set of R&D capabilities reaches across many industries. In a recent global study3 that assessed R&D leadership in 10 top sectors, the United States was ranked number one for seven of those 10 sectors. But we may not stay in the lead for long. Other countries are ramping up their spending. Some with far smaller R&D footprints—like Japan and South Korea—already outpace us in two measures of R&D intensity: spend as a percentage of GDP and researchers per million inhabitants. As the graphic below shows, from 2000 through 2013, South Korea, China, and Taiwan dramatically expanded their R&D intensity in both respects, while the United States made little change over the same period. And what about the US’s global lead in raw-dollar R&D spending? Experts predict China is on a pace to pass us by 2019.4 China already focuses more of its R&D on commercializing new technologies, while the US focuses a significant core on basic and applied research.5 The “secret sauce” of innovation R&D spend alone isn’t a defensible advantage for the US. Other countries can—and do—increase their investments. And someday in the not too distant future they may very well surpass us. **Does that mean we’ll lose our leadership? No.** The **enduring strength of US innovation**, or of any nation’s capacity to invent, is more complicated than the number of dollars spent on R&D alone. What matters is the innovation ecosystem–the complex collaboration between private business, government, academia, finance, independent research, and other functions to bring new products and services to market. An effective innovation ecosystem marshals top talent, allows ideas to flow, and lowers barriers to breakthroughs. The US’ entrepreneurial spirit and substantial funding from venture capital firms are **huge competitive advantages and key differentiators**

for the country. It remains the center for “disruptive innovation” thanks to its research infrastructure and low barriers to entrepreneurs and start-ups. It’s also **more resilient with the sum being greater than the** individual **parts.** That’s one of the hidden strengths of what the US brings to the challenge: Key stakeholders within our ecosystem have evolved over time to become less siloed and more collaborative. With the increasing pace of digitalization across the manufacturing industry, its innovation ecosystem has become a more closely connected system with stronger linkages between government, small business, big business, universities, venture capitalists, and research institutions that leverage and benefit from the deeper knowledge and connectivity between each other. What’s next? The US innovation ecosystem must continue to evolve to maintain our competitive position. To stay ahead, key players in the ecosystem should regularly analyze our relative position within the global innovation environment, identify challenges, and capitalize on our strengths. For example, the US is a pioneer in basic and applied research. That’s long been a strength. But spending in these areas has stagnated over the last decade and the government contribution has shrunk as a percentage of the overall federal budget. This puts research performed at government-sponsored institutions at potential risk. Executives indicated that as basic and early applied research takes more time to deliver results in terms of tangible products and technologies, and how/when/where the learnings will be precisely applied aren’t known, it thereby makes it more difficult for shorter term sector specific businesses to nurture it properly. To keep our competitive edge, the government needs to maintain investment levels in the basic and early applied research to ensure a strong foundation for future success. While many other economies across the globe have increased their government R&D support, how should the innovation ecosystem respond? We need to focus on building efficient and effective collaboration and tech transfer mechanisms between basic and applied research as well as through to scale-up commercialization. The health, adaptability, and success of a nation’s innovation ecosystem ultimately determines its competitiveness. When the ecosystem works, **there is a continuous and self-reinforcing cycle** in which breakthroughs bring new technologies and products to market, sales and profits increase, and companies invest more in R&D. Our nation’s success hinges on the ability of industry, government, and research labs to work together and engage in ongoing dialogue about creating an environment in the US that continues to promote competitive R&D work and innovations in advanced manufacturing.

# 1NR

## Overview

### ! A/Os

#### Bedoya key to regulate FRT

Jessica Rich 11/18, former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection (BCP), Counsel at Kelley Drye LLP, “Some fireworks at Bedoya’s Senate confirmation hearing, but confirmation still seems likely,” Ad Law Access, 11-18-2021, https://www.adlawaccess.com/2021/11/articles/some-fireworks-at-bedoyas-senate-confirmation-hearing-but-confirmation-still-seems-likely/

On November 17, the Senate Commerce Committee held its eagerly-awaited hearing on the nomination of Alvaro Bedoya, a data privacy academic from Georgetown Law, to be FTC Commissioner. Bedoya is slated to replace Rohit Chopra, who departed the agency last month to become Director of the CFPB, and Bedoya’s appointment would once again give the Democrats a voting majority. In the run-up to his hearing, some have wondered – Can we expect Bedoya to provide Chair Khan with a reliable third vote for her agenda, or will he bring a more bipartisan approach to the agency? From his answers and demeanor at the hearing, the answer is probably…both.

First, a little table-setting: Bedoya’s nomination was considered along with three others – Jessica Rosenworcel for FCC Chair and two nominees for the Department of Commerce. The hearing was well-attended by Committee members, who directed the majority of their questions to Rosenworcel. (Yes, net neutrality, broadband access, and the “homework gap” all got more attention than privacy.) All four current FTC Commissioners attended the hearing in person, in a bipartisan show of support for Bedoya, though Bedoya attended remotely due to a recent exposure to COVID.

Here are some takeaways from Bedoya’s portion of the hearing.

He appears likely to be confirmed, even if largely along party lines. Although Senator Wicker made a reference to Bedoya’s “strident” views and Senators Lee, Cruz, and Sullivan slammed his “extremist” tweets (see below), most of the questions (from 18 Senators!) related to Bedoya’s area of expertise (privacy), where there is more alignment between the parties than in other areas. He handled the questions well, and repeatedly expressed support for collaboration and bipartisanship (e.g., specifically mentioning that he wants to work closely with Commissioner Wilson on privacy). Democrats have the votes (in the Committee and on the Senate floor), even if they ultimately have to call in V.P. Harris to break a tie.

He spoke about his nomination and the issues in personal and emotional terms. Bedoya highlighted that he and his family were welcomed into this country 34 years ago. He talked about his experience as a Senate staffer, learning about the terror and harm caused by stalking apps from a shelter for battered women. He realized then and believes now that “privacy is not just about data, it’s about people.” His goal as a Commissioner would be to make sure the FTC protects people, and to help both consumers and businesses manage the multiple crises facing the country – a COVID crisis, a privacy crisis, and a small business crisis.

He appears likely to vote with the majority on many (or most) issues. No big surprise here, but when asked his views about various issues, he consistently supported positions that Khan, Slaughter, and (his predecessor) Chopra have supported – federal privacy legislation, Magnuson-Moss privacy rulemaking if Congress doesn’t act, pushing back against the “unprecedented consolidation” that is forcing small businesses to close, streamlining the FTC’s rulemaking and subpoena processes, reducing the power of the platforms, and reining in tracking technologies like facial recognition. As to the latter, he said he would not support banning facial recognition technologies altogether, since some applications assist with benefits like public safety and healthcare. However, he would support banning facial recognition technologies that are hidden, that lack consent, or that collect, use, and share data without limits.

He’s a real-live privacy expert. He clearly has the credentials, starting with his work as a Senate staffer and continuing through his years at Georgetown Law as a professor and head of a privacy think tank. But he also quickly and confidently answered all questions related to privacy – from the need for privacy legislation generally, to his views on Senator Schatz’s “duty of loyalty” and Senator Markey’s proposal to amend COPPA, to the lines he would draw on facial recognition (see above).

He wrote some controversial tweets, and a number of Republicans seem poised to vote “no” on his confirmation. Senator Sullivan cited a tweet from Bedoya calling the 2016 Republican convention a “White Supremacist rally.” Cruz cited tweets about ICE as a “domestic surveillance agency” and a retweet involving critical race theory and white supremacy. He also called Bedoya a “left wing activist, bomb thrower, extremist, and provocateur.” Lee ran through a series of supposedly “yes or no” questions in rapid succession, and accused Bedoya of being evasive when he tried to qualify his responses. And Wicker referred to Bedoya’s “strident” views, as noted above. As to the tweets, Bedoya apologized, saying that it was “rhetoric” and that he would put aside any partisan views if he became Commissioner. However, these Senators (and perhaps other Republicans) seem poised to vote “no” on Bedoya’s confirmation, and some have said they plan to place a “hold” on the process, which could slow it down.

If confirmed, he could help reduce tensions at the Commission. With acrimony among the Commissioners currently at unprecedented levels (see our recent post here), adding Bedoya to the mix could help reduce the tensions (despite the tweets). He’s known to be collegial, he worked across the aisle as a Senate staffer, he repeatedly invoked bipartisanship at the hearing, and all of the sitting Commissioners (Democrats and Republicans) showed up at the hearing to support him. That augurs well for the dynamics at the Commission, even if the votes remain split along party lines.

We will continue to monitor progress on Bedoya’s nomination and post updates as they occur.

#### It causes extinction---there are multiple scenarios

Dr. Eric W. Orts 18, Guardsmark Professor of Legal Studies & Business Ethics and Professor of Management at The Wharton School, University of Pennsylvania, MA in Political Science from the New School for Social Research, LLM from Columbia Law School, JD from the University of Michigan School of Law, BA in Government from Oberlin College, “Foreign Affairs: Six Future Scenarios (and a Seventh)”, 6/27/2018, https://www.linkedin.com/pulse/foreign-affairs-six-future-scenarios-seventh-eric-orts/

7. Fascist Nationalism. There is another possible future that the Foreign Affairs scenarios do not contemplate, and it’s a dark world in which Trump, Putin, Xi, Erdogan, and others construct regimes that are authoritarian and nationalist. Fascism is possible in the United States and elsewhere if big business can be seduced by promises of riches in return for the institutional keys to democracy. Perhaps Foreign Affairs editors are right to leave this dark world out, for it would be very dark: nationalist wars with risks of escalation into global nuclear conflict, further digital militarization (even *Terminator*-style scenarios of smart military robots), and unchecked climate disasters.

### O/V – Link T/C

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

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

2. Branding and Credibility

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

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

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

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

### T/C Populism

#### Solves rural political alienation

Kelloway 21 (Claire Kelloway, senior reporter and researcher with the Open Markets Institute, primary writer of FoodAndPower.net, former sustainability fellow with Bon Appetit Management Company, BA political science, concentration in political economy and sustainable development, Carleton College, “How Biden can rein in the Big Meat monopoly,” Vox, 2-24-2021, https://www.vox.com/future-perfect/22298043/meat-antitrust-biden-vilsack)

Taking on Big Meat wouldn’t just help consumers, farmers, and meatpacking workers; one poll found 82 percent of independent rural voters would be more likely to vote for a candidate who supports “a moratorium on factory farms and corporate monopolies in food and agriculture,” so it could also help halt Democrats’ losing streak in rural areas and heartland states.

As progressives take their campaign against consolidation into a higher gear with a friendlier administration in power, Big Meat needs to be on the priority list.

#### That’s the root cause of US populism

Rodriguez-Posea 21—(Professors of Economic Geography at the London School of Economics). Andrés Rodríguez-Posea, Neil Lee, & Cornelius Lipp. August 11, 2021. “Golfing with Trump. Social capital, decline, inequality, and the rise of populism in the US”. Cambridge Journal of Regions, Economy and Society. Accessed 10/2/21.

We hypothesise that low social capital alone is unlikely to have triggered the swing of voters to Donald Trump and that interpersonal inequality at the local level is unrelated to increases in Trump’s vote share. We propose that it is precisely the long-term economic and demographic decline of the places that still rely on a relatively strong social capital that is behind the rise of populism in the US. Strong, but declining communities in parts of the American Rustbelt, the Great Plains, and elsewhere, reacted at the ballot box to being ignored, neglected and being left-behind. The results of the analysis show that increases in populist vote in the US are fundamentally driven by the economic and demographic decline of strongly cohesive midtown and rural America. These places still have greater levels of social capital than more dynamic and unequal areas of the US. This social capital has played a role in the swing of votes within communities driven by a growing feeling of frustration, increasingly known as the rising geography of discontent (McCann, 2020) or the politics of resentment (Cramer, 2016). In small cities and rural areas of the US, scattered predominantly across the Rustbelt and the Great Plains, the rise in populist vote represents a reaction of strong communities in which individual losses are identified with collective losses. These so-called ‘places that don’t matter’ (RodríguezPose, 2018) have had enough of seeing their people leave and their jobs go and have used the ballot box to exact revenge on a system they consider offers little to them. By contrast, the more dynamic, mainly urban, areas of the US, where society is often less cohesive, where there is less social capital and where interpersonal inequalities are significantly higher, have, for the moment, shunned the calls of populism. We argue that our results have implications beyond the United States. In particular, work across Europe, including studies considering Brexit (e.g., Carreras et al., 2019; Lee et al., 2018) and Euroscepticism more generally (Dijkstra et al., 2020), have highlighted the importance of long-term decline in explaining the growth in populism. Yet the focus has tended to be on income and industrial decline, rather than employment and population decline, as a cause. The decline of previously tight-knit communities has been underplayed in this literature, but our results provide an important justification to investigate whether they can be generalised outside the United States. The paper is structured as follows. The next section studies the rise of Trumpism in the US. This is followed by a section looking at explanations for the growth of the Trump vote, focusing, in particular, on social capital, interpersonal inequality, and long-term economic and demographic decline. The methods and data used in the analysis are presented in the ensuing section, which is followed by the econometric analysis. The main conclusions of the study are put forward in the final section. The rise of populism in the US On 8 November 2016, Donald Trump was elected president of the US. Trump, a businessman with limited previous political experience, managed against the odds first to secure the Republican Party nomination and then the presidency on a political platform with strong nationalist and authoritarian populist tendencies (Norris and Inglehart, 2019). Trump’s election was achieved on the wings of winning the electoral votes of crucial swing states, such as Pennsylvania, Ohio, Michigan and Wisconsin. In these states, like very much everywhere else in the US, the votes for the Democratic candidate, Hillary Clinton, were geographically concentrated in the larger cities. Clinton triumphed in cities like Philadelphia, Pittsburgh, Columbus, Cincinnati, Cleveland, Detroit, Milwaukee and Madison, and took some university towns in Ohio and Pennsylvania. The suburbs, towns and rural areas, by contrast, provided fundamental support for Donald Trump (Rodden, 2019). Figure 1 shows the Trump margin, the swing in the share of votes towards the Republican Party between the 2012 presidential election, when Mitt Romney was the Republican presidential candidate, and the 2016 election. The Trump margin is highest in most of the mid-Atlantic, Midwest, and Great Plains states. The greatest swing took place in an arch surrounding the Great Lakes, drawing a semicircle expanding from northern Maine in the East to north-eastern Minnesota in the West (Figure 1). The geography of the Trump margin changed relatively little in the 2020 election (Figure 2). Despite losing the election to Joe Biden, Donald Trump increased his margin relative to the votes obtained by Mitt Romney in 2012 across many rural and small-town counties where he had already prevailed four years earlier. He also managed to make forays into territories traditionally relatively hostile to the Republican Party, such as southern Texas and parts of New Mexico (Figure 1). However, the main geographical traits of the 2016 election remained untouched in November 2020. The Trump margin was, once again, highest in rural and small-town communities around the Great Lakes, the Midwest and the Great Plains. In contrast, Donald Trump attracted less votes along both coasts and in large urban agglomerations everywhere in the US (Figure 1). Possible explanations for the rise of Populism Why did Donald Trump get elected in 2016? Why did he almost get re-elected in 2020? What are the reasons behind the rise of authoritarian populism in the US? The rise of Trumpism in the US has coincided with that of forms of authoritarian populism in other western democracies. Especially in the second half of the 2010s, researchers have tried to investigate the causes of populism from different perspectives. The main divide in the studies of populism has been between those focusing on cultural parameters versus those emphasising economic explanations. Those examining culture and values have centred their explanations around the role of values (Norris and Inglehart, 2019). Citizens embracing populism are those that feel ill at ease with what they increasingly regard as a different society from the one they grew up in or with the image of society transmitted to them by their parents and family. These citizens generally regard globalisation, migration and multiculturalism as key factors behind the rise of economic (but also cultural and identity) insecurities (Norris and Inglehart, 2019; Salmela and von Scheve, 2017). The change in cultural values threatens their identity and undermines family and religious traditions, transforming the environment they live in into one they no longer feel comfortable with (Norris and Inglehart, 2019). Gradually, this insecurity has morphed into anger and resentment towards a system that, in their view, no longer values them (Salmela and von Scheve, 2017). Economic explanations revolve around the economic insecurity brewed by deregulation and globalisation (Guiso et al., 2017). Factors such as the openness to trade and the exposure to Chinese goods (Autor et al., 2013, 2016; Colantone and Stanig, 2018) rank high in this strand of research. Recent economic transformations are exploited by populists, invoking protectionism while stoking economic nationalism, such as in Donald Trump’s ‘Make America great again’ 2016 campaign slogan. Post-financial crisis austerity has also been considered a driver of discontent (Gray and Barford, 2018). Cultural and economic transformations are causing rising resentment with a system, which is increasingly reflected in the electoral ballot. Voters supporting populist options are both swayed by their individual characteristics, such as age, race, education, exposure to new technologies, health, work status or welfare dependency, as well as by the conditions of the places where they live (Alabrese et al., 2019). At the intersection between culture and economics, two factors were signalled by Putnam as the main risks for American democracy. Social capital, as ‘the performance of […] democratic institutions depends in measurable ways upon social capital’ (Putnam, 2000: 349), and interpersonal inequality and the increasing polarisation of American society. Putnam argued these trends went hand in hand and reinforced one another (Putnam, 2000: 359): ‘the last third of the twentieth century was a time of growing inequality and eroding social capital. By the end of the twentieth century, the gap between rich and poor in the United States had been increasing for nearly three decades, the longest sustained increase in inequality in at least a century, coupled with the first sustained decline in social capital’. In the next subsections, we look at the potential role of both factors in the rise of populism, as well as that of long-term economic and demographic decline as a possible alternative. Social capital as a driver of populism Social capital has become one of the dominant concepts in the social sciences. The concept draws on a longstanding body of research, which suggests that social networks matter for all sorts of social and economic outcomes. Coleman (1988) defined social capital as a resource considering (a) obligations and expectations, (b) information channels and (c) social norms. These three aspects of social relationships reduce the coordination costs of shared action and improve outcomes, moving away from a static view of social relations and economic activity as being about individualised actors, towards a view that economic activities are relational rather than simply transactional (Rodríguez-Pose and Storper, 2006). Putnam took on this concept and defined it as ‘the features of social life— networks, norms and trust—that enable participants to act together more effectively to pursue shared objectives’ (Putnam, 1995: 664). Most views of social capital consider it a force for good. In his work on the strength of weak ties, Granovetter (1973) showed the importance of social relations in enhancing economic outcomes, while Putnam (2000: 394) indicated that social capital ‘strengthens our better, more expansive selves’. Hence, the long-term decline of social capital in the US posed a serious threat to American society and its democracy, as it pushes citizens to free-ride ‘by neglecting the myriad civic duties that allow […] democracy to work’ (Putnam, 2000: 349). However, there are also longstanding concerns that it can have negative consequences. Olson (1965) viewed associational behaviour as lapsing into special interest groups. Overall, closed networks may enable the development of social capital, but they can also allow the development of group-think and incentives to engage in factional behaviour rather than in the general interest (Rodríguez-Pose and Storper, 2006) and prevent the progress of new ideas and social change (Coleman, 1988). In short, a tight-knit community can entrench the ‘forces of tradition’ and restrict social change (Farole et al., 2011: 68). In terms of how social capital can affect voting behaviour, social capital is often seen as a pillar of a functioning democracy, something which goes back to Alexander de Tocqueville and his argument that civic association underpinned the US democratic model. Similarly, Putnam (1993) argues that the lack of adequate social capital in southern Italy undermined democracy and legitimate political representation. His arguments for the US are that declining social capital not only depresses civic engagement and political participation but that it also destroys connectedness and trust. The increasingly empty public forums that became the norm in the last third of the 20th century represented a threat to American democracy (Putnam, 2000: 412). In this respect, social capital can be considered as a form of protection against populism or demagoguery. Pre-dating the post-crisis resurgence of populism, Fieschi and Haywood (2004) indicated that a lack of trust in political institutions could fuel populism. Both Putnam (1993; 2000) and Fieschi and Haywood (2004) viewed social capital as essential for a healthy democracy and having a purely negative impact on populism (i.e., where there is greater trust, political relationships are healthier and more mutually respectful, and so populists are less able to blame elites). But this positive view of social capital has, more recently, also been challenged. Satyanath et al. (2017), for example, showed that German states with higher levels of social capital, proxied by associational behaviour, facilitated a rapid expansion of Nazi ideas and, in turn, Hitler’s accession to the Chancellery through higher shares of votes for the Nazi party. The presence of large and dense networks involving high levels of trust expedited a swift flow of information and a more rapid exposure to Nazi party propaganda. Interpersonal inequality and populism Putnam (2000) saw rising interpersonal inequality as the other main risk for American democracy. For him, the increase in interpersonal inequality and the decline of social capital were two sides of the same coin. On the one hand, the rise in inequality of the last third of the 20th century (Katz and Murphy, 1992) disrupted participation and reduced civic engagement. On the other, the decline in social capital accelerated the disintegration of American communities and eased the implementation of policies and the passing of legislation that fermented greater inequality. This process also had a geographical component as ‘the American states with the highest levels of social capital are precisely the states most characterised by economic and civic equality’ (Putnam, 2000: 359). This view of interpersonal inequality as a threat to democracy and, therefore, a driver of populism has been shared by many economists who have examined the roots of the recent rise of authoritarian populism in developed countries. The rise in wealth polarisation in American society, as well as elsewhere in the developed world, is a fundamental factor for the increasing support of extreme antisystem options at the ballot box. Economic transformations in recent decades, and, above all, globalisation and automation, have driven ‘multiple, partially overlapping wedges in society’ (Rodrik, 2018: 23). One of these wedges concerns income and wages. The economic system has been leaving increasing shares of the population behind, in conditions that are financially insecure (Eichengreen, 2018; Guiso et al., 2017). The concentration of wealth in a dwindling number of hands (Milanovic, 2016; Piketty and Saez, 2014)—the top 1% (Dorling, 2019)—and the parallel rise in the people at risk of poverty in developed countries (O’Connor, 2017; Rodrik, 2018) is considered tainted with a stigma of unfairness (Rodrik, 2018: 23). Citizens have come to believe that the growing wealth of the elites has been earned unfairly and, consequently, the tolerance towards inequality has decreased (Pastor and Veronesi, 2018). Hence, interpersonal inequality, often confounded with economic unfairness (Starmans et al., 2017), is, from this perspective, pushing voters towards illiberal and anti-system parties at the ballot box. Inequality is perceived to drive a reaction against the status quo, resulting in an erosion of democratic institutions and leading to nativism and plutocracy (Milanovic, 2016). For Putnam (2000: 359) ‘there is every reason to think that the twin master trends of our time—less equality, less engagement—reinforce one another’. Thus, fighting the decline of social capital is also a way to prevent the rise of inequality and vice versa. It is also the best way to combat the challenges besieging American democracy. The role of long-term economic decline Putnam’s work is about all sorts of decline. From that in civic engagement or in political participation to declines in bowling or card playing. All these declines are meticulously documented in Bowling alone. Yet, there is one type of decline that is conspicuously absent from Putnam’s (2000) analysis: that of smalltown and rural America. Similarly, the growth of territorial inequalities and the rising geographical polarisation in the US does not feature prominently in Putnam’s work. However, the demographic and economic decline of small-town and rural America has been documented for quite some time (e.g., Fuguitt et al., 1989; Johnson, 2006). Small towns and large swaths of rural areas have been losing population and jobs throughout the second half of the 20th and the beginning of the 21st century. The decline of these areas has been matched by the evolution of many large cities, such as Detroit, Cleveland, Buffalo, Milwaukee or Toledo, once among the most dynamic industrial hubs in the US (Hartt, 2018). Many of these cities articulated, and still articulate, large hinterlands in ‘Rustbelt’ states. Such decline has had important implications for social capital. According to Putnam (2000: 207), ‘the decline in social connectedness over the last third of the twentieth century might be attributable to the continuing eclipse of smalltown America’. This is because small-town and rural America have for long been the centres of civic engagement. In these areas, people have been and remain community-oriented (Wuthnow, 2019: 4). During most of America’s history this feeling of community, widespread across the whole of the US, was regarded as a force for good. ‘Residents of small towns and rural areas are more altruistic, honest and trusting than other Americans’, noted Putnam (2000: 205). They are viewed as deeply proud, caring about their communities and wanting the best for them (Wuthnow, 2019). Communities with a better endowment of social capital have been perceived as better able to cope with all sorts of economic and social challenges (Rupasingha et al., 2006). However, when these communities suffer long-term population and economic decline and when the way of life that created and sustained the feeling of community ebbs away (Rodríguez-Pose, 2018; Wuthnow, 2019),2 the very social capital behind the cohesiveness and former dynamism of these areas can also channel the growing anger and resentment felt by those being left behind. When the feeling of neglect becomes widespread, when there is growing resentment about the rising economic gulf between large cities and small communities (Cramer, 2016: 83), social capital at a local scale can become the mechanism to diffuse that anger and outrage at a system they feel no longer represents and serves them. Areas with a strong social capital develop a consciousness that helps shape their political views (Cramer, 2016) and this consciousness is inherently related to place. Locals concerned about the many problems afflicting their communities, from population loss, brain drain and ageing to social disintegration and increasing drug addiction, feel that their plights are ignored by the federal government (Wuthnow, 2019) and can react collectively at the ballot box. In this respect ‘place matters because it functions as a lens through which people interpret politics’ (Cramer, 2016: 12). This consciousness is both rooted in place and class, but also ‘infused with a sense of distributive injustice’ (Cramer, 2016: 12). And it may also be the mechanism that feeds the increasing call for attention of places that have seen far better times, have been devastated by economic processes such as globalisation or automation and where people are becoming effectively stuck because of lack of capacity and/or opportunities for mobility (Rodríguez-Pose, 2018: 202). These processes have contributed to render their economies redundant and, often, undermine the self-esteem and sense of purpose of many local dwellers. Such consciousness is contributing to spread out a geography of discontent (Dijkstra et al., 2020; McCann, 2020) and a politics of resentment (Cramer, 2016) to areas that have had a rough ride linked to both economic and cultural transformations and have seen their friends and neighbours leave, their jobs dwindle, and their services gradually disappear (Collantes and Pinilla, 2019; Guilluy, 2019). Social capital can, in this respect, provide the vehicle for this anger to come out into the open at the ballot box (Rodríguez-Pose, 2018) or, increasingly, through rebellion and revolt (Guilluy, 2019).

### T/C – Climate (Meat)

#### Turns and solves climate

Smith 21 (Georgie Smith, agriculture and food systems journalist, 4th generation farmer, “What the pandemic revealed about the meat supply chain,” Fortune, 6-24-2021, https://fortune.com/2021/06/24/what-the-pandemic-revealed-about-the-meat-supply-chain/)

Yet a shift toward a more sustainable or less centralized industry is unlikely to happen overnight, as big meat companies, regional producers, impact investors, and consumers took away different lessons from the experience.

Tackling the food industry’s environmental toll and sustainability record is a massive undertaking. Food makes up 10% to 30% of a household’s carbon footprint, with meat—primarily beef, pork, and chicken— contributing 56.6% of the greenhouse gases emitted in an average American’s diet. In 2019 agriculture contributed 9.6% of the U.S. total emissions, a significant portion of which came from methane emissions from livestock production, putting the industrialized meat supply chain in the crosshairs of the climate change debate.

Big Meat shrugs off the pandemic

Despite weeks of meatpacking plant shutdowns during the pandemic— leading to beef- and pork-packing facilities operating at 60% of capacity in April and May—record-high retail meat prices and a high appetite for meat domestically and internationally contributed to historic profits for many large U.S. meat-supply companies.

The “Big Four” meat companies—Tyson Foods, JBS SA, Cargill, and National Beef, currently controlling 80% of the U.S. meat supply chain—largely shrugged off the supply challenges.

The COVID-19 meatpacking plant shutdowns of 2020 are unlikely to inspire a significant, immediate shift in favor of a more decentralized industry that favors local producers, industry critics say.

And they have few incentives to make meaningful changes in favor of diversity or sustainability anytime soon, analysts say.

“When it comes to meat, the sad fact is that the pandemic didn’t last long enough,” says Alan Lewis, VP of government affairs and policy advocate for Natural Grocers, a 150-plus natural foods grocery chain based in Colorado, when asked if the pandemic created any significant moves toward sustainability within the U.S. meat supply chain.

The pandemic was good for the largest producers’ bottom line.

In March, JBS announced its profits for 2020 were up 65% over the previous year. Cargill, a privately held company, disclosed to bond investors it made almost $4.3 billion in net income during the first nine months of its 2020 fiscal year, more than any full year before, Bloomberg reported.

Tyson, which also reported solid sales in 2020 and early 2021 growth surpassing projected earnings, updated its own sustainability commitment in recent weeks, the latest in a recent flurry of net-zero pledges from large meat-supply companies.

An analysis published in March 2021 by New York University researchers criticized the vast majority of the world’s large meat and dairy companies as slow to make net-zero commitments.

Consumers have been signaling since before the pandemic they will use their purchasing power to support brands committed to sustainability. A January 2020 survey of nearly 19,000 consumers in 28 countries found that nearly six in 10 respondents were willing to change their shopping habits to reduce environmental impact. Brands that embraced sustainability goals saw share prices increase whereas brands that ignored sustainability increased reputational and business risk, a Deutsche Bank report found.

Most recently, Tyson pledged in June to achieve net-zero greenhouse gas emissions across its global operations and supply chain by 2050. The company vowed to continue work started in 2018 encouraging corn farmers to use less fertilizer and implement practices that reduce soil loss. The target was to expand those practices to 2 million acres, representing 100% of feed purchased by Tyson by 2030.

“Our net-zero ambition is another important step in our work toward realizing our aspiration to become the most transparent and sustainable food company in the world,” said Donnie King, Tyson Foods president and CEO, in a statement.

But longtime Big Meat critics like Lewis argue that meatpackers’ sustainability pledges aren’t nearly enough to combat climate change when they are still part of a consolidated meat production supply chain largely dependent upon monoculture agriculture practices. Since 1961, conversion of land to commercial agricultural and forestry production has contributed to increasing greenhouse gas emissions, loss of natural ecosystems, and declining biodiversity, according to a 2019 special report by Intergovernmental Panel on Climate Change.

“At what point are they going to replace commodity corn and make the way they raise chickens sustainable?” Lewis asks, referring to Tyson’s net-zero pledge.

Other recent high-profile net-zero announcements in meat include Brazilian giant JBS pledging in March to reach net-zero emissions by 2040. The company joins Smithfield Foods, which vowed to become carbon negative by 2030, and Cargill, which committed to reducing emissions by 30% across its North American beef supply chain by 2030. National Beef has yet to make any sustainability commitments for its supply chain.

Not everyone is eager to usher in change.

Agricultural economist Michelle Klieger points out that despite pandemic hiccups, the industrialized meat supply chain has historically “served the customer really well.”

Consolidation over the past 50 years took away price volatility and increased accessibility, Klieger says.

“Tyson especially has been really good about running a tight ship; when prices sank they were solvent and bought up the competition,” Klieger says. “So, by the 1980s was the first time Americans could eat chicken as many meals as they wanted because it was consistent pricing and it was available.”

For impact investors, the pandemic illustrated a robust demand for regional meatpacking production, with many seeing potential in more sustainable farming and ranching practices.

“Sustainability was already top of the mind for consumers; that’s only more so the case now,” says Jason Jones, the former founding president of Vital Farms who is now building out a new insect-based protein alternative company.

Greater scrutiny

As the large meat producers benefited from the high retail prices, farmers and ranchers, especially beef producers, experienced low live-animal prices, a trend that has continued into 2021 according to the USDA.

The U.S. Department of Agriculture is working on new guidelines to address anticompetitive behavior and farmers' compensation, the Wall Street Journal reported on June 22. Earlier this month, the U.S. Secretary of Agriculture Tom Vilsack said he would back establishing a special investigator within the USDA dedicated to investing and preventing anticompetitive practices in meatpacking, Reuters reported.

In June 2020, the U.S. Department of Justice opened an antitrust probe into anticompetitive practices in the meat industry, looking at the wide margin between input and output prices during and after the pandemic.

Citing “lessons learned from the COVID-19 pandemic and recent supply-chain disruptions,” the Biden administration recently announced a $4 billion investment in strengthening regional food systems, including regional processing capacity, which may help small-scale meatpackers like Missouri rancher Kim Wells, who opened up a small, regional USDA-approved meatpacking facility during the height of the pandemic.

An October 2020 survey of 1,000 consumers found that post-pandemic shoppers had shifted toward supporting local farms and producers and were disappointed by the mostly food-giant options available in their local grocery stores.

Ninety-one percent of consumers said it was important to feed their family healthy, fresh food, and 96% said locally grown and produced food is the “freshest, healthiest, and most nutritious food available.”

The pandemic was an “educational moment” for consumers, Jones says, most of whom had never experienced a period of food shortages in their lifetime.

“COVID-19 put a spotlight on where our food comes from and that we can’t just assume it will be available at the store for us in a nice Styrofoam package,” Jones says.

## 2AC 1

### Uniqueness – T/L

#### AND…

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

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

The Politics of Filling the Fifth Seat

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

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

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

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

The Winds of Change at the FTC

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

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

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

A 2-2 tie on the Federal Trade Commission empowers Republicans to block action into bad actors in the economy—and Senate Republicans are enabling this.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The main way for opponents—such as the U.S. Chamber of Commerce, which under the leadership of major tech firms has unleashed an all-out assault against Khan—to deter action against corporate concentration

Marked

and misdeeds is to keep at least some agency actions bottled up while the 2-2 deadlock persists. That includes potential rulemaking and 6(b) orders to study markets. The PBM investigation falls along those lines, giving Wilson Phillips the opportunity to obstruct.

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

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

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

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

### AT: N/L – T/L

#### Their ev says it’s popular with anti-facebook republicans, that’s not the plan and doesn’t apply to the centrists most vulnerable to new pressure from constituents – that’s Salvino – particularly Manchin

Lord 12-1-21 (Joseph Lord, congressional reporter at Epoch Times, former scholar in the Lyceum Program, BA Philosophy, Clemson University, “Senate Commerce Committee Deadlocks on FTC Pick Bedoya,” The Epoch Times, 12-1-2021, <https://www.theepochtimes.com/senate-commerce-committee-deadlocks-on-ftc-pick-bedoya_4133298.html>

The Senate Commerce Committee deadlocked on a vote to confirm Alvaro Bedoya’s nomination to become one of the Federal Trade Commission’s (FTC) five commissioners.

On Dec. 1, the committee voted 14–14 on the nomination, but under Senate rules, it can proceed to the full Senate for a vote.

President Joe Biden nominated Bedoya in September to join the board of the FTC, which deals primarily with antitrust and consumer protection law.

Bedoya, a Georgetown University law professor, has focused much of his work on the connection between facial recognition technology and civil rights. More specifically, Bedoya has argued that facial recognition technology has often been used in a way that is biased against immigrants and other minorities.

If confirmed, Bedoya would join the FTC under newly installed Chair Lina Khan, and give Democrats a 3–2 majority.

Khan has been outspoken in supporting the use of antitrust law against tech giants. In his role, Bedoya would focus on the FTC’s goal of consumer protection.

Citing Bedoya’s “divisive views,” the committee’s ranking Republican member, Sen. Roger Wicker (R-Miss.), was one of the 14 Republicans to vote against the confirmation. Bedoya’s Twitter page showcases some of these “divisive views.”

On Twitter, Bedoya has given his endorsement to the Immigrant Defense Project, which markets itself as “promot[ing] fundamental fairness for immigrants accused or convicted of crimes.” More specifically, the organization has a focus on illegal and non-naturalized immigrants, describing one of its aims as “working to transform unjust deportation laws and policies.”

Bedoya has also opined on a litany of other issues, including abortion issues and Democrats’ multitrillion-dollar social spending bill.

“I will not vote to report the nomination of Mr. Bedoya to be the commissioner of the FTC,” Wicker said in his opening remarks. “I remain concerned about the frequency with which he has expressed divisive views on policy matters, rather than a more unified and measured tone.

“There has been a troubling trend of politicization at the FTC, which is different from how it has been in previous years. I fear Mr. Bedoya would not bring the cooperative spirit to the commission that we need at this time.”

Later in the session, Sen. Amy Klobuchar (D-Minn.) called for a vote on Bedoya’s nomination.

The committee, composed of 14 Democrats and 14 Republicans, voted along party lines. Even Sen. Kyrsten Sinema (D-Ariz.), who has struck a moderate tone against fellow Democrats on several occasions, joined with the party to vote for the nomination.

Given the current composition of the Senate, evenly split between 50 Democrats and 50 Republicans, Senate Majority Leader Chuck Schumer (D-N.Y.) and Minority Leader Mitch McConnell (R-Ky.) put in place a new procedural maneuver to allow deadlocked committees to be bypassed altogether.

Under the new rules, either leader can put forward a motion to bring matters straight to the Senate floor in the event of a tie in committee.

If Bedoya’s nomination is sent to the Senate floor under this procedure, Vice President Kamala Harris’s tie-breaking vote would push Bedoya’s nomination over the finish line—assuming that all 50 Senate Democrats unanimously support the nominee.

The evenly split Senate has already used the procedure to confirm Biden nominees.

In March, Xavier Becerra’s nomination to head the Department of Health and Human Services was evenly split in the Senate Finance Committee in another 14–14 vote.

But even if the procedure is invoked to bring Bedoya to a floor vote, his confirmation is far from guaranteed.

Moderate Sen. Joe Manchin (D-W.Va.), a self-described “conservative Democrat,” has been willing to break with his party on issues—including Biden nominees.

Early in Biden’s tenure in office, Manchin joined with Senate Republicans to strike down Biden’s nominee for White House budget director, Neera Tanden. Without Manchin’s support, Harris can’t cast a tie-breaking vote.

Manchin, who has emphasized the importance of unifying the divided nation, may also take issue with Bedoya’s views on divisive issues and could derail the nomination.

If Bedoya is confirmed, it will be another loss for Biden, who has in the past failed to have nominees confirmed. Aside from Tanden, Biden also was forced to withdraw gun control advocate David Chipman’s nomination to the Bureau of Alcohol, Tobacco, and Firearms for views that several Democrats, including Manchin, found unpalatable.

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

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

Leveraging Democratic Political Capital

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

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

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

Exploring Unprecedented Funding Initiatives

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

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

#### 3 – Biden’s PC – gets wrecked

--this card does NOT ONLY assume legislation – chosen because it also contextualizes to new enforcement agenda items, and uses an example from Obama era that involved agency rulemaking under the PSA

Carstensen 21 Peter C. Carstensen - Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, M.A., Yale University; LL.B., Yale Law School; former attorney at the Antitrust Division of the United States Department of Justice, where one of his primary areas of work was on questions of relating competition policy and law to regulated industries. He is a Senior Fellow of the American Antitrust Institute – “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST” – Concurrences – #1 - Feb 15, 2021 - #E&F - https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen

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

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

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

#### It’s key

GCR 1-5-22 (Global Competition Review, fantastic-looking topic expert analysis journal that wanted to charge me $1600 to read the rest of this article, “Alvaro Twist: The Tipline for 5 January 2021,” GCR USA, 1-5-2022, https://globalcompetitionreview.com/gcr-usa/alvaro-twist-the-tipline-5-january-2021)

Please, sir, I want some more antitrust. President Biden has discussed competition more than any president in recent memory, but it is Senate-confirmed agency heads that enforce the antitrust laws. Implementing a Democratic majority at the Federal Trade Commission has apparently required more political capital than the administration has been willing to spare thus far – hence the renomination of Alvaro Bedoya on Tuesday.

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

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

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

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

## 2AC 2

### AT: Thumper – T/L

#### NO thumpers – deadlock forces restraint – which necessarily prices in ANY and ALL prospective controversies from the existing agenda, because NONE OF IT has actually been enforced yet, which is the whole point

Hoffman 1-11-22 (D. Bruce Hoffman, partner at Cleary Gottlieb, practice focuses on antitrust enforcement, former Director of FTC’s Bureau of Competition, JD University of Florida Levin College of Law; and Henry Mostyn, partner at Cleary Gottlieb, practice focuses on EU and UK competition law, BPP Law School – London; “U.S. & EU Antitrust: Developments and Outlook in 2022,” 1-11-2022, https://www.clearygottlieb.com//news-and-insights/publication-listing/us-eu-antitrust-developments-and-outlook-in-2022)

The FTC in 2021 was characterized by staff and leadership turmoil, controversy and at least the appearance of a significant shift in agency priorities and practices. Initially, under Acting Chair Slaughter, the FTC largely continued its longstanding consensus-driven approach to antitrust, albeit with some aggressive statements on various issues from the Acting Chair and fellow Democratic Commissioner Rohit Chopra. That approach changed substantially with Lina Khan’s ascension to the position of FTC Chair.

Khan, a headliner antitrust progressive most famous for her criticism of Amazon and of the view that antitrust should focus on protecting consumers from higher prices or reduced output, was originally nominated by the President to be a Commissioner; no mention was made of her being Chair. Yet, to the surprise of observers and (as we understand it) much of the Senate, immediately after she was confirmed as a Commissioner the President designated her as Chair – an important distinction, because the FTC Chair controls the day-to-day administration of the FTC. Khan, with a three-Commissioner majority, moved swiftly to alter FTC practices in several areas:

Streamlining the process of adopting trade regulation rules and initiating discussion of several possible rules, notably including unprecedented rules on competition (such as on exclusive contracts, discounts and other widespread contractual practices)

Streamlining procedures for issuing compulsory process and eliminating the normal requirement of Commission votes for process in a wide range of cases

Rescinding longstanding bipartisan FTC guidance on antitrust enforcement to reflect a more regulatory, aggressive philosophy

Withdrawing from the recently adopted Vertical Merger Guidelines, leaving the FTC differently situated from the DOJ and with no clear guidance on vertical mergers.

Interestingly, though, these and other aggressive steps were not accompanied by an uptick in case filings (either initially under Acting Chair Slaughter or subsequently under Chair Khan); in fact, FTC case filings declined from the levels set under the Trump administration.

In any event, following this initial spate of activity, the progressive agenda has been slowed by the departure of Commissioner Chopra to serve as Director of the Consumer Financial Protection Bureau. While Commissioner Chopra cast a number of so-called “zombie votes” enabling the Commission to move forward on a limited number of issues after his departure, the Commission now has only four Commissioners, and so any controversial steps will have to wait until another Democratic Commissioner is confirmed, since the two Republicans can block new Commission actions they don’t support.

As a result, Commission action in the near future will either involve consensus – such as the study of supply-chain disruptions launched in December 2021, or the recently-filed challenge to the merger of NVIDIA and Arm – or areas in which the Chair and Bureau Directors can act without a vote, such as in issuing Second Requests triggering in-depth reviews of mergers (but actual challenges to mergers or consent decrees will require Commission votes, and thus at least some Republican support).

The President has nominated Alvaro Bedoya, a Georgetown law professor and privacy expert, to the Commission; however, his nomination (though supported by all four current FTC commissioners) drew significant opposition in the Senate and failed to advance in 2021. The President has just renominated Bedoya, re-starting the confirmation process. While we think it is still more likely than not that he will be confirmed, it may take several months for the process to play out.

So what will we see from the FTC in 2022? Initially, enforcement action in the form of consent decrees and litigated cases will likely be limited to consensus cases, given the 2-2 Commission split. Chair Khan has used the tools at her disposal to delay the review of some mergers, to launch full Second Request investigations of mergers that on their face don’t appear to raise competition issues and to issue threatening-sounding though legally insubstantial letters to merging firms reminding them that HSR clearance doesn’t mean that the merged firm is immune from antitrust scrutiny. We expect those trends to continue, even if they don’t result in enforcement action in the near term. While FTC staff has been subjected to a gag order and barred from public speaking since Chair Khan’s arrival, limiting insight into the FTC’s position and practices, we expect the limited public statements from the FTC to continue pushing for a progressive agenda. This will likely include criticizing large firms, touting the virtues of deconcentrating markets and expressing a general skepticism of mergers.

### AT: Thumper – SCOTUS Confirmation / Congress Is Busy

#### SCOTUS Confirmation and the rest of the Congressional agenda does NOT thump – they’ll make time for Bedoya’s confirmation as long as they have the votes

Lima 2-18 (Cristiano Lima, business reporter and author of The Washington Post's Technology 202 newsletter, MA Political Science, Lehigh University, “The FCC and FTC are still hobbled by vacancies. It’s not the first time.” The Washington Post, 2-18-2022, https://www.washingtonpost.com/politics/2022/02/18/fcc-ftc-are-still-hobbled-by-vacancies-its-not-first-time/)

The Senate Commerce Committee had scheduled votes for FCC nominee Gigi Sohn and FTC nominee Alvaro Bedoya for earlier this month, but Democrats had to scrap the plans after Sen. Ben Ray Luján (D-N.M.) suffered a stroke in late January.

With the Senate evenly split between the two parties, and Republicans staunchly opposing both Sohn and Bedoya, Democrats need every vote to get the nominees confirmed.

Luján announced Sunday that he’s “doing well” and plans to return to the Senate “in just a few short weeks.” The remarks mean Sohn's and Bedoya’s nominations will continue to languish in committee likely until at least March. And even if they advance out of committee, Senate Democrats will need to allocate precious floor time to get them sworn in.

“For these regulatory agencies, it is not like Cabinet offices or Supreme Court nominations or something like this where … the Senate is able to drop everything and move on it,” Wheeler said. “These things fit themselves in around the edges.”

Biden’s FTC and FCC nominees have already faced a slew of major hurdles.

For much of Biden’s first year, Congress and the White House were consumed by efforts to respond to the coronavirus pandemic and its economic fallout.

## 2AC 3

#### Says there’s *motive* – FTC key to enforcement

Evers-Hillstrom 1-11-22 (Karl Evers-Hillstrom, staff writer at The Hill, “Standing up for Family Farms,” The Hill, 1-11-2022, https://farmaction.us/2022/01/11/the-hill-standing-up-for-family-farms/)

The administration has leaned on anti-monopoly groups to help craft its economic agenda. Those organizations cheered Biden’s July executive order to crack down on anti-competitive practices, which specifically called out the meatpacking industry.

The order tasked the USDA with strengthening enforcement of the Packers and Stockyards Act, a century-old law meant to protect farmers and ranchers from unfair and deceptive practices in meat markets, and making it easier for farmers to bring claims under the law.

Farm Action is pushing the Biden administration to follow through on the rulemaking, while also lobbying the USDA to crack down on the practice of relabeling imported meat to make it appear as if it was grown by American farmers.

Maxwell and Huffman are cautiously optimistic, knowing that well-funded lobbying efforts and midterm election dynamics could upend some of their priorities. But they’re emboldened by a swelling of public interest about how food gets to families’ plates, driven in large part by pandemic-induced price increases and supply chain issues that affect all Americans.

“COVID really has exposed the frailty of our current food system,” Maxwell said. “Shelves were empty for the first time in Americans’ lives. This holiday, look how much beef cost, and yet farmers are still going broke. Those stories are getting out there.”

## 2AC 4

### AT: DOJ Solves

#### DOJ can’t substitute – similarly circumventing Biden’s agenda – confirmation failure dooms solvency

Brown 21 (Krista Brown, Senior Policy Analyst at the American Economic Liberties Project, former research associate at Open Markets Institute, helped draft amicus briefs in support of FTC’s suit against Qualcomm, BA economics, concentration in mathematics, Colby College; Pat Garofalo, Director of State and Local Policy at AELP; Lucas Kunce, Director of National Security Policy at AELP; Sarah Miller, Executive Director at AELP; Matt Stoller, Director of Research at AELP; Matt Buck, Kalen Pruss, Reed Showalter, and Olivia Webb, Fellows at AELP; “The Courage To Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach,” American Economic Liberties Project, January 2021, https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn\_12.12.pdf)

However, the USDA caved to industry and congressional pressure at critical moments, stalling and diminishing a promising slate of reforms. At the DOJ, despite powerful rhetoric from its leaders, the final report from its Antitrust Division disavowed much of a role for antitrust enforcement in addressing meatpackers’ and other agribusinesses’ enormous power. The administration eventually passed watered-down PSA rules in 2016 just before leaving office. All the while, DOJ failed to bring any significant cases against agribusiness after collecting ample evidence of illegal and unfair conduct from farmers, quietly closed an investigation into the seed and agrichemical industry, and even filed a legal brief in court supporting Monsanto’s ability to control farmers’ seed use.

### AT: USDA Solves

#### USDA fails – capture ensures circumvention

Brown 21 (Krista Brown, Senior Policy Analyst at the American Economic Liberties Project, former research associate at Open Markets Institute, helped draft amicus briefs in support of FTC’s suit against Qualcomm, BA economics, concentration in mathematics, Colby College; Pat Garofalo, Director of State and Local Policy at AELP; Lucas Kunce, Director of National Security Policy at AELP; Sarah Miller, Executive Director at AELP; Matt Stoller, Director of Research at AELP; Matt Buck, Kalen Pruss, Reed Showalter, and Olivia Webb, Fellows at AELP; “The Courage To Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach,” American Economic Liberties Project, January 2021, https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn\_12.12.pdf)

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## 2AC 5 – Recess Appointments

#### It’s NOT certain – our links can change uniqueness

Lima 2-18 (Cristiano Lima, business reporter and author of The Washington Post's Technology 202 newsletter, MA Political Science, Lehigh University, “The FCC and FTC are still hobbled by vacancies. It’s not the first time.” The Washington Post, 2-18-2022, https://www.washingtonpost.com/politics/2022/02/18/fcc-ftc-are-still-hobbled-by-vacancies-its-not-first-time/)

Biden’s FTC and FCC nominees have already faced a slew of major hurdles.

For much of Biden’s first year, Congress and the White House were consumed by efforts to respond to the coronavirus pandemic and its economic fallout.

“The Biden administration came into office with five existential issues that they had to deal with … and that sucked their focus and energy for the early days, and sucked the focus and energy of the Congress, as well,” Wheeler said.

Jeff Hauser, founder and director of the Revolving Door Project, an advocacy group that tracks nominations, said the Senate’s parliamentary rules haven't helped Democrats, instead giving Republicans new ways to slow down nominations they oppose.

“The overall process is just not working, and it's not working much more broadly than just these two nominees,” he said, adding that the FTC and FCC are “still relatively high priority among independent agencies.”

Ultimately, though, confirming polarizing nominees in an evenly split Senate was never going to be easy — or quick.

#### Requires them to change senate rules, obvi involves manchin

David Dayen 2-22, executive editor of The American Prospect, 2/22/22, “The Wilson Phillips Blockade and Republican Obstruction,” https://prospect.org/politics/wilson-phillips-blockade-and-republican-obstruction/

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

Senate Democrats could do something about that last bit by changing the Senate rules, or enabling President Biden to recess-appoint Bedoya and others. Until or unless that happens, Republicans will likely continue down this path to grind down government and protect their favored corporations from scrutiny and the public’s need for a fairer economy.

## 2AC 6 – Turn

### AT: !/N – Industrial Ag Good – T/L

#### Crop loss and shocks are inevitable from extreme weather, but shifting to sustainability solves

Morris 16 – Katlyn S. Morris, PhD Candidate in the Department of Plant & Soil Science at the University of Vermont, and Gabriela Bucini, PhD student at the Natural. Resource Ecology Laboratory (NREL) of Colorado State University, “California’s Drought as Opportunity: Redesigning U.S. Agriculture for a Changing Climate”, Elementa Science, https://www.elementascience.org/articles/10.12952/journal.elementa.000142/

Introduction

Climate change is affecting the production and profitability of agricultural systems, and this is expected to continue in the future. Projections show increased temperatures, changes in precipitation cycles, greater frequency of extreme weather events such as hurricanes and droughts, decreased topsoil moisture, and shifting pest populations (Vergara et al., 2014). In California, USA, the sustained drought of 2011–2016 has demonstrated one such effect of climate change that is expected to be more common. Drought cost California’s agricultural industry $1.5 billion in 2014, based on losses in crop revenue, livestock value, and the cost of groundwater pumping (Howitt et al., 2014). Economic loss in California’s agricultural sector is likely to continue based on projected climate and continued water shortages.

How can these agricultural losses and costs be minimized? What examples exist of agricultural systems that withstand drought, increased temperatures, flooding, and pest pressure? What is needed to replicate these resilient farm systems, in terms of agricultural policy, economic incentives, and cultural acceptance? We argue that this moment represents an opportunity to shift the existing agricultural paradigm in the United States to plan for long-term functionality in a changing climate. Hence, California’s drought can be seen as an opportunity in that it forces consumers, farmers, and policymakers to recognize the limits to natural resource use and to transform the current U.S. agricultural policy framework. Willingness to enact necessary policy changes to avoid a food and water crisis will require public pressure and support, farmer engagement, and collaboration across different levels of governance (local, state, national) and across different sectors of government (agriculture, water, natural resources).

Focusing on water restrictions as the primary means to arrive at a target level of water use is an incomplete approach to natural resource management, one which is distracting from a more fruitful conversation about truly sustainable agriculture. Setting water use limitations based on actual recharge rates is an approach that focuses on reaching a target, but the other critical piece is to address the questions: (1) How will agriculture achieve the goal of limiting water use without compromising food production? and (2) How can farmers and land users build resilience in their system to prepare for the future? An essential move is to redesign the agricultural systems that are built upon unsustainable practices, which will require forward-thinking policies that reflect a commitment to this paradigm shift.

Below, we review examples of resilient agroecosystems around the world, many documented within the field of agroecology. We then highlight an example of agroecology applied at a national scale due to policies and support from the French government. We propose that governmental support is needed in the U.S. to help California’s agricultural sector withstand and adapt to future water shortages, and to incentivize and promote the widespread adoption of sustainable agriculture.

Agroecology and agroecosystem resilience

Agroecology is “the application of ecological concepts and principles to the design and management of sustainable agroecosystems” (Gliessman, 1998), including maximizing nutrient cycling, minimizing external inputs, and conserving soil, water and energy. Agroecology is an approach that integrates ecological science with other scientific disciplines and knowledge systems (e.g. local, indigenous) to guide research and actions towards the sustainable transformation of our current agrifood system (Méndez et al., 2013).

Complex and diverse agricultural systems are less vulnerable to extreme weather events such as droughts and floods, and thus are overall more resilient to climate change (IPES, 2016). Many agroecological practices help build stable soils, which in turn are better able to maintain soil moisture during droughts and are less susceptible to erosion from storms and flooding (Magdoff and Van Es, 2000). Soils with high levels of organic matter have higher water-retention capacity, which maximizes the water available to plants during and following rainfall events (Hudson, 1994; Altieri et al., 2015). Soil organic matter can be maintained with crop residue application, cover cropping, and reduced tillage, leading to crop yield improvements and drought resistance (Lal, 2009). The evidence that agroecological practices build climate resilience has been analyzed for coffee farms in the tropics, which are highly vulnerable to climate extremes (Morris et al., in review), and has shown that shaded coffee agroforestry systems increase microclimate control, retain soil moisture, minimize erosion, increase nutrient use efficiency, maximize yields, and provide pest and disease control. In Brazil, incorporation of crop residues on coffee farms increased soil organic matter and soil water retention capacity, reduced soil temperature, and allowed better root system distribution (Camargo et al., 2010). In Costa Rica, coffee intercropped with leguminous trees (Inga densiflora) had higher water infiltration rates and less water runoff than coffee monocultures (Cannavo et al., 2011), while in Uganda, coffee agroforestry plots had 2.6 t C/ha more soil organic Carbon and significantly higher bulk density than coffee monocultures (Tumwebaze and Byakagaba, 2016).

Agroecology for resilience

Resilience refers to a system’s capacity to rebound after absorbing a disturbance (Cutter et al., 2008). Resilience can be viewed as an outcome, in which a system or population is able to cope with a hazard, or a process in which learning is continually applied to improve decisions and capacity. Coping capacity is the ability to respond to an occurrence of harm and to avoid or minimize negative effects (Saldaña-Zorrilla, 2008). Coping strategies may provide immediate relief but are not long-term adaptation strategies. Adaptive capacity is the ability to gradually transform in order to adjust to change. A key element of increasing the adaptive capacity of farms is building agroecosystem resilience to withstand climate extremes, such as drought and floods, and to maintain or recover their productive capacity with limited losses and costs. Many farmers around the world cope with and prepare for climate change by incorporating agrobiodiversity and soil conservation practices. They minimize crop loss through increased use of drought tolerant local varieties, water harvesting, mixed cropping, agroforestry, and soil conservation practices (Altieri and Toledo, 2011). Agricultural biodiversity helps cushion farms from shocks such as extreme weather events (Jarvis et al., 2007). Incorporating spatial and temporal diversity on farms can enhance beneficial biotic interactions and support a suite of ecosystem services beyond simple short-term production (Kremen et al., 2012; Mijatović et al., 2013). These ecosystem services, including erosion control, microclimate control (Laderach et al., 2010), pollination (Ricketts, 2004), and pest control (Scherr and McNeely, 2008) serve to support and sustain the healthy functioning of agroecosystems (Tilman et al. 2002).

Observations of agricultural resilience in the last several decades reveal that farms with healthier soils and higher agricultural biodiversity are better able to rebound after extreme climatic events. Cover cropping, the application of compost or manure, no till, agroforestry, fallow periods, and riparian buffers accumulate soil organic matter, increase soil water-holding capacity, and thus increase drought resistance for crops (Kremen and Miles, 2012). A 21-year study in Switzerland showed 20–40% higher water-holding capacity in organically-managed soils than conventionally-managed soils (Maeder et al., 2002). A 31-year field trial in Ontario demonstrated that increasing the complexity of crop rotations and minimizing tillage resulted in more consistent yields in periods of extreme weather conditions (Gaudin et al., 2015). A study conducted in Central American hillsides after Hurricane Mitch showed that farmers who used agroecological practices such as cover cropping, intercropping and agroforestry had 40% more topsoil on average and experienced 49% lower incidence of landslides than their conventional monoculture neighbors (Holt-Gimenez, 2002). In Chiapas, Mexico, more vegetatively complex coffee farms suffered less landslide damage from Hurricane Stan than simplified systems (Philpott et al., 2008). Diversification of a corn-soybean rotation to include perennial crops in the U.S. Corn Belt resulted in soil and water conservation and soil nutrient retention, as well as a reduction in agrochemical use without effects on yield or profitability (Liebman et al., 2013). These examples demonstrate the potential for agroecological practices to increase farm resilience.

#### Their evidence is industry propaganda that you should disregard

Ikerd 17 – John E. Ikerd, 5/31/2017. Professor Emeritus of Agricultural & Applied Economics University of Missouri Columbia. College of Agriculture, Food and Natural Resources. “Our Chemical-Dependent, Profit-Driven, Industrial Ag Complex is Not Going Quietly,” In These Times, http://inthesetimes.com/rural-america/entry/20177/farm-policy-corporate-power-industrial-agriculture-sustainablity-nixon.

In an attempt to stem the tide of growing public concern, the industrial agricultural establishment has mounted a nationwide propaganda campaign designed to, in their words, “increase confidence and trust in today’s agriculture.” The board members of one front group, the U.S. Farmers and Ranchers Alliance, include the American Farm Bureau Federation, John Deere as well as major agricultural commodity organizations. Board members Monsanto and DuPont have each pledged $500,000 per year to the campaign.

A recent study by Friends of the Earth, an international network of environmental organizations, documents similar “front groups” that have been spending more than $25 million per year to polish the tarnished public image of industrial agriculture. This doesn’t include the campaigns of individual industrial agricultural apologists that are carried out through public schools, 4-H and Future Farmers of America, local civic clubs, and state and local mass media. That said, the agricultural establishment seems to consider their PR campaign as little more than a “holding action” against growing public concerns. They are using their political power to establish legislative protections that would prevent effective regulation.

All 50 states already have some form of right-to-farm law, but they must be strengthend. The early laws, beginning in the 1980s, were enacted to minimize the threat to nuisance litigation and prohibitive state and local government regulation of “normal farming practices.” Current political initiatives, however, allow the agricultural establishment to define “industrial farming practices” as a legally protected economic right. Industrial agriculture's advocates know it's vulnerable to growing public concerns and they're doing everything in their power to protect it.

The agricultural establishment has essentially abandoned their earlier strategy for demanding that regulation of industrial agriculture be based on “sound science.” They seem to understand that the scientific evidence supporting the growing public concerns is now clear, compelling, even overwhelming. I personally think it has become misleading to cite a few specific studies when there is so much scientific information documenting the environmental, social, economic, and public health problems associated with industrial agriculture. I have started relying on meta-studies, where scientists or teams of scientists review dozens or hundreds of credible studies and draw logical, generalizable conclusions.

### AT: !/N – Industrial Ag Good – Yields

#### Sustainable ag increases yields

Morris 16 – Katlyn S. Morris, PhD Candidate in the Department of Plant & Soil Science at the University of Vermont, and Gabriela Bucini, PhD student at the Natural. Resource Ecology Laboratory (NREL) of Colorado State University, “California’s Drought as Opportunity: Redesigning U.S. Agriculture for a Changing Climate”, Elementa Science, https://www.elementascience.org/articles/10.12952/journal.elementa.000142/

Yields and productivity

In addition, contrary to the long-held assumption that organic or agroecological farms are less productive than large-scale conventional farms, diverse agroecosystems can produce higher yields per unit of land than monocultures. Research has shown that organic agriculture produces yields sufficient to ‘feed the world’ at present and for a growing population, without the need for agricultural expansion (Badgley et al., 2007). Various trials and meta-analyses have concluded that yields are comparable for organic and conventional fields (Ponisio et al., 2015, Pimentel et al., 2005), while others have shown a great deal of variability in yields depending on the crop, climatic and geographic conditions, and specific management practices (DePonti et al., 2012; Seufert et al., 2012). Productivity in terms of harvestable products per unit area is higher in polycultures than monocultures with the same level of management (Altieri, 1999). Yield advantages can range from 20–60% depending on crops, climate, and management factors. These yield advantages are attributable to more efficient use of water, light, and nutrients in polycultures and the maximization of vertical space of different crops (Altieri and Toledo, 2011).

Many of the principles of agroecology and other sustainable agriculture approaches can be applied to different geographies and crop or livestock systems to improve yields without reliance on agrochemicals and irrigation. For example, in Mexico one hectare planted with a mixture of maize, squash and beans can produce as much as 1.73 ha of a maize monoculture. In Brazil, intercropped maize and beans exhibited a yield advantage of 28 percent over maize monocultures. In the Brazilian Amazon, Kayapo yields are 200% higher in agroecological systems than they are in systems that use agrochemicals (Altieri and Toledo, 2011). In the United States, the Rodale Institute long-term trial of corn and soybeans managed conventionally versus organically showed that organic crops (fertilized with manure and intercropped with legumes) had significantly higher yields than conventional in 4 out of 5 of the drought years between 1988 and 1999 (Lotter et al., 2003). Manure and legume treatments improved soil water-holding capacity, water infiltration rate, and water capture efficiency, leading to higher yields in periods of water-stress (Lotter et al., 2003). A long-term, large scale trial in Iowa demonstrated that cropping system diversification of maize and soybean resulted in lower costs from reduced chemical inputs and higher yields over time (Davis et al., 2012). These examples from throughout Latin America and the United States challenge the assumption that diversified and organically managed farms are less productive than conventionally managed farms.

# 2NR

### 2NR---AT: FRT Defense

#### hmmm

Jessica Rich 11/18, former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection (BCP), Counsel at Kelley Drye LLP, “Some fireworks at Bedoya’s Senate confirmation hearing, but confirmation still seems likely,” Ad Law Access, 11-18-2021, https://www.adlawaccess.com/2021/11/articles/some-fireworks-at-bedoyas-senate-confirmation-hearing-but-confirmation-still-seems-likely/

He appears likely to vote with the majority on many (or most) issues. No big surprise here, but when asked his views about various issues, he consistently supported positions that Khan, Slaughter, and (his predecessor) Chopra have supported – federal privacy legislation, Magnuson-Moss privacy rulemaking if Congress doesn’t act, pushing back against the “unprecedented consolidation” that is forcing small businesses to close, streamlining the FTC’s rulemaking and subpoena processes, reducing the power of the platforms, and reining in tracking technologies like facial recognition. As to the latter, he said he would not support banning facial recognition technologies altogether, since some applications assist with benefits like public safety and healthcare. However, he would support banning facial recognition technologies that are hidden, that lack consent, or that collect, use, and share data without limits.

### 2NR---UQ

#### Currently, pressure on swing Senators tilts in favor – BUT it’s only a question of the scope of opposition lobbying

Kelly 1-10-22 (Makena Kelly, policy reporter for The Verge covering net neutrality, data privacy, and antitrust, “The FCC’s still in a stalemate a year into Biden’s presidency,” The Verge, 1-10-2022, https://www.theverge.com/22876628/fcc-biden-ftc-gigi-sohn-alvaro-bedoya-rosenworcel-net-neutrality)

After nearly a year into Joe Biden’s presidency, new pressure is mounting on the Senate to expeditiously confirm nominations for positions at two of the federal government’s top agencies with control over broadband and data privacy.

In new statements issued on Monday, public interest groups Free Press Action and Fight for the Future called on the Senate Commerce Committee to fill the final seats at the Federal Communications Commission and the Federal Trade Commission. Both Gigi Sohn and Alvaro Bedoya, for the FCC and FTC, respectively, have finished their confirmation hearing processes, but neither nomination has received a final committee vote to set them up for floor confirmation.

“Americans are in desperate need of these consumer protection agencies as their dependence on affordable access to the open Internet has grown during the pandemic,” Fight for the Future said in a statement on Monday. “Industry insiders have openly admitted that they are pushing for these delays because it benefits their bottom line, at the expense of the public.”

With open seats at these agencies, the FCC and FTC are unable to press forward on any partisan measures or Democratic policy priorities, like net neutrality. Late last year, Jessica Rosenworcel was confirmed as FCC chair, but no votes have been lined up for Sohn, Biden’s pick as the last remaining Democratic commissioner. Democratic FTC Commissioner Rohit Chopra stepped down from the agency after he was confirmed to lead the Consumer Finance Protection Bureau in October, leaving the FTC at a 2-2 deadlock.

Biden renominated Sohn and Bedoya on January 4th, setting the nominations up for further consideration by the Senate Commerce Committee. According to Politico on Monday, the committee plans to vote on nominees on January 24th, and the markup may include Sohn and Bedoya, but the final agenda has not been released as of publication.

“There’s no time to waste and so much to get done at the FCC: ensuring the billions being invested in broadband actually reach those who need it most, restoring Net Neutrality and Title II, reckoning with media regulators’ history on race and repairing the damage of the Trump years,” Craig Aaron, Free Press Action co-CEO, said in a Monday statement.

As FCC and FTC nominations saw some movement in the Senate last year, Republicans like Sen. Lindsey Graham and The Wall Street Journal editorial board argued that Sohn was a telecom policy extremist.

“Gigi Sohn is a complete political ideologue who has disdain for conservatives. She would be a complete nightmare for the country when it comes to regulating the public airwaves,” Graham said in a tweet thread last November. “I will do everything in my power to convince colleagues on both sides of the aisle to reject this extreme nominee.”

So long as every Senate Democrat, including Sen. Joe Manchin (D-WV), votes in favor of both Sohn and Bedoya, no Republican support would be necessary to confirm them.

### 2NR---I/L

#### This highlighting sure is creative! DOJ launched an investigation into supply chain, and biden has been criticizing meat packing, NOT that the two are related

Karl Evers-Hillstrom 2-17, reporter for The Hill, 2/17/22, “DOJ to investigate companies that exploit supply chain disruptions,” https://thehill.com/business-a-lobbying/business-a-lobbying/594696-doj-to-investigate-companies-that-exploit-supply

The Justice Department on Thursday launched an initiative to identify and prosecute companies that exploit supply chain disruptions to overcharge consumers and collude with competitors.

The effort comes as pandemic-driven supply chain congestion continues to drive up the cost of transporting and producing goods. The Biden administration has scrutinized oil producers, ocean carriers, meat processing companies and other industries for raising prices amid surging inflation.

The Justice Department said Thursday that it will investigate and prosecute companies that “seek to exploit supply chain disruptions for their own illicit gain.” The Justice Department is specifically looking into agreements between companies to fix prices or wages, rig bids or allocate markets that violate antitrust laws.

“Temporary supply chain disruptions should not be allowed to conceal illegal conduct,” Assistant Attorney General Jonathan Kanter, a critic of corporate consolidation, said in a statement. “The Antitrust Division will not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions.”

The Justice Department’s antitrust division formed a global working group to investigate supply chain collusion that will share intelligence with Australian, Canadian, British and New Zealand authorities.

With Thursday’s announcement, the Biden administration is ramping up its price gouging efforts that have drawn pushback from business groups that say rising prices are primarily a function of supply and demand.

Consumer prices increased by 7.5 percent from January 2021 to January 2022, the fastest rate since February 1982, according to Labor Department data.

The Biden administration has gone after highly consolidated industries dominated by a handful of companies, arguing that reduced competition leads to higher prices for consumers.

The administration has scrutinized ocean carriers, which saw their profits more than triple during supply chain congestion, and meatpacking giants benefiting from inflated meat prices.