# NEG Wiki Doc---Texas R2

# 1NC---Texas R2

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### 1NC---T

#### Scope is when the law applies

Dernbach 21 --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute applies. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action is not addressed in the statute, the statute is not applicable. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

#### Violation --- Plan only enforces an existing dictate of the statute, only removing an exemption expands the scope --- vote neg for limits and ground --- allows affirmatives to defend the status quo and circumvents core neg links

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.

### 1NC---T

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1NC---K

#### Attempts to achieve optimal competition subscribe to the notion of *Homo Economicus*---a desire for economic rationality that necessitates dividing society into governable entities---the impact is violent dispossession---vote NEG to forefront an analysis of institutional power relations.

Vicencio 14 (Dr. Eduardo Rivera Vicencio, Professor of the Department of Business and Economics at the Autonomous University of Barcelona; “The Firm and Corporative Governmentality: From the Perspective of Foucault;” International Journal of Economics and Accounting, DOI: 10.1504/IJEA.2014.067421, TM) [language modified]

Foucault explains the change of liberal governmentality to neoliberal governmentality in the 20th century in a detailed description of German neo-liberalism and, in less detail, the North American anarchic capitalism and French neoliberalism. In the case of Germany, the implementation of neoliberalism in the post-war period occurs in 1948, in a non-existent state and within a framework of state reconstruction requirements imposed by the USA and England. However, the theoretical origins lie in the Freiburg School in the late 1930s.

What happens at this stage with the onset of neoliberalism, is the reversal of the analysis performed by ordoliberals, with a state which provides economic freedom, a free market as the organising principle of the state, “ … a state under the supervision of a market rather than a market under the supervision of the state”. Moreover, “For liberals, the exchange is not the essence ... the essence of the market is competition”. This takes on again the classical conception that competition can ensure economic rationality. For this reason, neoliberalism becomes the creator of public law, based on the support and legitimacy of the state governments [Foucault, (2007), p.149 and 151].

Using three examples, Foucault shows the style of a neoliberal government; the first of which is a monopoly. It is referred to as a result of competition of the capitalist system, the product of capital concentration but with the objective of ensuring free competition. The state should intervene but the market itself should also respond to monopoly prices and, facing this possibility, the firm itself should opt for competitive market prices. The second example conforms to economic action which represents ongoing monitoring and activity through regulatory actions and ordering actions. In regulatory actions, price stability (inflation control), tax burden (as a way to influence savings and/or investments) and ordinary actions within the economic political framework are found and referred to as population techniques, learning and education, legal system resource availability, etc. Foucault’s third and final example is social policy which means that the economy ensures that each individual has a sufficient income to live alone or in a group and can be insured against the risks of life, old age and death and, called by the Germans, individual social policy or ‘social market economy’. He comes to the conclusion that the true and essential social politics according to neoliberalism is economic growth [Foucault, (2007), p.163 and 178].

However, the application of this scheme of social policy is not possible in Germany due to the Bismarck Socialist State, the influence of Keynesian economics or security systems that are applied in Europe. From this rejection of the application of neoliberal social policy in Germany, the Chicago School developed the ‘American anarchic capitalism’ along with the privatisation of insurance systems, where each individual, either personally or as a group, could insure against risks. This practice of neoliberal politics, says Foucault (2007, p.179) is what we see today in France (February 14th 1979 class).

Governmentality in the field of economic neoliberal thinking is a company subject to the mechanisms of competition and competitive dynamics; a partnership firm building a social network where the basic units are the way of business, where the objective of neoliberal policies is to spread, multiply and differentiate between firms. “The homo economicus who attempts to reconstruct is not the man of the exchange or the consumer, rather he is the [person] ~~man~~ of the firm and the production man” [Foucault, (2007), pp.182–187].

This subjection of society is not only economic it is vital for competitive play between companies, “... an institutional legal framework guaranteed by the state ...”; in this context, the firm becomes the key operator [Foucault, (2007), pp.209–213].

In the American neoliberalism study, as called by Foucault, anarchic capitalism is a business form based on human capital theory, where income is a capital return and, therefore, a wage is a capital income, inseparable from its holder, where the worker is a business in itself. Homo economicus is an entrepreneur, an economic subject and a legal subject; an interface between the government and the individual, a governable entity, which possesses innate elements and acquired elements. The first is genetic and the latter is the product of investing. In this way, “… the life of the individual – including the relationship, for example, with his private property, his family, his partner, his relationship with his insurance, his retirement – making it a sort of permanent and multipurpose business” [Foucault, (2007), pp.262–277].

Finally, a key element of this analysis is the civil society and its origins in the way to judge this economic subject, which is also the legal subject. “Civil society is the particular set in which it is necessary to relocate these ideal points constituted by homo economicus to manage them conveniently”. This is where the civil society and homo economicus form part of the same set of liberal governmentality technology, bound by the legal and political link [Foucault, (2007), p.336].

What unites individuals in civil society are ‘disinterested interests’ not a whole set of selfish interests and not the maximum profit in the exchange. This civil society groups sets of individuals in a number of nuclei; civil society is communal. Being the link between individuals is itself the principle of decoupling, when the economic loop is installed in society. It also works in reverse, “… the more progress towards economic status ... the more the constitutive bond of civil society and the more [hu]man is isolated is because of the economic loop with one and with everyone” [Foucault, (2007), pp..342–345]. Civil society is the engine of history [Foucault, (2007), p.347].

This paper is developed with the firm as the centre of neoliberal governmentality through the study of power relations of the firm and its discursive developments in this ideology, with reference to Foucault’s (1994, p.238) own recommendation, when he says, “… it should analyse institutions from power relations and not vice versa”

### 1NC---CP

**The United States federal government should adopt the principle of prohibiting anticompetitive conduct by platforms in the private sector.**

**Solves case – BUT avoids the collateral damage of separation that turns case**

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There is no topic in regulatory policy that is more pressing and more controversial than what to do about the tech giants – Google, Facebook, Amazon, and Apple. Critics claim that that these powerful platforms crush competitors, distort the political process, and elude antitrust law because it cares only about consumer prices. The only solution, they argue, is to break them up.

This diagnosis is mistaken. The tech giants have indeed engaged in anticompetitive conduct. They have excluded rivals selling products on their platforms by demoting them in search results, copying their products, or refusing to deal with them. While these tactics have harmed consumers, they have never been successfully challenged because they have rarely, if ever, created monopoly power or a dangerous probability of monopoly power, which the Sherman Act requires. This requirement should be eliminated.

The tech giants should not be broken up. Splitting them into smaller versions of themselves would result in higher prices or lower quality. Preventing them from selling their own products on their platforms would deprive consumers of choices they value. Nor should the goals of antitrust law be changed. The fundamental aim of antitrust law is to protect consumers and suppliers like workers from anticompetitive conduct. If courts also had to focus on preserving small business and limiting the political influence of large firms, the goals of antitrust would conflict. Courts would have no objective way of resolving the conflict, the rule of law would suffer, and consumers and workers would be hurt.

Congress should instead amend the Sherman Act to prohibit exclusionary conduct that significantly reduces competition, whether or not it results in actual or probable monopoly power. To avoid chilling procompetitive conduct, the change should apply only to the tech giants and should contain strict proof requirements. This careful expansion would make it much easier to deter tech giant exclusion that harms consumers or workers.

### 1NC---CP

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

#### The FTC can utilize current authority without creating new prohibitions.

Khan ‘21

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

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

I. Background

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

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

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

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

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

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

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

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

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

### 1NC---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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**1NC---DA**

**Climate provisions pass but it’s close – solves warming**

**Steinbauer 1-20** [James Steinbauer is a contributing writer covering national environmental policy. He was an editorial fellow at Sierra, 1-20-2022 https://www.sierraclub.org/sierra/it-s-do-or-die-time-for-build-back-better]

In the year since Joe Biden was inaugurated president, environmentalists have said again and again that the combination of this administration and this Democratic-controlled Congress is the **last best chance** to pass a climate bill. The warning is a year old, but the urgency remains as real as ever. **This is a do-or-die moment** to pass federal laws to tackle the climate crisis.

Democrats are running **against** two **clocks**. One is political: With President Joe Biden’s approval rating flatlining and COVID-19 cases and inflation increasing, most political pundits say Democrats will very likely lose their thin majorities in one or both chambers of Congress this fall. The other is geologic: With global **g**reen**h**ouse **g**as emission**s** and temperatures continuing to rise, scientists say we are likely to lose the opportunity to salvage a **livable climate** without sweeping action.

The extent to which human activity has already destabilized the climate is clear. Historic December tornadoes in the Midwest. Record heat in Alaska the day after Christmas. Wildfires in Colorado months after the end of the traditional wildfire season. According to NOAA, 2021 was Earth’s sixth warmest year on record. The planet’s seven warmest years have been the past seven. And it is only going to get hotter. Without major action to reduce greenhouse gas emissions, global temperatures are on track to rise 4.5 to 8 degrees Fahrenheit (2.5 to 4.5 degrees Celsius) by 2100. If the **U**nited **S**tates doesn’t meet its commitment to reduce its emissions, the world will fail to avoid **catastrophic climate change**.

“These higher temperatures continue to be a blaring siren that Congress needs to take action as soon as possible,” said David Shadburn, a government affairs advocate for the League of Conservation Voters.

The bulk of Democrats’ climate policy has been woven into the $2.2 billion **B**uild **B**ack **B**etter Act. But that proposed bill is stalled in the Senate. Senator Joe Manchin, the Democrat of West Virginia who has made a personal fortune from his fossil fuel investments, gave his party a big fat lump of coal for Christmas when, after months of negotiating, he said he could not vote for the legislative package as-is. “I can’t get there,” Manchin told Fox News. “This is a ‘no’ on this legislation.”

But **that** Christmas Eve bombshell **wasn’t the end** of the Build Back Better saga. At least one cause for optimism is that **Manchin** seems to **support the climate provisions in the bill**. “The climate thing is one that we probably can come to an agreement much easier than anything else,” Manchin told reporters in early January. Democrats' strategy for passing climate policy has been likened to giving medicine to a dog—you have to hide it in a spoonful of infrastructure peanut butter to get it down the legislative gullet. It’s a strategy that explains how the United Mine Workers of America, which describes its mission in life as lobbying for the interests of coal miners, has pleaded with Manchin to reconsider his opposition to the Build Back Better Act.

**The plan trades-off**

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

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

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

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

## Dynamism

### 1NC---Turn

#### Separating platforms wrecks innovation---post-plan neither small firms nor big firms have access to crucial data.

Mayer-Schönberger 18 (Viktor Mayer-Schönberger, Professor of Internet Governance and Regulation at the University of Oxford; and Thomas Ramge, Technology Correspondent for *brand eins* and writes for The Economist; “A Big Choice for Big Tech;” September/October 2018, Foreign Affairs, TM)

That is changing. Innovation is shifting to data-driven machine learning. Insights are no longer the product solely of human ingenuity. They are now the result of the automated analysis of huge amounts of data. More and more, the success of a firm rests on its ability to use the information it possesses. Because only the largest firms have access to enough data to compete, innovation is losing its power to make markets fairer.

To solve this problem, some experts have suggested breaking up digital superstars, so that they no longer control the marketplace, the information that flows among market participants, and the decision assistants. The model would be the robust antitrust enforcement that led to the breakup of Standard Oil, in 1911, and AT&T, in 1984. A less drastic alternative might draw inspiration from the steps taken by regulators in the 1990s to force Microsoft to stop bundling a Web browser with its operating system and, more recently, to prevent Google from favoring its own services in its search results.

But by reducing firms’ ability to use large amounts of data, such measures would reduce market efficiency and leave consumers worse off. If, for instance, Amazon were broken up into a marketplace and a separate tool to provide recommendations, the latter would no longer have access to the huge streams of data generated by the former. Nor would a breakup improve competition. Alternative recommendation engines would not see the market data either, so their suggestions would be no better. It would not really matter how regulators broke a firm up—whether they created many little Googles, for instance, or split YouTube from Google Search—because after the breakup, all the new entities would have less information to learn from, leading to inferior products and services overall.

Similarly, although restricting the ways digital superstars can collect or use data—through tougher privacy laws, for instance—might fragment markets and thus improve their resilience, the quality of recommendations would deteriorate absent sufficient data, leading to inefficient transactions and reduced consumer welfare.

### 1NC

**Startup innovation is high**

**Casselman 21** Ben Casselman writes about economics and other business topics for The New York Times, with a particular focus on stories involving data. Aug. 19, 2021. “**Start-Up Boom** in the Pandemic Is Growing Stronger.” <https://www.nytimes.com/2021/08/19/business/startup-business-creation-pandemic.html> {DK}

The coronavirus pandemic appears to have unleashed a tidal wave of entrepreneurial activity, breaking the United States — at least temporarily — out of a decades-long start-up slump.

Americans filed paperwork to start 4.3 million businesses last year, according to data from the Census Bureau, a 24 percent increase from the year before and by far the most in the decade and a half that the government has kept track. Applications are on a pace to be even higher this year.

The surge is a striking and unexpected turnaround after a **40-year decline** in U.S. entrepreneurship. In 1980, 12 percent of employers were new businesses; by 2018, the most recent year for which data is available, that share had fallen to 8 percent.

The prolonged decline worried economists, because start-ups are a key source of job growth, innovation and economic resiliency. A reversal of the trend could contribute to a more **dynamic**, productive economy that could more easily rebound from future recessions.

“The pandemic forced a big realignment that we never would have seen otherwise,” said John Lettieri, president and chief executive of the Economic Innovation Group, a Washington research organization. “What I hope is that this was the definitive moment where the sclerosis broke.”

It is too soon to declare that the slump is over. The Census Bureau tracks business applications by the week, but not all applications turn into real-world businesses or result in hiring. Data on actual business formation won’t be available for several years. And even if the rebound proves real, it could fade quickly as the economy reopens and people who started businesses in the pandemic return to more traditional forms of employment.

So far, however, the entrepreneurial boom has proved broader and more durable than early skeptics expected. Many of the biggest gains have been in industries heavily affected by the pandemic, such as retailing, food service and logistics, but there have also been significant increases in manufacturing, finance, construction and other sectors. And so far, at least, the economy’s reopening doesn’t seem to be pulling people away from entrepreneurship — the share of workers reporting they were self-employed hit an eight-year high in July.

“There is evidence that this is something that is **not just transitory**,” said John Haltiwanger, a University of Maryland economist who was among the first to document the decline in entrepreneurship.

Until last year, Omayya Atout and Ellen Hodges were living a life typical of many aspiring musicians in New York, with day jobs and dreams. Ms. Hodges, 27, was working as a barista in a Manhattan coffee shop. Mr. Atout, 32, had a job as a civil engineer at Amtrak. The couple, who have since married, had done a few gigs around the city — both play guitar and some keyboard, and Ms. Hodges sings — with hopes of hitting it big, but no real expectation of doing so.

When the pandemic hit, the coffee shop sent workers home, and Mr. Atout’s salary was cut. Home all day and their income uncertain, the couple began to take the prospect of a music career more seriously. They set up a website and opened a business, Songlorious, writing custom songs for weddings, birthdays and similar events. Within weeks, they had more business than they could handle and began hiring other musicians to help out. Last fall, Mr. Atout quit his railroad job to work on the venture full time.

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“I think the pandemic kind of forced us into this a little bit,” he said. “It gave us a nudge where I’ve always wanted to do something but I was too scared because I didn’t want to lose the stability of my job.”

Songlorious is in many ways typical of Covid-era start-ups. It is an online-only business in a field, performing arts, that was heavily disrupted by the pandemic. Its founders started the company at least partly out of financial necessity. And though it began in New York, they are building the business in a midsize city, Chattanooga, Tenn., where they moved in December looking in part for a lower cost of living. Early evidence suggests the increase in start-ups has been strongest outside the big-city downtowns that have been hit hard by the exodus of office workers.

The increase was probably driven, to some extent, by the layoffs that left millions of people out of work early in the pandemic. Researchers at the Kauffman Foundation found that about 30 percent of new entrepreneurs last year were unemployed when they started their businesses, roughly double the prepandemic rate.

The preceding recession, more than a decade earlier, also led to millions of job losses, but entrepreneurship, by a variety of measures, fell sharply and rebounded only slowly. It was accompanied by a financial crisis and a collapse in home values, which made it difficult to get capital to start businesses.

This time may have been different partly because would-be entrepreneurs were more likely to have the wherewithal to pursue their visions. Swift action by the Federal Reserve helped prevent a financial crisis, and home prices boomed.

The government also handed out hundreds of billions of dollars in unemployment benefits, direct checks to households and other aid. Mr. Atout said federal stimulus checks had helped him and Ms. Hodges make ends meet while they got their business running.

Many entrepreneurs also describe a factor that is harder to quantify: The pandemic and its disruptions led many people reassess their lives and consider a different path.

“It made you think about life differently, in a way, when our whole lives were flipped upside down,” said Deborah Gladney, who started a business in Wichita, Kan., with her sister, Angela Muhwezi-Hall, during the pandemic.

**Platform integration at the expense of competitors is pro-competitive**

**Portuese 21** [Aurelian; October 25; Law Professor at the Brussels School of Governance, Law PhD at the University of Paris II Pantheon-Assas; Information Technology and Innovation Institute, ““Please, Help Yourself”: Toward a Taxonomy of Self-Preferencing,” https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing]

INTRODUCTION

**Antitrust populists**, in their **desire** to reduce the size of large companies and protect competitors—especially small businesses—rather than consumers, argue that Internet platforms should **not** be allowed to promote **their own products and services**. The critique has materialized under the new moniker of “**self-preferencing**.” It holds that antitrust should **prohibit** Internet platforms from favoring **their own products and services**, **even if** such prohibition **improves consumer welfare**. In addition, antitrust populists use their critique of self-preferencing to bolster their case for a **structural separation** of platforms (i.e., breakup) or, slightly less radically, for **functional separation** of the platform (i.e., requiring the platform business to be operated separately from the product sales business).

The antitrust literature acknowledges the proconsumer, procompetitive effects of self-preferencing.1 Yet, despite the **overwhelmingly positive effects** of self-preferencing on strengthening competition, antitrust populists aim to **weaponize self-preferencing** to target **only a few companies**, while allowing **self-preferencing** for the **rest of the economy**.

To indiscriminately prohibit the widespread practice of self-preferencing without considering its benefits would distort competition, not reinvigorate it.

The latest example of such weaponization of self-preferencing by antitrust populists is provided by Sens. Amy Klobuchar (D-MN) and Chuck Grassley (R-IA). They introduced legislation in October 2021 aimed at prohibiting the practice.2 However, the legislation would ban self-preferencing only for a handful of designated companies—the so-called “covered platforms,” not the thousands of brick-and-mortar sellers that daily self-preference for the benefit of consumers. Mimicking the European Commission’s Digital Markets Act prohibiting self-preferencing, Senate and the House bills would degrade consumers’ experience and undermine competition, since self-preferencing often benefits consumers and constitutes an integral part, rather than an abnormality, of the process of competition.

The vague term of “self-preferencing” includes many different practices:

* A distributor/platform favoring its private labels over third-party products (i.e., “prominent placement”). For instance, Amazon promotes Amazon Basics products over third-party sellers’ products, much like supermarkets promote their own private-label products.3
* A distributor/platform favoring a complementary product from its market position (i.e., “market leveraging”). For instance, Google made its front page customizable by users to have news clips or other content appear, even though that competes with other Internet news sites such as Flipboard.4
* A distributor/platform requiring a complementary product in order to use the main product (i.e., “tying”). For instance, Apple introduced the Lightning plug for iPhones to replace the micro-USB connector mostly because the Lightning could be used more effectively in the newly introduced device iPad.5
* A distributor/platform preinstalling products and services on a device (i.e., “pre-installation”). For instance, Microsoft Windows comes with preinstalled software, and smartphone companies preinstall apps that compete with other companies’ apps in their integrated smartphones. So, for example, the iPhone comes preinstalled with a flashlight and Windows with spell-check, even though consumers could purchase and install them from other vendors.6
* A distribution/platform not treating business partners “neutrally” (i.e., “platform neutrality”). For instance, digital platforms are requested to have no (financial) interest in downstream competition.7 Under this requirement championed by Sen. Elizabeth Warren (D-MA), Google would be a search engine and nothing else. Amazon would be a mere platform and not an online department store. Facebook would be a social media website without messaging features, etc.

Whether it is structural separation, functional separation, or **imposed neutrality**, the objective is **the same**: to limit the **size and scale** of **certain platforms** (at the benefit of their rivals) for the sake of a **nebulous concept** of “**platform neutrality**.”8 Moreover, the attack on self-preferencing—whose very name connotes suspicious activity—reflects a fear that large companies leverage their power from a market in which they are dominant to enter, and compete in a market wherein they are not dominant, even though such a leveraging technique benefits consumers with lower prices, higher quality, innovative services, etc.

There is no legal duty for companies to help rivals compete with them—and correspondingly, there is no legal principle allowing courts to challenge companies’ business models.

Under U.S. law, it is legal for companies to create new products and promote them to their consumers among rival products.9 Indeed, under U.S. antitrust laws, there is no duty for companies to help rivals. As Justice Scalia in the seminal case of Trinko made clear, the Sherman Act “does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”10 Therefore, there is no legal duty for companies to help rivals compete with them—and, correspondingly, there is no legal principle allowing courts to challenge companies’ business models. But antitrust populists and their allies in Congress want to change that.

More importantly, unless companies engage in self-preferencing in an explicitly anticompetitive way—meaning intentionally limiting the ability of competitors to use their platform with anticompetitive motives—the practice **usually makes** consumers **better off**. And that, rather than some vague concern for competitors, should be the focus of antitrust policy. Consumers often prefer a platform’s products over those of rivals, and if the law prevents their needs from being served, consumers are harmed by having less choice. But competition can also be harmed by the platform being prevented from challenging the market positions of entrenched incumbents. For over 150 years, large retailers have used self-preferencing strategies with their own private labels, resulting in lower prices for their products and putting price pressure on branded products.11 For example, Amazon Fashion and Amazon Pharmacy aggressively compete on price with established clothing brands and pricey pharmacists.12

Nobel-prize winner Jean Tirole believes there currently is no “silver bullet” for antitrust authorities to consider the procompetitive from the anticompetitive effects of self-preferencing practices.13 This report develops a taxonomy of self-preferencing practices so that antitrust enforcers can distinguish between those that benefit consumers and those that may harm consumers. The taxonomy differentiates self-preferencing as a self-promotion tool from self-preferencing as an overt exclusionary tool—and there is no need for legislation overall to address the latter problem. Vigilant antitrust enforcement suffices in preventing anticompetitive conduct and eliminates needing to resort to radical proposals such as breaking up the companies or regulating them as public utilities.

HOW SELF-PREFERENCING HAS GAINED ANTITRUST PROMINENCE

On both sides of the Atlantic, two series of facts have recently brought self-preferencing to the fore of antitrust debates, especially by well-known digital companies.

First, the European Union was the first to put self-preferencing in antitrust enforcement. The EU fined Google in 2017 for self-preferencing its own products on its Google Shopping services.14 The EU’s General Court is expected to rule on Google’s fine challenge on November 10, 2021. The EU also fined Google in 2018 for favoring its own Chrome browser and search app in its Google Android smartphones.15 Both decisions, and others, contributed to a growing movement in Europe against self-preferencing, especially in the digital industry. Of course, it doesn’t hurt that the companies whose sales would be limited are largely American.

Second, in 2016, Open Markets Institute director Barry Lynn and then fellow researcher Lina Khan encouraged Sen. Warren to come out with a plan to break up “big tech.”16 The next year, Khan published the “Amazon’s Antitrust Paradox,” where she accused, among other things, Amazon of self-favoring its products over third-party products and thereby unfairly competing and necessitating a structural separation of the platform.17 In 2019, she published another article both advocating for the “separation of platforms and commerce” through breakups and praising Democratic presidential candidate Sen. Warren for suggesting the breakup of companies and regulating them as “platform utilities” to avoid self-preferential treatments. Now chair of the Federal Trade Commission (FTC), Khan outlined her antitrust vision in which she wants to focus on “structural incentives that enable unlawful conduct—be it certain conflicts of interest, business models, or structural dominance.”18 In other words, through a coordinated effort from anticorporate Neo-Brandeisians, self-preferencing has rapidly come to the fore as a new antitrust concern.

WHY SELF-PREFERENCING IS A COMMON BUSINESS PRACTICE

Self-preferencing is a **long-standing** and **common business practice** consisting of **leveraging capabilities** to promote **one’s own complementary products and services**. It is indeed a “common and self-fulfilling phenomenon,” wrote Michael A. Salinger.19 Moreover, self-preferencing covers a **wide range** of **commonly accepted business practices**. In that respect, the notion is **problematic** as a potential antitrust violation—and is the reason antitrust enforcement generally warrants a deferential approach toward “common business practices.”20 Such an approach is commonsensical, as long-standing common business practices cannot be anticompetitive practices, unless antitrust enforcers are keen to prohibit the very fundamentals of the competitive process.

**AND, plan injects uncertainty into the tech sector beyond platforms themselves – crushes dynamism**

**Huddleston 20** [Jennifer; December 18; Director of Technology and Innovation Policy at the American Action Forum, J.D. from the University of Alabama; American Action Forum, “Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation,” <https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>]

With a **growing number** of likely **divergent** claims, the current **tech antitrust** battles could continue for some time and lead to **more confusion** around the **application of antitrust** to this **dynamic sector** of economy. This may appear to be a **short term** problem, but **uncertainty** around the application of **competition policy** could impact **numerous sectors** of the **economy**. Regulators already appear to be **increasing scrutiny** of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow **traditional** antitrust applications could further the **uncertainty** or thought that **previously justified actions** might be subject to **greater scrutiny**. If a court chooses to embrace the creative and **expansive** theories at the center of these state-led cases, it could **set precedent** that **changes the application** of antitrust law in the future **not only** for the **technology industry**, but in many **other areas** of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would [**not remedy**](https://www.americanactionforum.org/insight/continuing-a-principled-approach-to-antitrust/) the underlying policy concerns—the **uncertainty** and **broad reach** created by these competing state cases would likely **stifle economic growth** and **innovation**.

**Case by case adjudication is inevitable – even if the plan creates a new standard, which it doesn’t, that standard will still need to be applied which requires adaption to each case**

**FTC rulemaking high now**

**Conley et al 1/19** Wiley Rein LLP: Stephen Conley, Duane Pozza, and Kathleen Scott. “‘An Avalanche of Rulemakings’ – The FTC Gears Up for an Active 2022.” January 19, 2022. <https://www.jdsupra.com/legalnews/an-avalanche-of-rulemakings-the-ftc-1324181/> {DK}

On December 10, 2021, the Federal Trade Commission (FTC) published its Annual Regulatory Plan for 2022 – the first under FTC Chair Lina Khan – noting that it “will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices.”[1] Among other rulemakings, the Annual Regulatory Plan notes that the FTC is considering a Trade Regulation Rule on Commercial Surveillance to stop “lax security practices,” limit “intrusive surveillance,” and ensure “that algorithmic decision-making does not result in unlawful discrimination.”[2]

The release of an expansive agenda comes just months after the agency streamlined its Rules of Practice under Section 18 of the FTC Act and created a **new rulemaking group** within the FTC’s Office of General Counsel, to expedite otherwise cumbersome rulemaking requirements under the Magnusson-Moss Act. While these procedural maneuvers will allow the FTC to increase the pace of the rulemaking process, many of these measures will likely require the support of three Democratic Commissioners, and the agency is currently in a 2-2 partisan deadlock pending the confirmation of nominee Alvaro Bedoya.

The FTC Cites ‘Changed Circumstances’ as a Catalyst for Rulemaking

The FTC’s Annual Regulatory Plan identifies “changed circumstances” in 2021 as the impetus for the agency to promulgate new competition and consumer protection rules. Specifically, the FTC identifies the U.S. Supreme Court’s decision in AMG Capital Mgmt., LLC v. FTC as a key turning point that has hampered the agency’s enforcement capabilities. As we discussed in greater detail here, that decision interpreted Section 13(b) of the FTC Act to not provide the FTC with the authority to seek restitution or disgorgement in federal court. The agency had historically relied on Section 13(b) to seek monetary penalties in a wide range of cases involving unfair or deceptive practices. However, if the FTC adopts a rule outlawing certain practices, it can still seek monetary penalties for violations of the rule under a separate part of the FTC Act.

Another key catalyst mentioned by the FTC in the Annual Regulatory agenda was a “case-by-case approach to promoting competition,” which has purportedly proven “insufficient.”[3] According to the FTC, this approach has resulted in “a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches.”[4]

FTC Plans to Initiate Consumer Protection and Competition Rulemakings

To address perceived market concentration across the economy, the FTC under Chair Khan plans to examine how to define “unfair methods of competition” under Section 5 of the FTC Act in an attempt to root out perceived anticompetitive practices. In addition to the proposed Trade Regulation Rule on Commercial Surveillance, the FTC is also actively seeking comment on the following:

A rule targeting business and government impersonation fraud – as discussed in another article in this issue, the FTC recently released an Advanced Notice of Proposed Rulemaking (ANPRM) targeting rising government and business impersonation fraud committed via telephone calls, text messages, and other forms of communication. Comments on the ANPRM are due February 22.

A rule requiring reporting of security incidents by covered financial institutions – as described in greater detail here, the FTC is seeking comment on a Supplemental Notice of Proposed Rulemaking (SNPRM) that would require covered financial institutions to report certain security incidents to the FTC within 30 days of the date of discovery. The rulemaking would further amend the FTC’s Safeguards Rule under the Gramm-Leach-Bliley Act. Comments on the SNPRM are due February 7.

A petition from Accountable Tech proposing that the FTC promulgate rules to prevent “surveillance advertising,” or the practice of displaying ads to individual consumers based on inferences about their interests, demographics, or other characteristics inferred from their activities over time. Comments on the Accountable Tech Petition are due January 26.

A petition from the Institute for Policy Integrity asking the FTC to regulate “drip pricing.” The petition describes “drip pricing” as “the practice of advertising only part of a product’s price upfront and revealing additional charges later as consumers go through the buying process.”

Importantly, the Annual Regulatory Plan also took note of President Biden’s Executive Order on Promoting Competition in the American Economy. As we discussed in greater detail here, the Executive Order encouraged the FTC to exercise its statutory authority to address a number of competition issues. In the Annual Regulatory Plan, the FTC stated that it will “explore the benefits and costs” of several of the Executive Order’s rulemaking proposals for the agency, including “surveillance, the right to repair, pay-for-delay pharmaceutical agreements, **unfair competition in online marketplaces**, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.”[5]

FTC Commissioner Christine Wilson dissented from the Annual Regulatory Plan, arguing that it “extends far beyond” the agency’s routine review of existing rules and that many of the existing rules “should be abolished in any event.”[6] She further characterized the Annual Regulatory Plan as ushering in “an avalanche of rulemakings” and rejected Chair Khan’s depiction of the economy as being “hyper-concentrated.”[7] Indeed, in a subsequent statement made at the agency’s December 16 Open Meeting, Commissioner Wilson referred to the FTC’s 2022 agenda as a “Rule-a-Palooza.”[8] Commissioner Wilson’s dissent signals likely uniform Republican Commissioner opposition to most of the agency’s planned rulemakings, leaving the body in a 2-2 Democrat-Republican split on many of the proposals. That said, proposals like the Safeguards Rule SNPRM have drawn some bipartisan support and may point to some additional rulemaking even without a fifth Commissioner.

Much of the FTC’s Expansive Rulemaking Agenda Likely Hinges on Confirmation of a Fifth Commissioner

President Biden originally nominated Alvaro Bedoya on September 13, 2021 to fill the FTC Commissioner seat vacated by former Commissioner Rohit Chopra upon his confirmation as Director of the Consumer Financial Protection Bureau on September 30. Bedoya is the founding director of the Center on Privacy & Technology at Georgetown Law and previously served as the first Chief Counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. He faced opposition from Republican senators on the U.S. Senate Committee on Commerce, Science, & Transportation (Committee) during his November 17, 2021 confirmation hearing, but President Biden renominated him to the FTC Commissioner spot on January 4, 2022. He appears likely to be the swing vote on many of these proposed rulemaking initiatives – not just whether they will go forward, but also their scope and ambition if they do so.

For decades, the FTC has tended to focus much more on enforcement than rulemaking – but in 2022, the agency is poised to **shift gears** and propose rules that could regulate practices throughout the economy.

**All their rulemaking solves cards are entirely theoretical – 60 years of empirics prove it fails**

**No I/L – Manyika mentions new businesses once –large companies are key to innovation because they can invest in multiple startup projects at once – plan crushes by targeting platforms facilitating investment**

**Omicron thumpers Oppenheimer – growth has slowed, stock prices are falling, and inflation is skyrocketing**

**Countries will cooperate not clash in periods of decline – Covid proves**

**Trade doesn’t solve war**

**Musgrave 20** --- Paul Musgrave is an assistant professor of political science at the University of Massachusetts Amherst, “The Beautiful, Dumb Dream of McDonald’s Peace Theory”, Foreign Policy, NOVEMBER 26, 2020, https://foreignpolicy.com/2020/11/26/mcdonalds-peace-nagornokarabakh-friedman/

**Of course**, I would explain to my students, war could also proceed from other causes. **Economic integration may be no panacea** to interstate war after all. John Vasquez writes: “War among equals has followed the failure of power politics to settle certain highly salient issues”—none, he writes, more than “issues involving territory, especially territorial contiguity.”

In the former Soviet Union, the wars over Chechnya, Georgia, Ukraine, and now Nagorno-Karabakh have all involved territory as a crucial element, a story much closer to what Vasquez’s theory would predict than to Friedman’s.

Globalization may have increased the costs of these wars, **but they have** obviously **not prevented them**. To be sure, Armenia has no McDonald’s, an issue grave enough to have been raised in the parliament at Yerevan earlier this year. The Azerbaijan franchise’s cheerleading was also slapped down by the Home Office.

Regardless, Friedman’s logic suggests the conflict shouldn’t have begun, or shouldn’t have been so bloody once it did. Both Armenia and Azerbaijan score highly (and almost identically) on the ETH Zurich KOF Globalisation Index. The pace of deaths suggests that the conflict could qualify as a so-called real war by the traditional 1,000 battle-related-deaths criterion. (Indeed, some reports say the death toll blew past that level quickly.)

And if the conflict has knocked the final support from the Golden Arches theory, it has also finally toppled whatever confidence remained in the 1990s belief in the eternal sunshine of the American order.

The resurgent Nagorno-Karabakh conflict provides yet another reason to worry that the world is entering a new phase of more violent conflict—including major wars—and globalization will **no more prevent them** than **burgeoning** trade before Archduke Ferdinand’s assassination prevented World War I.

After all, **wars keep emerging** that challenge the optimistic assessment that war is a relic of the past. The specific ways these conflicts emerge, moreover, point to the possibility that **new wars** could break out that make **even bloody conflicts** like those in Syria and Yemen **seem relatively minor.**

Driven by processes of imperial dysfunction and internal breakdown, today’s wars have causes that are enormously difficult to heal.

The conflicts in the former Soviet Union, from Chechnya in the 1990s to Nagorno-Karabakh today, represent a set of wars in the post-Soviet succession. Russia has attempted to maintain its central role against real and perceived rivals throughout that vast region including transnational Islam, the European Union, the United States, China, and now arguably Turkey.

In the Middle East, revisionist regional powers like Saudi Arabia and Iran contend for power as the United States continues to loudly proclaim that it is unwilling to continue playing its imperial stabilizing role (even if Washington never actually seems to find the exit).

And China, which once preferred to keep its border disputes quiet, seems increasingly willing to saber-rattle from the Taiwan Straits to the Himalayas.

**(if time) Courts kill solvency**

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

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

## System Risk

### 1NC

#### Cyber security high

Page 21 --- Carly Page, Tech Crunch, “Big Tech pledges billions to bolster US cybersecurity defenses”, Aug 2021, https://techcrunch.com/2021/08/26/big-tech-pledges-billions-to-bolster-u-s-cybersecurity-defenses/

Tech giants Apple, Google and Microsoft have pledged billions to bolster U.S. cybersecurity following a meeting with President Joe Biden at the White House on Wednesday.

The meeting, which also included attendees from the financial and education sectors, was held following months of high-profile cyberattacks against critical infrastructure and several U.S. government agencies, along with a glaring cybersecurity skills gap; according to data from CyberSeek, there are currently almost 500,000 cybersecurity jobs across the U.S that remain unfilled.

“Most of our critical infrastructure is owned and operated by the private sector, and the federal government can’t meet this challenge alone,” Biden said at the start of the meeting. “I’ve invited you all here today because you have the power, the capacity and the responsibility, I believe, to raise the bar on cybersecurity.”

In order to help the U.S. in its fight against a growing number of cyberattacks, Big Tech pledged to invest billions of dollars to strengthen cybersecurity defenses and to train skilled cybersecurity workers.

Apple has vowed to work with its 9,000-plus suppliers in the U.S. to drive “mass adoption” of multi-factor authentication and security training, according to the White House, as well as to establish a new program to drive continuous security improvements throughout the technology supply chain.

Google said it will invest more than $10 billion over the next five years to expand zero-trust programs, help secure the software supply chain and enhance open-source security. The search and ads giant has also pledged to train 100,000 Americans in fields like IT support and data analytics, learning in-demand skills including data privacy and security.

“Robust cybersecurity ultimately depends on having the people to implement it,” said Kent Walker, Google’s global affairs chief. “That includes people with digital skills capable of designing and executing cybersecurity solutions, as well as promoting awareness of cybersecurity risks and protocols among the broader population.”

And, Microsoft said it’s committing $20 billion to integrate cybersecurity by design and deliver “advanced security solutions.” It also announced that it will immediately make available $150 million in technical services to help federal, state and local governments with upgrading security protection, and will expand partnerships with community colleges and nonprofits for cybersecurity training.

Other attendees included Amazon Web Services (AWS), Amazon’s cloud computing arm, and IBM. The former has said it will make its security awareness training available to the public and equip all AWS customers with hardware multi-factor authentication devices, while IBM said it will help to train more than 150,000 people in cybersecurity skills over the next five years.

While many have welcomed Big Tech’s commitments, David Carroll, managing director at Nominet Cyber, told TechCrunch that these latest initiatives set a “powerful precedent” and show “the gloves are well and truly off” — but some within the cybersecurity industry remain skeptical.

**Breakups solve absolutely no part of this advantage:**

**1 – obviously everyone still uses AWS post-plan, even if they lease it from a different company**

**2 – there’s an entire cottage industry of interconnectivity tech like IFTTT – dubbed the “IoS” – specifically purposed to re-establish IoT interconnections**

**Krishnakumar 18** (Arunkumar Krishnakumar, Fintech thought leader and an investor, “IFTTT is addictive, but will it help new-age banks?” Daily FinTech, 6-15-2018, https://dailyfintech.com/2018/06/15/ifttt-is-addictive-but-will-it-help-banking/)

IFTTT stands for If This Then That, and as an application has been around for eight years. It is a free app that allows users to create chains of simple conditional statements called applets. I can set up an applet that shares the Medium posts I have clapped on to LinkedIn. This requires me to authenticate myself on both services and provide explicit permissions to talk to each, with a few simple button clicks.

We know the IoT, and IFTTT can be termed the Internet of Services (IoS). @jellerm posted an article that touched upon IFTTT in personal finance management, describing the usefulness of such a customized user experience.

Last week Monzo bank had announced integration of their banking app to IFTTT. This got me experimenting with the cool possibilities of IFTTT and realised it was a such a time saver for Social Media. But the interesting possibilities of making these services talk to each other was not just exciting, but also addictive.

I started with some basic social media applets, but went on to create alerts for so many, including pollen levels in my area. There are quite a few smart home applications of this functionality and I am only surprised that, I hadn’t been using this app all these years.

But is this useful enough in the context of Financial Services? What was Monzo thinking when they came up with the idea to open up their services to IFTTT applets? They claim that they had only customer experience in mind when they launched this integration. I think there is a lot more to it.

Enabling IFTTT on a service would be like creating a sandbox environment, or in technology terms, a parallel production environment. As customers create these rules/applets, it would give Monzo the spectrum of use cases it could build onto their banking app.

Its like making customers tell you what they want – without you asking for it. The cool aspect is that, Monzo have just enabled the use case and not built it themselves, but the customers are already benefiting through the applet. The number of times these applets are used would tell Monzo the real demand for a particular functionality.

Many use cases with direct debits, payments categorisation, invoice payments or generation can be automated using IFTTT. Many PFM use cases, as described by Jessica in her article on Tink can be achieved using IFTTT. These are possible use cases, but only time will tell if they are actually going to be popular and practical.

While I prefer to open up my banking app to check my balance, the next generation would most likely ask Alexa. And they can also get Alexa to transfer £100 pounds from their current to savings account if they said “Alexa, I feel responsible” and get the reverse transaction to happen if they said “Alexa, surprise me”. The good thing is, they won’t be interacting with the bank at both times.

If IFTTT integration becomes a common theme across digital banks, Financial Services will most likely be integrated into various other life style services and transactions. And when we use banking services, we mostly wouldn’t realize or know that a bank existed behind these interactions.

**3 – Dean Curran’s a card-carrying member of the Ulrich Beck risk society critical school – he advocates far broader, radical anticapitalist changes to society than the plan**

**Breakups only magnify the problem**

**Foster ’20** [Dakota and Zachary Arnold; May; Visiting Researcher at Georgetown's Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London; Research Fellow at the Center for Security and Emerging Technology, J.D. at Yale Law School; Center for Security and Emerging Technology, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” <https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf>]

Smaller AI firms might invest **less in cybersecurity**, making them and their products **more vulnerable**. Cybersecurity is **expensive**, and trade secret theft occurs primarily through cyberattacks.155Although big companies have a larger attack surface and more points of vulnerability, they also have the ability to invest in cybersecurity. By contrast, small firms often lack the cybersecurity resources to defeat sophisticated, state-sponsored hackers.

The **top U.S. tech firms** lead in **domestic absolute spending on IT**, which **includes** cybersecurity.156 Facebook’s Head of Global Affairs, Nick Clegg, claimed that “the resources that we will spend on security and safety this year alone [2019] will be more than **our overall revenues** at the time of our **i**nitial **p**ublic **o**ffering in 2012. That would be pretty much **impossible** for a **smaller company**.”157

Not coincidentally, smaller businesses run a **greater risk of cyberattack**,158 and they are **less likely** than large companies to **identify the source**.159 Because of their size and **access** to larger companies **through the supply chain**, smaller firms are **lucrative cyberattack targets**.160Moreover, **if smaller, post-breakup companies** increasingly work on **defense-relevant products**, they will **become more salient targets for foreign actors**. Cybersecurity breaches generally result from internal mistakes rather than foreign government activity,161 yet “Defense Technology” and “Information and Communication Technology” are two of six industries identified by the National Counterintelligence and Security Center as the most likely targets for foreign intelligence collectors.162

**Their ev never says collapse is inevitable, merely that stuff’s interconnected and everyone uses AWS**

**AND, never gets to a terminal impact – government interventions check that part**

**Konings 18** (Martijn Konings, Associate Professor of Political Economy at the University of Sydney, author of *The Emotional Logic of Capitalism* and *Capital and Time: For a New Critique of Neoliberal Reason*, series editor for the Stanford University Press book series, Currencies, “A Critique of the Critique of Finance,” Stanford University Press Blog, 2-7-2018, https://stanfordpress.typepad.com/blog/2018/02/a-critique-of-the-critique-of-finance.html)

Critics of neoliberal capitalism rarely recognize the **productive power of speculation**. If there is one theme that unites the various critiques of contemporary finance, it is the emphasis on its speculative character. Financial growth is said to be driven not by the logic of efficient markets, but rather by irrational sentiment, “animal spirits” that do not respect fundamental values. Emphasizing the role of volatility in contemporary capitalism (evident at the time of writing, as the stock market is experiencing a downturn) is important as an antidote to notions of market efficiency and equilibrium. But it is a mistake to think that it provides a sufficient basis for effective critique. **Predictions** regarding the **limits or collapse** of **neoliberal finance** have simply **not enjoyed a good track record**. **Over and over**, the contemporary financial system has **proven capable of sustaining higher levels of speculative activity than anticipated**. This has certainly been true of the past decade. Capital and Time: For a New Critique of Neoliberal Reason is my attempt to make sense of this—that is, to understand what might be wrong or missing in the existing heterodox critique of speculation, and to advance a more accurate understanding of the role of uncertainty, risk, and speculation in contemporary capitalism. At the heart of the critique of speculation we find a **distinction between real and fictitious forms of value**. Although “**essentialist**” (or “foundationalist”) modes of explanation have been under fire across the social sciences for several decades now, when it comes to the critique of finance they have had considerable staying-power: without a notion of real value, it often seems, we lose any objective standard against which to assess the speculative gyrations of capitalist markets. Capital and Time asks what kind of critical theory we might develop if we bracket the anxious attachment to a notion of fundamental value. To that end, it turns to the work of economist Hyman Minsky. Although Minsky has been popularized precisely as a critic of speculation, he in fact insisted that almost all value judgments and investments were to some degree speculative—their success or failure would be determined in an unknown future. For him, the key economic question is how order emerges in a world that offers no guarantees, how more or less stable standards and norms arise amidst uncertainty. Of course, the “endogenous” origin of financial standards is a well-rehearsed theme in heterodox economics—indeed, it is a staple of the “post-Keynesian” literature that claims Minsky’s legacy. But such perspectives have never been able to break with the idea that **financial stability** is at its core dependent on external interventions that suppress speculative impulses. For Minsky, however, this is to **miss the point** about **endogeneity**. To his mind, there was no clear dividing line between financial practices and their governance: central banks and other public authorities are no more able to see into the future and to transcend uncertainty than private investors are. Minsky was therefore highly skeptical about official claims of discretionary precision management: financial governance is always embroiled in the very risk logic that it is charged with managing. That also means that financial policy can appear quite ordinary, even banal: at the heart of capitalist financial management is a logic of **backstopping** and **bailout** that responds to the possibility that the failure of an institution may take down wider financial structures. The stability of the post-New Deal financial system is often attributed to the Glass-Steagall separation of the stock market and commercial banking. But Minsky tended to view Glass-Steagall as one of several measures to direct bank credit away from the stock market towards other, no less speculative ends, notably consumer and mortgage financing. To his mind, the **stability** of the post-war period derived rather from the creation of an extensive **financial safety net** (which included, for instance, deposit insurance, which removed the rationale behind bank runs) that served to **socialize risk**. This institutional arrangement turned out to have a significant drawback: a pattern of chronic inflation emerged that, by the late 1970s, was widely perceived as a major problem. Minsky’s lack of faith in the possibility of cleanly staged external interventions led him to feel that that there was no real way out of this predicament. Monetarist doctrines, ascendant during the 1970s under the influence of Milton Friedman, relied on exactly the belief in an arbitrarily defined monetary standard that Minsky rejected as naïve. Muddling through, it seemed, was the price of avoiding another financial crash and depression. The Volcker shock of 1979 changed this dynamic in a way that Minsky had not foreseen but that is comprehensible when seen through the lens he provided us with. Paul Volcker looked to monetarism not as a means to enforce an external limit or standard on the financial system, but as a politically expedient way to break with accommodating policies and to proactively engage the endogenous dynamics of finance. The consequences of the Volcker shock were predictable (which is exactly why the Federal Reserve had been reluctant to pursue similar policies in previous years): inflation gave way to instability and crisis. Inflation was conquered as jobs were lost and wages stagnated. And, far from money being returned to its neutral exchange function, opportunities for speculation multiplied. The American state was never going to sit idly by as the financial system returned to dynamics of boom and bust: **when instability took the form of systemic threats, authorities would bail out the institutions that had overextended themselves**. Of course, Volcker would not have been able to predict the specific features of the too-big-to-fail regime as it emerged during the 1980s and evolved subsequently; but the very point of the neoliberal turn in financial management that he had overseen was to create a context where **risk** could be **socialized** in ways that were more selective and therefore did **not entail** generalized **inflation**. The inflation of asset values that has been such a marked feature of the past four decades has always been premised centrally on the willingness of authorities to view the “moral hazard” of the too-big-to-fail logic as a policy instrument—even if they may have decried it officially as a regrettable corruption of market principles. Spectacular bailouts, mundane policies to protect the key nodes of the payment systems, the “Greenspan put”, the different iterations of quantitative easing—these are all variations on that basic too-important-to-fail logic. Existing critical perspectives tend to view crisis and the need for bank bailouts as manifesting the essential incoherence of neoliberal finance, its lack of solid foundations and the irrationality of speculation. Capital and Time breaks with such moralistic assessments. The way **deepening inequality** and the speculative growth of asset values continue to feed off each other is troubling for any number of reasons, but **there is nothing inherently “unsustainable” about it—the process does not have a natural or objective limit**. At this point in time, the critique of speculation does little more than lend credibility to official discourses that present crises as preventable and bailouts as one-off, never-to-be-repeated interventions. In that way, it prevents us from critically relating to a neoliberal reality that has been shaped to its core by the speculative exploitation of risk and uncertainty, and in which regressive risk socialization serves as the everyday logic of financial governance.

**No meltdowns impact**

**Shellenberger 19** Michael Shellenberger, author, environmental policy writer, cofounder of Breakthrough Institute and founder of Environmental Progress, Time Magazine “Hero of the Environment.” [It Sounds Crazy, But Fukushima, Chernobyl, And Three Mile Island Show Why Nuclear Is Inherently Safe, 3-11-19, https://www.forbes.com/sites/michaelshellenberger/2019/03/11/it-sounds-crazy-but-fukushima-chernobyl-and-three-mile-island-show-why-nuclear-is-inherently-safe/#5b4a65ff1688]

But now, eight years after Fukushima, the best-available science clearly shows that Caldicott’s estimate of the number of people killed by nuclear accidents was off by one million. Radiation from Chernobyl will kill, at most, 200 people, while the radiation from Fukushima and Three Mile Island will kill zero people. In other words, the main lesson that should be drawn from **the worst nuclear accidents** is that nuclear energy has **always been inherently safe**. The truth about nuclear power’s safety is so shocking that it’s worth taking a closer look at the worst accidents, starting with the worst of the worst: Chernobyl. The nuclear plant is in Ukraine which, in 1986, the year of the accident, was a Soviet Republic. Operators lost control of an unauthorized experiment that resulted in the reactor catching fire. There was no containment dome, and the fire spewed out radioactive particulate matter, which went all over the world, leading many to conclude that Chernobyl is not just the worst nuclear accident in history but is also the worst nuclear accident possible. Twenty-eight firefighters died after putting out the Chernobyl fire. While the death of any firefighter is tragic, it’s worth putting that number in perspective. Eighty-six firefighters died in the U.S. in 2018, and 343 firefighters died during the September 11, 2001 terrorist attacks. Since the Chernobyl accident, 19 first responders have died, according to the United Nations, for ”various reasons” including tuberculosis, cirrhosis of the liver, heart attacks, and trauma. The U.N. concluded that “the assignment of radiation as the cause of death has become less clear.” What about cancer? By 2065 there may be 16,000 thyroid cancers; to date there have been 6,000. Since thyroid cancer has a mortality rate of just one percent — it is an easy cancer to treat — expected deaths may be 160. The World Health Organization claims on its web site that Chernobyl could result in the premature deaths of 4,000 people, but according to Dr. Geraldine Thomas, who started and runs the Chernobyl Tissue Bank, that number is based on **a disproven methodology**. “That WHO number is based on LNT,” she explained, using the acronym for the “linear no-threshold” method of extrapolating deaths from radiation. LNT assumes that there is no threshold below which radiation is safe, but that assumption has been discredited over recent decades **by multiple sources of data**. Support for the idea that radiation is harmless at low levels comes from the fact that people who live in places with higher background radiation, like Colorado, do not suffer elevated rates of cancer. In fact, residents of Colorado, where radiation is higher because of high concentrations of uranium in the ground, enjoy some of the lowest cancer rates in the U.S. Even relatively high doses of radiation cause far less harm than most people think. Careful, large, and long-term studies of survivors of the atomic bombings of Hiroshima and Nagasaki offer compelling demonstration. Cancer rates were **just 10 percent higher among atomic blast survivors**, most of whom never got cancer. Even those who received a dose 1,000 times higher than today’s safety limit saw their lives cut short by an average of 16 months. But didn’t the Japanese government recently award a financial settlement to the family of a Fukushima worker who claimed his cancer was from the accident? It did, but for reasons that were clearly political, and having to do with the Japanese government’s consensus-based, conflict-averse style, as well as lingering guilt felt by elite policymakers toward Fukushima workers and residents, who felt doubly aggrieved by the tsunami and meltdowns. The worker’s cancer was highly unlikely to have come from Fukushima because, once again, the level of radiation workers received was far lower than the ones received by the Hiroshima/Nagasaki cohort that saw (modestly) higher cancer rates. What about Three Mile Island? After the accident in 1979, Time Magazine ran a cover story that superimposed a glowing headline, “Nuclear Nightmare,” over an image of the plant. **Nightmare? More like a dream.** What other **major industrial technology** can suffer **a catastrophic failure** and **not kill anyone**? Remember when the Deepwater Horizon oil drilling rig caught on fire and killed 11 people? Four months later, a Pacific Gas & Electric natural gas pipeline exploded just south of San Francisco and killed eight people sleeping in their beds. And that was just one year, 2010. The worst energy accident of all time was the 1975 collapse of the Banqiao hydroelectric dam in China. It collapsed and killed between 170,000 and 230,000 people. Nuclear’s worst accidents show that the technology has always been safe for the same, inherent reason that it has always had such a small environmental impact: the high energy density of its fuel. Splitting atoms to create heat, rather than than splitting chemical bonds through fire, requires **tiny amounts of fuel**. A single Coke can of uranium can provide enough energy for an entire high-energy life. When the worst occurs, and the fuel melts, the amount of particulate matter that escapes from the plant is **insignificant** in contrast to both the fiery explosions of fossil fuels and the daily emission of particulate matter from fossil- and biomass-burning homes, cars, and power plants, which kill seven million people a year. It's not that nuclear energy never kills. It's that nuclear's death toll is **vanishingly small**. Consider nuclear's global death toll in context. These are just annual deaths. - walking: 270,000 - driving: 1,350,000 - working: 2,300,000 - air pollution: 4,200,000 By contrast, nuclear's death total is likely to be **around 200**.

**No grid impacts.**

**Uchill ’18** [Joe; august 23; internally citing Department of Homeland Security officials and other cybersecurity experts; Axios, “Why "crashing the grid" doesn't keep cyber experts awake at night,” 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.

#### No internet collapse

CASTELLUCCIO 20 --- MICHAEL CASTELLUCCIO, technology editor for Strategic Finance for 26 years, “COULD A PANDEMIC CRASH THE INTERNET?”, July 13th 2020, https://sfmagazine.com/technotes/july-2020-could-a-pandemic-crash-the-internet/

We’re all familiar with the brownouts and blackouts when electric utilities are stressed with the demands brought on by heat waves, and the rationing of water by water companies during extended droughts. But what about the other essential utility, the internet? Could it buckle and crash under the pressure of sudden, massive demands on its networks?

It isn’t unthinkable. Computer scientists have described a variety of circumstances that could knock large sectors of the internet offline, but there are built-in safeguards against this happening. Because of its global size and the systems in place to redirect traffic around any broken links, it looks like it could survive anything less than a simultaneous attack on its entire structure of countless connected networks.

That kind of all-encompassing assault is unlikely according to Paul Levinson, professor of media and communications at Fordham University. “It would be very hard for the entire internet to crash based on an important systems theory principle called redundancy. There are so many backup systems, so many workarounds, so many different ways to get from point A to point B. All these come online instantly and automatically if the system fails.” The internet isn’t a single network, but rather a decentralized web of individual networks handling millions of connections at any given moment.

## Dependency Trap

### 1NC

#### Antitrust doesn’t solve local digital platform development

First 21 --- Harry First NYU School of Law (New York), specialist in antitrust and business crime, “DIGITAL PLATFORMS AND COMPETITION POLICY IN DEVELOPING COUNTRIES”, May 2021, https://www.concurrences.com/en/review/issues/no-2-2021/articles-en/digital-platforms-and-competition-policy-in-developing-countries-100660-en

56. The third lesson is that the hope that digital platforms will allow local small and medium-sized businesses more access to global value chains remains just that, a hope. Local marketplace platforms do not yet have a global reach and key international platforms have proven difficult to access, but not because of any anticompetitive conduct. Developing country competition law enforcers should still be alert to anticompetitive practices, like self-preferencing, but not for the purpose of driving exports. Impact on local markets and local business should be reason enough to act.

57. The fourth lesson is that there appears to be little evidence so far of exclusionary conduct aimed at digital platforms of the type with which competition law is tasked to deal. This does not mean that such conduct is unlikely. In some jurisdictions with active merger enforcement, attention should be paid to the possibility of acquisitions done to quash nascent competitors (as in the fintech sector in South Africa). Economic theory counsels that rivalry from upstart competitors is a key driver of innovation.

#### Turn --- Digital platform dominance increases innovation and growth in developing countries

First 21 --- Harry First NYU School of Law (New York), specialist in antitrust and business crime, “DIGITAL PLATFORMS AND COMPETITION POLICY IN DEVELOPING COUNTRIES”, May 2021, https://www.concurrences.com/en/review/issues/no-2-2021/articles-en/digital-platforms-and-competition-policy-in-developing-countries-100660-en

26. Digital platforms are in widespread use in developing countries. The major U.S. digital platforms tend to be ubiquitous—in South Africa, for example, nearly half of all Internet users use Facebook, YouTube, and WhatsApp [39]—but there are also more local platforms in developing countries that are of significant size. [40]

27. Digital platforms can be categorized in different ways. Most common is to categorize them by the type of service they offer; the proposed EU Digital Markets Act, for example, has eight categories of “core platform service,” such as search engines, social networks, and operating systems. [41] This type of categorization is similar to product markets as analyzed under competition law. A more functional approach divides digital platforms into transaction platforms and innovation platforms. [42] Transaction platforms are generally multi-sided and “support exchanges between a number of different parties,” Amazon and Uber being good examples. Innovation platforms (sometimes called technology or engineering platforms) provide components that firms in a sector can use in common for their interactions. Computer operating systems and technology standards are good examples of these platforms. [43]

28. Entrepreneurs in developing countries have generally not created innovation platforms. [44] Rather, they have used platform technologies created elsewhere to offer products that are distributed digitally, mostly on a relatively localized basis, that is, within the home country of the entrepreneur. Platform technologies are thus tools for these enterprises, allowing them to create new products and distribute them more efficiently. Even if entrepreneurs in developing countries do not create the tools, however, their use of platform technologies can still be market-creating or sustaining and thereby qualify as innovation that can drive economic growth.

29. As the following examples will show, whether platforms are successful depends on many factors beyond competition law enforcement. Indeed, at the moment, competition law violations may not as yet have emerged. The question, though, is whether competition policy can play a role in keeping digital platform tools accessible and digital product markets competitive.

#### Alt cause --- internet access

### 1NC---A/C

#### Mergers thump

#### Alt causes to inequitable digital economies---no data sharing and lack of infrastructure---antitrust alone fails.

1AC Gurumurthy et al. ’20 [Anita “Unskewing the Data Value Chain: A Policy Research Agenda for Equitable Platform Economies”; (September 1, 2020); Available at SSRN: <https://ssrn.com/abstract=3872492>; AS]

Development is about how developing countries can move out of highly competitive activities with low margins to higher value activities with higher knowledge premiums, a process that has been recognized as structural transformation (Mann & Iazzolino, 2019). Fuelled by digital intelligence, all sectors of the economy are today undergoing a rapid makeover; a transition that requires developing countries to ensure that their productivity gains and digital capabilities are in a virtuous cycle. However, the “intelligence premium” harvested by dominant platform-lead firms in global data value chains constitutes a barrier to entry, impairing the global competitiveness of developing countries (Gurumurthy et al., 2019). The private enclosures of data and digital intelligence unfairly cement the competitive advantage of rich countries in global data value chains and thwart the potential for structural transformation of developing countries. Hence, while the data paradigm presents an urgency for systemic coordination towards national digital industrialization, it also represents a highly contested faultline in global resource redistribution.

The development question for the digital economy then is this: how can the data value chain be unskewed for redistributive equity and inclusion?

This conundrum has been the topic of significant, even if nascent, debates. Both traditional and new age policy proposals are being put forth from various quarters: institutional reform proposals from multilateral agencies and regional political blocs such as OECD, policy review assessments initiated at the national level, and unconventional and radical solutions from progressive civil society networks and scholars.

The emerging proposals can broadly be divided into three main areas: reining in Big Tech power, carving out a new resource governance regime for data resources, and building intelligence infrastructure capabilities in the Global South. Admittedly, many of the ideas involved are fledgling and demand in-depth exploration and robust debate before they can coalesce into clear and effective policies. But the juggernaut of Big Tech impunity and a yawning democratic deficit in global/regional policies in critical areas like trade, taxation and capital flows demand bold and agile action that eschews incremental, status quoist measures. They call for a conceptual overhaul that accounts for the realpolitik of geo-economic power.

The following sections take stock of noteworthy policy proposals that have emerged in each of the three areas, examining them critically and posing priority directions for a research agenda11 that can answer the following questions:  How are current policy directions and emerging institutional mechanisms able to address questions of market fairness and economic equity in the digital economy?  How do emerging global policy frameworks on data and AI impact national development priorities and pathways?

Area 1. Reining in Big Tech power through traditional policy instruments

In mainstream policy discourses in the digital arena, there is increasing recognition that competition and taxation policy reform are urgently needed to effectively curb Big Tech power in global data value chains.

With respect to competition policy, there is mounting consensus that industrial era competition law frameworks need to be overhauled so that they are able to effectively address the anti-competitive risks of network-data effects in data value chains. In 2020, the European Commission for Competition announced an in-depth study aimed at the updation of its merger assessment rubrics to address the realities of asset light, data heavy platform business models of the digital age (Modrall, 2020). The United States House Judiciary Committee has just concluded an investigation into the structural separations to be effected in data value chains to ensure that corporations controlling essential platform infrastructures are not also competing with the businesses that transact goods and services on them, the urgently needed “separation of platforms and commerce” that legal scholar, Lina Khan, has flagged in her study of Amazon’s antitrust behavior (Khan, 2017; 2019). Such interventions to overhaul traditional competition laws are urgently needed in the Global South as well.12

Currently, the European Union is exploring a limited form of structural separation by prohibiting specialized data sharing services from deploying the data that they transact for other uses, in an attempt to establish boundaries between data intermediation and intelligence services layers. But as the proposed regulation in its current form does not extend to cloud service providers, content intermediaries, and data exchange platforms developed in the context of IoT, it can be argued that this regulatory solution does not go far enough.13

**[[Dartmouth’s Card Ends]]**

Emerging scholarship from the Global South suggests that a replication or emulation of the approaches of the US or EU may be inadequate and new conceptualizations may be needed. For example, a recent paper by IT for Change (Singh, 2020) emphasizes a new doctrine of structural separation for the data value chain. This proposal posits that Big Tech firms must be forced to choose between operating in either the upstream layers of provisioning cloud intelligence services or building their business models around the downstream activities of data collection and processing. This, it is argued, will ensure the creation and maintenance of a “salutary distance” between the different layers of global data value chains, preventing the end-to-end capture of data and intelligence value that leads to extreme market concentration.14

There is also recognition that in global data value chains enmeshed in transnational capital flows, national approaches alone may not suffice to curb platform firms’ abuse of their market dominance. Drawing attention to the multilaterally agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the United Nations General Assembly in 1980, KozulWright (2020) has therefore called for a global competition authority.

As for international digital taxation, it is clear that breaking the global stalemate to arrive at a progressive tax regime is critical. The UN Economists Network (2020) has identified the development of a new global taxation framework on cross-border digital transactions to broaden the tax base of developing countries as an urgent policy priority. A pertinent research agenda for bringing competition and taxation laws up to speed in the digital era therefore includes:

 Models for legal-institutional frameworks that can guide the design of a global competition authority.

 Context-specific exploration of evidence from developing countries of transnational platforms’ anti-competitive practices in a range of economic sectors.

 Metrics for antitrust risk assessment of data value in mergers.

 An institutional model for digital competition regulation that accounts for structural separation of the multilayered data value chains in different sectors.

 Conceptual modelling to determine how ‘significant economic presence’ criteria for transnational digital firms can work in developing country contexts.

 Comparative case studies of digital taxation measures adopted by different countries from the Global South and implications for macroeconomic development.

Area 2. A new resource governance regime for data

Conventional policy measures to check Big Tech are partial solutions. While they can make a dent in the market power of digital giants, by themselves they are unlikely to ensure equitable ‘intelligence dividends’ across firms/economic actors in the platform economy. In the absence of an appropriate resource ownership regime around data that balances public and private interests, the intelligence premium garnered by Big Tech will only further private value capture, transferring out value from most of the developing world. Additionally, data building blocks essential for public digital infrastructures across all key sectors – health, education, finance, agriculture, finance, manufacturing etc. – will remain elusive for these countries, condemning them

to a downward development trajectory. A new resource governance regime for data therefore becomes a cornerstone policy agenda for development in the twenty-first century.

Legal scholarship on resource governance underlines the role of appropriate private and public ownership frameworks (Epstein, 1987), with room for context-specific resource management tenets (such as access rights for forest-based communities). This is vital for the public interest, and a precondition for the realization of social good. Unfortunately, mainstream policy discussions on data governance (for instance, the World Bank’s concept note for its 2021 World Development Report – Data for Better Lives and ongoing conversations at the WIPO (2020) on exploring a sui generis patents regime for AI generated outputs) assume as a given, the de facto private ownership regime that operates in data resources.

As illustrated in Section 2b, in global and plurilateral negotiations on digital trade, the contestation between the dominant data economies and the rest of the world is primarily over the extent of liberalization of data flows and market access in e-commerce and digital services. The enclosure of data by first-mover digital firms leaves the majority of developing countries with no other option than to integrate into the e-commerce/digital services status quo.

In order to effectively address the resource governance vacuum that has created the data wild west, we need a “global constitutionalism for data” that lays down the first principles to inform data’s entry and movement through the value chain (Gurumurthy & Chami, forthcoming). As the Digital Justice Manifesto (2019) mooted by the progressive South-centric network, Just Net Coalition, recognizes, this would involve making normative decisions around a range of issues: determination of the boundaries of the data and the intelligence economy based on rights and inclusive development considerations, allocation of rights in data and intelligence resources, and the prevention of state/corporate abuse of data power. As more and more sectors of economic and social life get datafied, these questions occupy center-stage in many policy debates at the global and national level, and indeed, in each and every sector.

In order to effectively address the resource governance vacuum that has created the data wild west, we need a “global constitutionalism for data” that lays down the first principles to inform data’s entry and movement through the value chain.

A data economy based exclusively on safeguards through privacy rights cannot stall data extractivism. On the contrary, the privacy ‘shield’ becomes a minimalist, and even reductionist, means to allow data to flow ‘freely’ to the already powerful private hoarders dominating the global data value chains. Representing the embedded relationalities in which people, natural resources, things and phenomena share existence, data is a ‘system resource’ harnessed through intelligence infrastructures.

The commercial exploitation of advances in synthetic biology serves as a cautionary tale about the connection between value capture from digital intelligence and data theft from communities. Digital gene sequencing techniques enable Big Pharma and Big Agriculture to extract value from genetic resources (flora, fauna, microorganisms), without having to physically access genetic samples that attract various obligations – prior and informed consent of the ‘source communities’, benefits sharing mandates etc. – under the Convention on Biological Diversity. As the fourth industrial revolution transforms production chains in a range of sectors, the lack of ‘system resource’ frameworks for non-personal data sets will legitimize data theft, transferring control of the economic (and social) activity to digital (and digitally-emboldened)15 behemoths. Similarly, aggregate, anonymized personal data footprints of a community may be deployed to design commercial interventions that erode group privacy.16

Data discussions have a disproportionate focus on government open data frameworks for economic development, eclipsing the role of privately captured data for public and social value creation. Without appropriate data governance frameworks, Big Tech firms that exercise de facto ownership and control over valuable data and intelligence resources will have little incentive to share data voluntarily. IT for Change’s work, which has also informed national level policy processes on non-personal data governance in India, has underlined how a sui generis ‘community data’ regime grounded in the Ostromian idea of common property resource governance may be able to address these quandaries (Singh & Vipra, 2019; Singh & Gurumurthy, 2020). Drawing upon common property resource governance traditions in biodiversity, genetic, and traditional knowledge resources, we also propose five core principles of a community data regime: (1) the community’s right over data resources associated collectively with it, (2) prior informed consent of the community for use of such resources, (3) benefit sharing with the community, (4) transparency in the form of community data resource registers to prevent misuse and enable legitimate access, and (5) the community’s participation in governance of community data resources, including through non-profit trusts.17

Future research is required in a range of areas to build upon these directions:

 A model framework law for community data rights that outlines nested and overlapping sovereignties, including jurisdictional, indigenous, etc.

 Exploration of an equity-centered resource/benefit allocation regime for AI technologies based on community data rights and of a FRAND regime for essential AI building blocks for future innovation.

 Implications of digital trade agreements on resource governance regimes for data.

 Data market regulation to recognize social relationality and collective autonomy implicated in data transactions.

 Parameters of ‘relevant data communities’ and resolution of context-specific ambiguities of the notion.

 Application of community data claims in different categories of data resources.

 Issues of trusteeship for effective data stewardship models.

 Prior informed consent at the individual and collective level in aggregate, anonymized nonpersonal data resources.

Area 3. Data infrastructure capabilities for the Global South

Without endogenous capacities to process data and generate digital intelligence and thereby move into the high value segments of data value chains, most developing countries can only realize the “first-order benefits” of accessing global digital trade markets (UNCTAD, 2019). Investments in domestic digital and data infrastructure are hence vital to bridge the “digital capability gap” between domestic firms (in digital and other sectors) and transnational corporations, and to leverage the “second-order benefits” of productivity, wealth and well-being that the data revolution brings (UNIDO, 2020; UNCTAD, 2019). Official Development Assistance (ODA) has an important role to play in bridging this gap. But as current studies of the nexus between ODA, digital economies and sustainable development suggest, not enough attention has been paid to the potential downsides of ODA projects in the digital sector: harmful concentration and monopoly, rising inequality, or state and corporate use of digital technologies to control rather than empower citizens (Bennett, 2019). As a response to this deficit in global development cooperation, the UNCTAD has been advocating for stronger South-South cooperation in digital industrialization: development of public broadband and connectivity programs, investment in cloud infrastructure, and creation of regional level single digital markets that can contribute to the strategic integration of non-personal data flows for development of regional AI capacity (Banga & Kozul-Wright, 2018).

South-South cooperation is no simple mantra for the realization of inclusive and equitable growth. Policy choices must catalyze alternative platform business models, nudging data value chains towards a fairer and equitable distribution of data value across the economy (Gurumurthy et al., 2019). National data and AI strategies could support plural imaginaries of platform ecosystems that socialize data value

It is increasingly evident that the development of data public goods – including open digital/data ecosystems – is critical, especially to promote domestic innovation. At the same time, there is a very real risk that without clear access and use guidelines and licensing conditionalities for innovators, powerful transnational digital corporations may appropriate the value of such public goods (Walker, 2019; IT for Change, 2020). Also, a superficial extension of open access regimes for information and knowledge resources and software public goods to the data domain is not appropriate, with the latter needing institutional governance frameworks to ensure both safeguards and enabling conditions.

Learning labs that promote collaborative South-South research can bring significant, evidence based perspectives to understand national digital infrastructure policy pathways. Research is needed to explore the following issues:

 Global overview of standards development (including platform and data interoperability) and access-and-use regimes for public/national open/shared data infrastructures.

 Risk assessment and impact studies of ODA in national digital infrastructures.

 Development implications of regional single digital markets.

 Predisposing factors enabling virtuous cycles between intelligence infrastructures and economic development.

 Case studies of digital/data public goods initiatives (in health, agriculture, mobility, and transportation) to evolve progressive visions for national intelligence infrastructure development.

Table 1. A policy research agenda for unskewing data value chains: Indicative thematics

Table

Description automatically generated

#### China fills-in.

Gurumurthy 21 (Anita Gurumurthy, Executive Director @ IT for Change, Bengaluru, India, advisor and expert on various bodies including the United Nations Secretary-General’s 10-Member Group in support of the Technology Facilitation Mechanism, the Paris Peace Forum’s working group on algorithmic governance, Save the Children’s ICT4D Brain Trust, and Minderoo Tech & Policy Lab‘s Board; Nandini Chami, Deputy Director at IT for Change; “Towards a Global Digital Constitutionalism: A Radical New Agenda for UN75,” 05-03-21, *Development (2021)*, Springer Link, <https://doi.org/10.1057/s41301-021-00287-z>, TM)

With Big Tech corporations extending their monopoly control through integration of multi-sector vertical markets (e.g., Amazon has branched out from e-commerce into health and pharma, digital streaming, and robotics) and data-based horizontal markets (that is, Amazon is not only a data collector, but also cloud and analytics provider), norm- and rule-making in the digital arena is in the throes of a major shift. This is represented in the hollowing out of public infrastructures, not simply through privatization, but a systemic socialization of privately controlled platforms. The platformization epoch in the digital society hence represents a de-democratization and de-publicization of governance. The private platform and its constituent functionalities are the public protocols, and the data-based intelligence that powers it is the law.

This shifting terrain of power has ushered in what has been referred to as a new bipolar world, with China’s rise as a new AI superpower. China has historically pursued a different route to digital capability—digital and data sovereignty to expand domestic digital industry, and export of surplus industrial output through e-commerce (UNECA 2019). In the post-COVID-19 context, through its ‘Digital Silk Road’ initiative, the country has sought to export advanced technologies such as 5G and facial recognition (Triolo and Greene 2020). Chinese Big Tech companies are also establishing supply chains in agriculture, dairy, and retail commerce, extending their markets, in the South East Asian region.Footnote16 The fourth industrial revolution thus presents a Hobson’s choice in which countries may be forced to choose between US and Chinese corporations for access to advanced digital prowess.

### 1NC---AT: LIO !

#### LIO resilient.

Ikenberry ’18 [John; June 28; Professor of International Relations at Princeton University; Ethics & International Affairs, “Why the Liberal World Order Will Survive,” vol. 32, no. 1]

Self-Reinforcing Characteristics of Liberal International Order

The United States has dominated the post-war international order. It is an order built on asymmetries of power; it is hierarchical. But it is not an imperial system. It is a complex and multilayered political formation with liberal characteristics— openness and rules-based principles—that generate incentives and opportunities for other states to join and operate within it.

Four characteristics reinforce and draw states into the order. First, it has integrative tendencies. Over the last century states with diverse characteristics have found pathways into its “ecosystem” of rules and institutions. Germany and Japan found roles and positions of authority in the post-war order; and after the cold war many more states—in Eastern Europe, Asia, and elsewhere—have joined its economic and security partnerships. It is the multilateral logic of the order that makes it relatively easy for states to join and rise up within the order. Second, the liberal order offers opportunities for leadership and shared authority. One state does not “rule” the system. The system is built around institutions, and this provides opportunities for shifting and expanding coalitions of states to share leadership. Formal institutions, such as the IMF and World Bank, are led by boards of directors and weighted voting. Informal groups, such as the G-7 and G-20, are built on principles of collective governance. Third, the actual economic gains from participation within the liberal order are widely shared. In colonial and informal imperial systems, the gains from trade and investment are disproportionately enjoyed by the lead state. In the existing order, the “profits of modernity” are distributed across the system. Indeed, China’s great economic ascent was only possible because the liberal international order rewarded its pursuit of openness and trade-oriented growth. For the same reason, states in all regions of the world have made systematic efforts to integrate into the system. Finally, the liberal international order accommodates a diversity of models and strategies of growth and development. In recent decades the Anglo-American model of neoliberalism has been particularly salient. But the post-war system also provides space for other capitalist models, such as those associated with European social democracy and East Asian developmental statism. The global capitalist system might generate some pressures for convergence, but it also provides space for the coexistence of alternative models and ideologies.

These aspects of the liberal international order create incentives and opportunities for states to integrate into its core economic and political realms. The order allows states to share in its economic spoils. Its pluralistic character creates possibilities for states to “work the system”—to join in, negotiate, and maneuver in ways that advance their interests. This, in turn, creates an order with expanding constituencies that have a stake in its continuation. Compared to imperial and colonial orders of the past, the existing order is easy to join and hard to overturn.

# 2NC

## T---No FTCA

### 2NC---O/V

#### 1st --- forces the aff into a topic controversy --- Treble damages is key to distinguish antitrust from neg CPs

CRANE 74 --- MARK CRANE, Hopkins, Sutter, Owen, Mulroy & Davis, Chicago, Ill. Member of the Criminal Practice and Procedure Committee, Antitrust Section, American Bar Association, “REFORM OF THE FEDERAL CRIMINAL LAWS: A MAJOR CHANGE IN CRIMINAL ANTITRUST LIABILITY”, Antitrust Bulletin, 19 Antitrust Bull. (1974), https://journals.sagepub.com/doi/abs/10.1177/0003603X7401900301

The right to treble damages distinguishes antitrust offenses from most other offenses, since the treble damage remedy is not widely available to the victims of crime. Even the Securities Act of 193361 and the Securities Exchange Act of 1934 6 ' 2 -two statutes comparable to the antitrust laws in the amount of private litigation they have fostered-do not have treble damage provisions. The private right to sue for violations of those statutes is a judge-created right to single damages.6 3

#### 2nd --- neg uniqueness --- Dividing ground between Sherman/Clayton for Aff and Section 5 for Neg forces the Aff to be a departure from the SQ in a way that generates unique disad links --- Section 5 for the Aff allows them to defend “SQ but with more enforcement”

Buchanan 11 --- Buchanan Ingersoll & Rooney is a national law firm with a proven reputation for providing progressive, industry-leading legal, business, regulatory and government relations advice to our regional, national and international clients, PC, “FTC Files New Section 5 Suit Against Intel, Broadening the Scope of Federal Antitrust Enforcement”, April 5th 2011, https://www.bipc.com/ftc-files-new-section-5-suit-against-intel,-broadening-the-scope-of-federal-antitrust-enforcement

The FTC Act also has a few important limitations. It applies only to for-profit institutions, meaning that nonprofit hospitals and other nonprofit entities are not subject to suit under Section 5, even if they would be under the Sherman Act. It also applies only to interstate commerce, and excludes some foreign commerce. Most importantly, Section 5 contains no private right of action, and treble damages are not available. Instead, Section 5 is enforced exclusively by FTC action. It is this difference that accounts for the FTC's renewed interest in Section 5.

As the Commissioners make clear in their published statements on the Intel proceeding, the FTC's renewed interest in Section 5 in Intel and other recent cases is in part a reaction to recent decisions by the federal courts, such as Twombly, 550 U.S. 264, and Credit Suisse, 551 U.S. 264, that the Commissioners see as "'shrinking' the ambit of the Sherman Act both procedurally and substantively." Statement of Commissioner J. Thomas Rosch, at 4. Concerned with the rising number and cost of private treble damages suits, the courts have been raising additional barriers to antitrust enforcement, barriers that also apply to government enforcement under the Sherman Act. These restrictions will not apply to Section 5 actions; as Section 5 is enforced only by the FTC and is not subject to what some courts may see as abusive or frivolous private actions, the courts have not and likely will not feel the need to restrict Section 5 actions in the same way they have Sherman Act actions.

This Section 5 action represents the FTC's bid to claw back the restrictions that the courts have applied to the Sherman Act, allowing it to continue pursuing public enforcement under a statute that, as the Commissioners wrote in Intel, "extends beyond the borders of the antitrust laws," despite the courts' crackdown on abusive private enforcement actions. In the Commissioners' Statement, they make this explicit by suggesting that, in light of these recent developments, "it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5." This means that even cases which, like Intel, might have previously been litigated under the Sherman Act are more likely to be enforced instead by the FTC.

### 2NC---AT: W/M

### 2NC---AT: C/I

#### Ignore colloquial references to “core antitrust” as including FTCA --- Courts have consistently identified a distinction --- and that percision is key to ground and limits

**Raphael 16** – Litigation partner in the San Francisco office of Munger, Tolles & Olson Justin P. Raphael, Motion to Dismiss and Memorandum in Support filed by Defendant, Thompson, et al. v. 1-800 Contracts, Inc., et al., US District Court for the District of Utah, November 2016, LexisNexis

The FTC administrative action was not brought “to prevent, restrain, or punish violations of any of the antitrust laws.” Rather, it was brought under Section 5 of the FTC Act, 15 U.S.C. § 45. The term “antitrust laws” is defined in the Clayton Act to encompass a specific list of federal antitrust statutes, 15 U.S.C. § 12(a), which the Supreme Court has held is exclusive. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958) (“[T]he definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment that [a statute not listed therein] may be colloquially described as an ‘antitrust’ statute.”). That definition does not include Section 5 of the FTC Act, and multiple courts have acknowledged that the FTC Act is not an “antitrust law.” See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing “prima facie” weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that “prima facie weight is given only to violations of the ‘antitrust laws’ as defined by the Clayton Act,” which “does not include violations of the FTC Act”); Yamaha Motor Co. v. FTC, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is not “one of the ‘antitrust laws’ within the meaning of Sections [16(a) and 16(i)] of the Clayton Act”).

Thus, an action brought under Section 5 of the FTC Act is not a proceeding “to prevent, restrain, or punish violations of any of the antitrust laws,” and does not toll the statute of limitations. See Laitram Corp. v. Deepsouth Packing Co., 279 F. Supp. 883, 891 (E.D. La. 1968) (“Since the FTC proceeding against [the defendant] was for violation of Section 5 of the FTC Act, not for violation of one of the antitrust laws within the meaning of Section 5 of the Clayton Act, the FTC proceeding does not toll the running of the statute of limitations.”).

#### Core antitrust laws are Sherman and Clayton --- Including FTCA expands conduct to include deceitful behavior and standard setting --- which are not anticompetitive in a vacuum --- voter for limits and ground

LEIBOWITZ 06 --- JON LEIBOWITZ, FTC Chair, 2009-2013, FTC Commissioner 2004-2013, “CONCURRING OPINION OF COMMISSIONER JON LEIBOWITZ IN THE MATTER OF RAMBUS, INC. DOCKET NO. 9302”, August 2006, https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802rambusconcurringopinionofcommissionerleibowitz.pdf

It would be equally apt, though, to characterize Rambus’s conduct as an “unfair method of competition” in violation of Section 5 of the FTC Act. Section 5 was intended from its inception to reach conduct that violates not only the antitrust laws1 themselves, but also the policies that those laws were intended to promote.

\*\*FOOTNOTE 1 INSERT\*\*

1 15 U.S.C. § 12 (a) (2006). The antitrust laws include the Sherman Act and the Clayton Act (as modified by the Robinson-Patman Act). The FTC Act is not an antitrust law.

\*\*END FOOTNOTE 1\*\*

At least three of these policies are at issue here. From the FTC’s earliest days, deceitful conduct has fallen within Section 5's province for its effects on competition, as well as on consumers.2 Innovation – clearly at issue in this case – is indisputably a matter of critical antitrust interest.3 In addition, joint standard-setting by rivals has long been an “object[] of antitrust scrutiny” for its anticompetitive uses, notwithstanding its great potential also to yield efficiencies.4 In this case, Rambus’s deceptive conduct distorted joint standard-setting decisions and innovation investments in ways that seriously injured the operations of the competitive market to the detriment of consumers; it thereby transgressed the policies and spirit of the antitrust laws in all three respects. While respondent’s behavior before JEDEC might well have been challenged solely as a pure Section 5 violation, Complaint Counsel did not litigate this theory before the administrative law judge. Thus, I write separately to discuss and reemphasize the broad reach and unique role of Section 5.

#### Give special deference to ev from Areeda and Hovenkemp --- it’s the most authoritative and predictable – overwhelming legal consensus

**Allensworth 15** (Rebecca Haw Allensworth, Associate Professor of Law at Vanderbilt Law School, JD Harvard Law School, M.Phil University of Cambridge, BA Yale University, “The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust,” Iowa Law Review, vol.100, 2015, https://scholarship.law.vanderbilt.edu/faculty-publications/14/)

It is often pointed out that while the United States **Supreme Court** is the **final arbiter** in setting antitrust policy and promulgating antitrust rules, it does so too infrequently to be an efficient regulator.' And since the antitrust agencies, the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"), rarely issue guidelines, and even more rarely issue rules or regulations, very little antitrust law is handed down from on high. Instead, circuits split, and lower courts **must muddle through** new antitrust problems by finding analogies in technologically and socially obsolete precedents.

When faced with this **void of authority**, especially covering cutting-edge antitrust issues raised by new technology and business arrangements, **lower courts often turn to a single treatise**, **Antitrust Law**: An Analysis of Antitrust Principles and Their Application, by the late Philip E. **Areeda and** Herbert **Hovenkamp**.2 The treatise's **influence** is such that Justice Breyer has remarked "that **most practitioners** would **prefer** to have **two paragraphs** of **Areeda**'s treatise **on their side** than three **Courts of Appeals** or four **Supreme Court Justices**."3 Why courts are so influenced by the treatise is no secret: It is up-to-date, technologically savvy, politically middle-of-the-road, economically literate, comprehensible, and comprehensive. The monopoly that Professor Hovenkamp (as the only living editor of the treatise) has inherited and lovingly maintains is certainly the kind of which antitrust would approve: It is a monopoly "thrust upon it"4 by **simply being the best**. But its dominance in lower courts and, therefore, in firm decision-making, should raise concerns among those who believe it was Congress's intent to put the courts, not a professor, in charge of antitrust policy.

The solution, of course, is **not** to **force the lower courts away** from the **Areeda-Hovenkamp** treatise; **in the absence of binding authority**, reliance on such a fine treatise can only improve antitrust jurisprudence. But this reliance may illustrate the need for institutional reform. It suggests that something should be done to solve the bottleneck problem at the Supreme Court and to encourage the antitrust agencies to issue more rules to guide firms in their business deals and lower courts in their resolution of disputes. This Essay explores the structural and institutional causes of the void of antitrust authority, explains how the Areeda-Hovenkamp treatise fills that gap, and identifies the legitimacy problems that inhere when lower courts treat a secondary source as speaking for the Supreme Court. Finally, this Essay points out how a more economically literate bench and Chevron deference to FTC antitrust rules would help alleviate the problem.

II. THE AREEDA-HOVENKAMP TREATISE IN THE LOWER COURTS

It is **difficult to overstate** the importance of the Areeda-Hovenkamp treatise. Whether evaluated **quantitatively** or **qualitatively**, the reach that the treatise has had on antitrust law and policy is staggering. The market power that Herbert Hovenkamp enjoys over influencing antitrust law in the courts is honestly gained, but **no one can argue** that he enjoys anything short of a **monopoly**.

A. THE TREATISE BY THE NUMBERS

The modern treatise-a 21-volume set, updated semiannually, 5950 pages long, and retailing for $42255--takes its origins in a three-volume set published by Harvard antitrust legends Philip E. Areeda and Donald F. Turner in 1978.6 Under the Areeda-Turner brand, it has been **cited** in over **5oo federal cases**;7 under the Areeda-Hovenkamp title, which was obtained after Professor Hovenkamp replaced Professor Turner in 1989, it has been cited in another **700**.8 **Many opinions** cite the treatise repeatedly.9 That makes the treatise the **single most-cited antitrust authority**, including such ubiquitous cases as the Supreme Court's 1918 decision in Chicago Board of Trade, which established the "Rule of Reason," and the U.S. Court of Appeals for the Second Circuit's ALCOA case, which defined the offense of monopolization under the Sherman Act in 1945.-- And it outstrips citations to antitrust agency materials, including the Merger Guidelines, at a ratio of three-to-one., As for other treatises, hornbooks, and academic materials, **nothing even comes close**. The next most cited academic work on antitrust, Robert Bork's The Antitrust Paradox, has been cited in only 183 federal district and appellate court cases.12

B. OTHER MEASURES OFINFLUENCE

Qualitative analysis of the citations confirms the impression given by the numbers: The treatise is an **essential source of antitrust authority** at **all levels of federal practice**. Courts commonly quote portions of the treatise at length, setting apart passages as block quotes rather than rephrasing the point.l1 And **courts** will often explicitly adopt propositions offered by the treatise **as law**. For example, in the U.S. Court of Appeals for the D.C. Circuit's Microsoft case, the court adopted the treatise's position on structural relief in vacating the remedy below and cautioning against a heavy-handed structural remedy on remand.'4 Likewise, in LePage's Inc. v. 3 M, the U.S. Court of Appeals for the Third Circuit adopted the treatise's position that a competitor offering a broader range of products can use bundled discounting to exclude an equally efficient rival.,5 Another case even used the treatise's language to name a section heading: "Plaintiff Fits Areeda and Hovenkamp's Description of 'A Nascent Firm.’”16

Judicial references to the treatise are glowing; in addition to Justice Breyer's high praise quoted above, it is not uncommon for courts, in citing the treatise, to comment on its high quality or accessibility.'7 The depth of the treatise's influence is complemented by its breadth, and it is cited for a wide range of ideas. Although often cited for a succinct restatement of the law,' 8 it is also treated as authoritative on antitrust policy,'9 relevant economic concepts,20 and on the state of lower court disagreement about particular issues. 2 ' Even its prescriptive positions-advocating a change in the law or a resolution to a circuit split-have frequently found traction in the courts.2 2 It would seem that an early review of the treatise made an accurate prediction when it praised it thus:

In the tradition of classic encyclopedias like Wigmore's and Williston's, it is both a monument and an indispensable guide. Its magisterial pronouncements will, for a generation, be the **starting point of research** by practitioners, judges, and **students** of law and industrial organization.23

Arguably, the flaw in this prediction was that it did not go far enough. It has been for two generations, not one, that the treatise has provided the **starting point**-and in many cases the **final analysis**-for antitrust **practitioners** and **judges**.

### 2NC---AT: AFF Ground

### 2NC---AT: Reasonability

## Adv---Dynamism

### 2NC---Turn

### 2NC---UQ

#### Dynamic start ups are rising and will continue

Rist 1/5 Kjartan Rist Contributor. “2022 Startup Predictions: The Trends, Sectors, And Tech Worth Watching.” Jan 5, 2022. <https://www.forbes.com/sites/kjartanrist/2022/01/05/2022-startup-predictions-the-trends-sectors-and-tech-worth-watching/?sh=7906f2e16082> {DK}

Since the onset of Covid-19 two long years ago, venture capital-backed technology companies have exceeded all expectations and played a significant role in driving the economic recovery.

Indeed, the VC ecosystem increasingly looks like the last remaining source of dynamism in a global economy largely bereft of new ideas, and 2021 saw record levels of investment into the European venture community.

Given our growing reliance on the innovation, efficiency and problem-solving capabilities delivered by VC-backed technology, we should expect the pace of investment to step up once again in the year ahead. Here are a few of the trends and technologies likely to drive these investment decisions.

Net Zero through technology

According to John Lervik, Founder of industrial dataops provider Cognite, industrial technology’s role in mitigating climate change is still underestimated. Deploying digital software tools is no longer optional for industrial businesses. This type of tech adoption is now essential both to compete and to comply with overriding sustainability targets. For asset-intensive industries, we are already well on the way towards a transformation in how energy is produced, stored, distributed and consumed.

More broadly, advanced analytics, AI, business intelligence and cloud tools will all play a vital role in combating environmental concerns in 2022, contributing to sustainable industry practices through increased transparency, production efficiency and improved energy management. Data is becoming the key environmental decision-maker as more companies embrace automation and digitization.

Crypto regulation takes shape

Crypto skepticism is still engrained amongst some investors. However, vastly increased adoption – including sovereign countries, corporates, and larger institutional investors – has forced the hand of regulators, banks, and international infrastructure providers.

In 2021 we saw increased deployment through crypto assets embedded into products and services, offering greater accessibility for consumers. Alongside this, more service providers are piggybacking on the growth of the crypto economy to create compliance, custody and lending solutions, new exchanges and intermediaries.

Adoption in 2022 will be further enhanced by Government-driven structured regulatory processes and increased lobbying by emerging key players in the crypto economy such as Coinbase, FTX, Digital Currency Group, and Galaxy Digital, amongst others. Ultimately, regulation is much needed by all parties to defeat the sceptics and send crypto mainstream.

Therapy and psychedelics support

With the world currently facing an extreme shortage of health clinicians, many of whom themselves are struggling with burnout, digital platforms will continue to take centre stage, going beyond the current apps linking patients and therapists to deliver more self-service solutions.

Just as video consultation and telemedicine have become key features in the healthcare supply mix, the maturity of – and growing advocacy for – psychedelics will offer patients additional treatment options in 2022. Technology will play a substantial role in the deployment and delivery of psychedelic-focused therapy. While existing technologies are still very nascent, as venture investment increases, they will widen access to treatment for millions of people who are currently being neglected.

Meta hype

Continued technology development, working from home, decentralization, and the increased focus on the virtual world has propelled the topic of ‘meta’ to most innovation agendas. A self-indulgent tech behemoth has even taken ownership of the name!

However, what’s becoming clear is that meta development cycles are much longer than originally anticipated, further hardware innovation is still needed, and, consequently, application areas are still limited. Big Tech will try to own the metaverse, but it will face a significant challenge due to changing power structures, IP/content rights and the acceleration of the decentralization movement, especially the greater use of the blockchain.

Globalization in reverse?

As consumers and businesses, we have all faced disruptions and shortages due to supply chain frailties. In 2021, a wave of extreme weather, combined with shortages of workers and cargo space, created a perfect storm for the global supply chain, adding further pressure onto organizations to rethink and remodel the way they manufacture, sell and ship their produce.

The supply chain is on the verge of a revolution, with businesses placing less emphasis on cutting costs and more on building the capacity and resilience to weather disruption. This will likely mean companies bringing their operations closer to home. In a Bank of America study, 75% of companies said they were reshoring operations to their home bases or neighboring countries.

We’re also going to see more companies investing in ‘smart factories,’ with an emphasis on automation, cloud platforms and other enabling technologies to deliver products in time, at the right volume and when needed.

The YOLO economy

The pandemic has forced many people to take stock of their lives, review their frenetic lifestyles and ask big questions such as “Why I am doing this?” or “What’s it all for?”

Last year, this trend was one of the driving factors behind The Great Resignation. In 2022, we can expect to see more holistic changes in how people live and the emergence of the YOLO (You Only Live Once) economy.

The YOLO ethic centres individuals in their own entrepreneurial pursuit of life improvement – whether that’s greater job satisfaction, better work/life balance, or simply the chance to do more of the things that interest them.

It’s good news for the startup community, where this attitude and belief system is already commonplace. But even startups need to keep their finger on the pulse of how employee attitudes may be changing along YOLO lines. For example, Atom Bank has introduced a 4-day work week without any pay cut. Microsoft is trialing the same approach. Employee demands for locational flexibility, creative working-week structures, and more equitable and accessible recruitment methods are all going to grow in 2022.

The rise of the Family Office

As more tech companies stay private for longer, Family Office venture investment is growing at a monumental pace. Almost 70% of all family offices have been set up since 2000, with half emerging post-financial crisis in 2008. According to Rob Diamon from Diamond Wealth, there is $10 trillion of wealth amongst Family Offices, a figure predicted to grow to $65 trillion over the next 15 years.

However, many Family Offices are still working out how to play the VC game – for example, whether/when to go direct, how to staff their operations, how to best access chosen partner funds. Due to the sheer size of the wealth and their focus on private markets, Family Offices could further disrupt the private investment world in 2022. The main question is how?

The invasion of Europe and an early stage investment renaissance

When a home market becomes saturated, increasingly competitive, or the talent well runs dry, it is customary to conquer new territories in search of talent and investment opportunities.

Hence, it’s no surprise to see that US investors are now participants in more than one-quarter of all investment rounds in Europe, with more than 600 US VCs investing in 2021, according to Atomico. At the same time, the US participation in European $100m+ rounds went up by 200%, and 95% of all transactions of $250m+ had US/Asian participation.

Ownership of Europe’s fast-growth businesses is fast being handed over to non-European investors. While this gives entrepreneurs greater choice and volume of investment, it’s skewing the investment landscape towards later stage investment cases and more mature companies. European investors are suffering from a lack of institutional backing to compete, and they have a challenge on their hands in 2022 to compete against the deep pocket and machine-like investment procedures of Tiger, Coatue, Softbank, Insight, and others.

I believe that we’ll start to see more European investors refocusing efforts on early-stage investing. After all, the fundamentals in Europe are strong: There’s a considerable inflow of talent into the entrepreneurial sector, a recycling of capital by serial founders and a continuous flow of exits. The future unicorn pipeline needs addressing in 2022, and European investors need to get this right.

### 2NC---AT: Small Firms Better

#### Large firms have higher R&D *investment* and *productivity*

Kennedy 20 - Dr. Kennedy was the chief economist for the U.S Department of Commerce (Joe, <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>, emuse)

So-Called Kill Zones Could Maximize Welfare and Innovation To the extent established companies are conducting research in a narrow market, it makes sense for entrants to avoid head-on competition and instead exploit complementary markets. This is almost as likely to be true whether the industry is dominated by one firm or five. Breaking into an industry with relatively mature technology dominated by large players is never easy. That is why many industries have gone through periods of heavy investment in the early stages of an industry as companies try to become one of the dominant players. Once the industry has matured to achieve economies of scale or network effects, new entrants tend to focus on complementary technology rather than trying to challenge the larger companies head-on. Few complained after the 1930s automobile-sector start-ups declined precipitously. By the 1930s, it made little sense to invest in new automobile companies when it was clear the technology system (internal combustion engine) and major players (American Motors, Chrysler, Ford, and GM) had already been established. Investment to create new entrants would have represented a waste of societal resources. Instead, funding went to emerging industries such as radios, chemicals, and machine tools. Today is no different. The technology and business models for search, social networks, and Internet retailing are relatively mature; society is better off if entrepreneurs and venture capitalists focus on other areas. Indeed, to the extent investors may be focusing their capital outside a few areas where large firms have established positions in what are somewhat mature technologies, it is arguably a good thing because it means there is more capital for other promising areas. Hathaway, in fact, acknowledged the possibility that “venture capital investment may have increased in non-tech sectors too, so that the tech giants have simply diverted the flow of capital to other areas.”25 The is buttressed by an earlier study by Oliver Wyman, which shows that acquisitions by Facebook, Google, and Amazon have not had a negative effect on the amount of venture capital flowing into tech industries.26 (See figures 1 and 2.) Acquisitions Often Increase Innovation There is often an assumption that acquisitions decrease innovation, but a number of studies suggest the opposite. A Dutch study looks at acquisitions in the manufacturing sector, which includes technology companies, and finds that both acquisitions and divestitures are positively correlated with increased innovation.27 Likewise, a paper by Igor Letina, Armin Schmutzler, and Regina Seibel argues that prohibiting killer acquisitions strictly reduces the variety of innovation projects

#### Large companies are more innovative---best empirical studies

Kennedy 20 - Dr. Kennedy was the chief economist for the U.S Department of Commerce (Joe, <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>, emuse)

The Assumption That Small Firms Are Inherently More Innovative Than Large Firms Is Not Borne Out by the Evidence One core argument made by anti-monopolists who oppose large companies and argue that kill zones and killer acquisitions are real and harmful is that small firms are inherently more innovative than large firms. As FTC Commissioner Christine Wilson argued, “[M]any today believe that small firms are inherently more innovative than large ones, so that the acquisition of a small firm by a large one necessarily reduces innovation.”45 For example, Tim Wu recently testified before Congress that innovation in technology sectors would increase if government imposed greater regulations and increased antitrust enforcement because “[o]ver the last century, competitive, open sectors—ecosystems—have proved themselves superior to those monopolized or dominated by a ‘big three’ or ‘big four.’”46 In fact, large companies are as or more innovative than small firms. In a 1996 paper, Wesley M. Cohen and Steven Klepper found that large firms invest more in R&D as a share of sales.47 The number of patents and innovations produced per R&D dollar decline with increasing firm size. But they argued that this reflects a mismeasurement of innovation outputs. Large firms benefit from “cost spreading,” because they can spread the benefits from one innovation across more units and products, leading to a greater overall level of innovation per unit of R&D. They wrote, “Not only does cost spreading provide the basis for explaining the R&D-size relationship, it also challenges the consensus that has emerged from the R&D literature that large firm size imparts no advantage in R&D competition.”48 More recently, in 2016, business professors Anne Marie Knott and Carl Vieregger estimated that a 10 percent increase in the number of employees increases R&D by 7.2 percent, and a 10 percent increase in firm revenues increases R&D productivity by 0.14 percent. This shows that large firms not only invest more in R&D activities, they also enjoy higher returns on innovation output per dollar invested in R&D.49 Other research has found that “small firms prevail in the early stages and innovation tends to concentrate in larger firms as industries evolve towards maturity.”50 In the 1990s, many small firms emerged and competed to be the winners in IT platforms. But only a few firms could emerge as winners, and the ones that did continue to invest in innovation. Data on Venture Investments Suggests Tech Acquisitions and High Market Share Do Not Hurt Start-Ups The right measure of the effect of killer zones is not the trend in the specific market wherein large tech firms operate, but in the overall tech innovation ecosystem. Even Hathaway acknowledged that the relative declines he observed in the narrow markets where the big firms are strongest could be offset by investments moving to other, more promising, markets. In fact, that appears to be exactly what has happened. From 2006 to 2019, venture capital investments in IT deals increased steadily and significantly. Although it leveled off in 2019, tech funding was still 54 percent above the 2017 level. Figure 2 shows the number of technology angel and seed deals as well as the number of early stage deals. The number of angel and seed deals rose by almost six-fold between 2006 and 2019, peaking in 2015. The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down.

### 2NC---Link

#### Multiple Links:

#### 1. Separation---Platforms are key to tech sector innovation

Atkinson ’21 [Robert D; March 10; Ph.D. at UNC-Chapel Hill, the founder and president of ITIF; Information Technology & Innovation Foundation, “How Progressives Have Spun Dubious Theories and Faulty Research into a Harmful New Antitrust Doctrine,” https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new]

Myth 8: Big Technology Companies Create Innovation Kill Zones28

Large U.S. technology platforms invest almost as much in R&D as the entire U.K. economy does (business and government).29 But knowing that innovation is important, neo-Brandeisians have argued that big technology companies actually limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in them (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firms to benefit from economies of scale or network effects, and enable the smaller firms to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell therefore might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler that guides entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring, as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities.

Moreover, if they are creating kill zones, why did the number of angel and seed deals rise almost sixfold between 2006 and 2019, peaking in 2015? The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down. (See figure 5.)

### 2NC---AT: Bias

#### Author bias args are too sweeping

**Knight 20** --- Will Knight is a senior writer for WIRED, covering artificial intelligence, “Many Top AI Researchers Get Financial Backing From Big Tech”, Oct 4th 2020, https://www.wired.com/story/top-ai-researchers-financial-backing-big-tech/

Meredith Whittaker, a research scientist at NYU, previously worked for Google on a project that connected the company with academic research. She also led protests inside the company in 2018 against its policies on sexual misconduct and surveillance.

“People know who pays them,” she says. But she says it’s unfair to assume that someone funded by a company cannot be critical of Big Tech. She says several researchers who work at tech companies are critical of their employer’s technology. And she says pushback within companies can help check their power. “Worker organizing and worker dissent are only increasing as the status of this technology becomes more and more apparent,” she says.

A spokesperson for Google says the company’s policies prohibit staff from seeking to influence academic work. “Google’s collaborations with academic and research institutions are **not driven by policy influence in any way**,” the spokesperson says. “We are a huge supporter of academic research because it allows us to work with academics who are looking to solve the same problems that we are.”

Ben Recht, a professor at UC Berkeley, has previously criticized the idea of researchers simultaneously working for a university and a company. But he doesn’t think corporate funding for AI should be seen as inherently bad. “You can make a capitalist argument that it is good for companies to pursue ethical technology,” he says. “I think that this is something that many of them strive to do.”

Recht also points out that even without industry funding, academics can produce ethically questionable work, like the algorithms that underpin face recognition or those that help turn social media platforms into echo chambers and sources of misinformation. And Recht also notes that the money that flows from government agencies, including the military, can also influence the direction of research.

### 2NC---AT: Econ !

**Trade doesn’t solve war**

**Musgrave 20** --- Paul Musgrave is an assistant professor of political science at the University of Massachusetts Amherst, “The Beautiful, Dumb Dream of McDonald’s Peace Theory”, Foreign Policy, NOVEMBER 26, 2020, https://foreignpolicy.com/2020/11/26/mcdonalds-peace-nagornokarabakh-friedman/

**Of course**, I would explain to my students, war could also proceed from other causes. **Economic integration may be no panacea** to interstate war after all. John Vasquez writes: “War among equals has followed the failure of power politics to settle certain highly salient issues”—none, he writes, more than “issues involving territory, especially territorial contiguity.”

In the former Soviet Union, the wars over Chechnya, Georgia, Ukraine, and now Nagorno-Karabakh have all involved territory as a crucial element, a story much closer to what Vasquez’s theory would predict than to Friedman’s.

Globalization may have increased the costs of these wars, **but they have** obviously **not prevented them**. To be sure, Armenia has no McDonald’s, an issue grave enough to have been raised in the parliament at Yerevan earlier this year. The Azerbaijan franchise’s cheerleading was also slapped down by the Home Office.

Regardless, Friedman’s logic suggests the conflict shouldn’t have begun, or shouldn’t have been so bloody once it did. Both Armenia and Azerbaijan score highly (and almost identically) on the ETH Zurich KOF Globalisation Index. The pace of deaths suggests that the conflict could qualify as a so-called real war by the traditional 1,000 battle-related-deaths criterion. (Indeed, some reports say the death toll blew past that level quickly.)

And if the conflict has knocked the final support from the Golden Arches theory, it has also finally toppled whatever confidence remained in the 1990s belief in the eternal sunshine of the American order.

The resurgent Nagorno-Karabakh conflict provides yet another reason to worry that the world is entering a new phase of more violent conflict—including major wars—and globalization will **no more prevent them** than **burgeoning** trade before Archduke Ferdinand’s assassination prevented World War.

After all, **wars keep emerging** that challenge the optimistic assessment that war is a relic of the past. The specific ways these conflicts emerge, moreover, point to the possibility that **new wars** could break out that make **even bloody conflicts** like those in Syria and Yemen **seem relatively minor.**

Driven by processes of imperial dysfunction and internal breakdown, today’s wars have causes that are enormously difficult to heal.

The conflicts in the former Soviet Union, from Chechnya in the 1990s to Nagorno-Karabakh today, represent a set of wars in the post-Soviet succession. Russia has attempted to maintain its central role against real and perceived rivals throughout that vast region including transnational Islam, the European Union, the United States, China, and now arguably Turkey.

In the Middle East, revisionist regional powers like Saudi Arabia and Iran contend for power as the United States continues to loudly proclaim that it is unwilling to continue playing its imperial stabilizing role (even if Washington never actually seems to find the exit).

And China, which once preferred to keep its border disputes quiet, seems increasingly willing to saber-rattle from the Taiwan Straits to the Himalayas.

## Adv---Systemic Risk

### 2NC---AT: I/L---Monocultures

#### Polycultures in cybersecurity solve nothing

Grimes 09 --- Roger A. Grimes is a contributing editor. Roger holds more than 40 computer certifications and has authored ten books on computer security. He has been fighting malware and malicious hackers since 1987, “Don't fall for the monoculture myth”, CSO, April 24th 2009, https://www.csoonline.com/article/2632142/don-t-fall-for-the-monoculture-myth.html

What is a more secure product? Do you measure that with known bug counts, severity of bugs, time to patch, or how often it is publicly exploited? And is the product you are moving to actually more secure or just attacked less often because it is not as popular? This leads to the other argument: When it comes to software, there's safety in fewer numbers of users. The idea is that when everyone is using the same application or operating system (OS), a computer monoculture is created that leads to more exploits.

On the face of it, it's a compelling argument, one that's hard to reason against. If we all use the same software, then attackers can write one piece of code to exploit us all simultaneously. It seems to make sense that moving away from a monoculture (an argument first popularized in a paper by Dan Greer and others in 2003) would reduce overall security risk.

And for sure, there are compelling factual arguments on a case-by-case basis. If you didn't run (unpatched) versions of Microsoft SQL Server in 2003, the SQL Slammer worm couldn't get you. Besides Windows, I also run OpenBSD, Ubuntu, and Mac OS X at home, and the last operating systems are attacked less frequently, with the exception of my Apache-based Web servers, which are attacked six to eight times more often than my IIS servers. However, the truth is that I don't get exploited on any of these systems unless I intentionally allow them to get exploited. (I run eight honeypots to monitor malware and hacker behavior.)

Celebrate diversity?

The key question is whether a more diverse software landscape -- i.e., the opposite of a computer monoculture -- would be safer over the long run.

Although some may accuse me of using this column to defend my full-time employer, the truth is that no one has presented compelling evidence that moving to a computer multiculture would provide more security protection to more users over the long run. Lots of people have speculated, but if the Windows world just up and splintered into a dozen different OSes and applications, no one has proven that it would provide more security value. Conventional wisdom says it might, but could it really?

I think the potential challenges to this way of thinking are many. First, often the alternatives people choose are as insecure as the market leaders they abandon; people may get get a temporary decrease in security risk until the software they use becomes more popular.

The monoculture argument about safety in fewer numbers holds water only if the move to the less popular software stays under the radar. If the masses follow, nothing is gained. Ten years ago, Microsoft Office document formats were the only game. But then Adobe's PDF arrived, and now PDFs are as common on the Internet as Office files. And not surprisingly, PDF is receiving more than its fair share of hackers and exploits. Some protection vendors are claiming that PDF exploits account for nearly half of all exploits in the wild today, surpassing Office's issues.

Adobe Acrobat Reader critics usually recommend moving to Fox-It, except that Fox-It has already had exploits. Internet Explorer critics recommend moving to Firefox, Safari, Opera, or Chrome, but all of these alternatives are commonly exploited too. Microsoft Office critics often recommend moving to OpenOffice.org, except that it, too, has already been exploited dozens of times, and some expert code analyzers think it is rife with exploits and insecure code. It's so frustrating it makes you want to move to simple text editors and text-only browsers, except those have already been exploited, too, and in any case, they fall well short of the features most of us need. When the world moves to the new product, you're right back where you started.

Life on the run

This isn't the answer, unless you plan on hopscotching around the software world from one program to the next, trying to keep one step ahead of the malicious hackers. While this works on a personal level, it's not so easy to manage in the enterprise. Plus, forcing the original vendor to become a more secure coder might make better use of overall effort. Who wants to be the person who forces their users to move to another product just to watch the original product become more secure than the new alternative?

Case in point: After the Microsoft SQL Slammer worm happened, there have been fewer than a handful of exploits against SQL Server, none popularly exploited. In the same time frame, there have been dozens to hundreds of exploits against SQL Server's most popular competitors -- same with IIS versus Apache after the Code Red worm debacle. Vendors that get a brutal lesson often fix their mistakes faster than the competition.

Note: Outside of the current security discussion, I highly recommend trying alternative products to see what feature sets and benefits they offer, and to be able to accurately point out the strengths and weaknesses when comparing against the products your company is using. Sometimes you can find a gem where you least expect it.

I believe the monoculture argument is losing more steam every day. The second rebuttal point is that the most popular applications are cross-platform already and exploits that work against one version usually work against the others -- not always, but more often than not. For example, a Safari browser exploit can be a problem no matter which OS you use. The same rule generally applies to Adobe Acrobat, iTunes, and Flash exploits. Not all work on all platforms, but they will attack most platforms with varying degrees of success.

Third, the file formats are becoming the new popular attack vector. If everyone up and moved to different applications, it probably wouldn't change a thing. Let's say the world ended up using 100 different word processors evenly distributed in use. People still need to communicate, and whatever document or protocol format becomes the de facto data exchange standard would become the de facto attack point. For example, most of the exploits against SQL databases don't pinpoint a particular platform or version of SQL, but rely upon SQL injection attacks. What make of SQL database you are using is far less important than the security of the code it is running.

Fourth, as computing moves into the cloud and as apps, documents, and protocols become more browser based, the differences between the various vendor products will lessen, and again, hackers will focus their attacks on the common links. Will the future attacks be against OSes, applications, data formats, and protocols, or will they leverage the inherent vulnerabilities in the cloud fabric itself?

I'm sure many readers are still discounting all my previous arguments. Suppose the world does move toward a more diverse computing environment. Is it really that hard for an attacker to attack 20 apps or OSes than one? Yes, of course, but maybe it's not the high hurdle most people think it is.

Crimeware pays

My fifth rebuttal point is that today's attackers are professional criminals. Make a point defense and they will get around it. Coding for 20 OSes or applications doesn't take that much more effort in real life than coding for one exploit. Look at all of the malware programs today that already use multiple attack vectors. Ten years ago, most malware programs attacked one exploit. Today, it's common for a single malware program to make use of 5, 10, or even 20 or more attack vectors. Conficker, anyone?

If we all ended up with 20 different apps and 20 different OSes, the attackers would simply begin exploiting more of them at once. All of the most popular apps and OSes are exploited pretty regularly. Attackers would learn to separate their entry exploit vectors and post-exploitation code into two separate but coordinated routines. The Metasploit project has been making this easy for more than half a decade. Are we to assume that rich, professional malware attackers will just give up and go home?

The idea of multiple attack vectors married with multiple post-exploit mechanisms in a malware program isn't even a new idea. Plenty of worms are already doing this, but it isn't mainstream because the attackers don't need the additional code and sophistication -- yet. If they use it sooner than they need it, it results in wasted computing cycles, slower malicious code, and easier detection. They'll also broadcast their new offensive techniques to the enemy (i.e., the anti-malware industry and the global community of good).

Lastly, and this is the biggest argument, we can't ignore the fact that most malware programs today (99.99 percent) don't rely upon software security vulnerabilities at all. They just trick the end-user into running malicious code. This attack vector will work for any OS and any application. This point alone should put the monoculture argument to bed. You can change the application, but until we change the end-user thought process, the biggest problem remains.

Two decades ago, I was telling users not to boot up with a floppy disk in the floppy drive. Then not to say yes to that request to run the macro, followed by "don't click on that file attachment." Today, it's "don't run that fake anti-virus program." Will we ever be able to train end-users to avoid running rogue code? Two decades of experience tell me that it isn't as easy as it sounds.

More to the point, in all of those 20 years, moving to a new app or OS never fixed the major underlying security problems (i.e., pervasive anonymity and lack of accountability) that underlie all malicious hacking. If everyone were to put up with the hassle of installing and learning a new product, we should not be surprised to end up with the same security threats again. Consider the last two decades of computer security defenses and their current success rate to see the logic of that argument. A lot of effort and time has been wasted without any improvement in overall computer security, because we did not address the underlying problems.

I'm all for moving to a new OS or application because you like the feature set or you know it is more secure, but don't think you can switch and leave all of the other security problems behind. Most security issues are global in nature and don't magically disappear because you are using a different product. Whatever you use, you must follow the same basic security tenets: patch often, don't run untrusted code, use strong passwords, etc.

The answers to our security prayers do not lie in a computing multiculture. Moving to new products has done zero to address the underlying security weaknesses that malware authors routinely exploit, and until we do that, we're just fooling ourselves.

**Polyculture approach to infrastructure high and inevitable**

**Gates 17** --- Megan Gates, senior editor at Security Management covering emerging cybersecurity threats and trends, as well as legal issues related to the security profession., “Power Play: Resilience & Infrastructure”, June 2017, https://www.asisonline.org/security-management-magazine/articles/2017/06/power-play-resilience--infrastructure/

The risks of a monoculture on critical infrastructure were brought to light outside of cyberspace in December 2015 when Ukraine’s electric grid was hit by a cyberattack, leaving approximately 225,000 people without power. Ukraine recovered, but was hit by another cyberattack in the fall of 2016, which again cut the power.

The electric grid in Ukraine, as in most of eastern Europe, was created when it was part of the Soviet Union. Ukraine’s system was standardized and designed to operate exactly the same way, across the board. Since Ukraine became an independent nation in 1991, it has built some diversification into its electric grid.

“But the culture, the thinking, the older system are all fairly standard across the country and look just like Russia—its adversary to the east—because it was all built on the old Soviet model,” says Marcus Sachs, CSO of the North American Electric Reliability Corporation (NERC). “That becomes a weakness when you repeat things and you don’t have diversity in thinking, and diversity in the way you run stuff.”

THE UKRAINE ATTACK

On December 23, 2015, three Ukrainian regional electrical distribution centers—called oblenergos—went down within 30 minutes of each other, cutting power to approximately 225,000 people. The cause of the outage: a coordinated cyberattack that was the first publicly acknowledged attack to result in a power outage.

The oblenergos were forced to use manual operations to restore power to the electric grid and restored power quickly after an initial outage of several hours. However, the impacted oblenergos continued to run their distribution systems in an “operationally constrained mode,” according to Analysis of the Cyber Attack on the Ukrainian Power Grid, issued by SANS Industrial Control Systems and the Electricity Information Sharing and Analysis Center (E-ISAC).

After restoring power, Ukraine worked with security vendors and government partners—including the U.S. Department of Homeland Security (DHS) and NERC—to investigate how the cyberattack was carried out.

They discovered that the attackers used spear phishing emails sent to administrative or IT network operators to gain access to the oblenergos’ business networks. The emails included an attachment—an Excel spreadsheet—that was embedded with BlackEnergy malware that, once opened, installed Secure Socket Shell backdoors on the oblenergos’ networks.

These backdoors allowed the attackers to gather information on the environment and enable access to other areas of the network more than six months before the December 23 attack.

“One of their first actions happened when the network was used to harvest credentials, escalate privileges, and move laterally through the environment,” the analysis says. “At this point, the adversary completed all actions to establish persistent access to the targets.”

The attackers used these stolen credentials to pivot into network segments where supervisory control and data acquisition (SCADA) dispatch workstations and network segments were located. Using these connections, the attackers learned how to interact with the oblenergos’ distribution management systems (DMSs) and developed malicious firmware to use later.

They gained access to the oblenergos’ industrial control systems (ICS) components, and installed a malicious software—called a KillDisk—across the environment. The attackers then combined their work to execute the attack, opening the oblenergos’ breakers and taking at least 27 substations offline. They also uploaded the malicious firmware they had created to prevent operators from using remote commands to bring the substations back online.

“During the same period, the attackers also leveraged a remote telephonic denial-of-service attack on the energy company’s call center with thousands of calls to ensure that impacted customers could not report outages,” the analysis says. “Initially, it seemed that this attack was to keep customers from informing the operators of how extensive the outages were; however, in review of the entirety of the evidence, it is more likely that the denial of service was executed to frustrate the customers since they could not contact customer support or gain clarity regarding the outage.”

The analysis authors also note that the power outage was not caused by BlackEnergy, the backdoors, KillDisk, or the malicious firmware. Instead, these components of the attack were used to access the oblenergos’ systems and then delay the restoration of power.

“However, the strongest capability of the attackers was not in their choice of tools or in their expertise, but in their capability to perform long-term reconnaissance operations required to learn the environment and execute a highly synchronized, multistage, multisite attack,” according to the analysis.

WHY UKRAINE?

No one has claimed responsibility for the attack on Ukraine’s electric grid. Ukraine’s Security Service has pointed a finger at Russia, but has not offered publicly available evidence to corroborate that claim.

However, there are many reasons that an attacker would see Ukraine as an attractive target for this kind of cyberattack, says Ernie Dennis, a cyber intelligence analyst at the Retail Cyber Information Sharing Center who was formerly with Arbor Networks.

Russia annexed part of Ukraine—Crimea—in 2014 and has stationed military troops along the border of eastern Ukraine since then. After the annexation occurred, there was not a great deal of pushback from the European Union or the United States, except in the form of sanctions.

If Russia had been developing the ability to conduct a cyberattack on an electric grid, and wanted to test the method and face few consequences for doing so, targeting Ukraine might be a good idea, Dennis says.

“Ukraine makes a great playground to test your neighbor’s resiliency to push more boundaries,” he explains. “If [the attackers] were to have done this in a legitimate European Union nation or a NATO ally, there’s a whole lot of other concerns that they have to worry about.”

Those concerns include being able to stay on the distributor’s network, facing a more robust defensive posture, and retaliation.

“But if you muck around in a country you’re already playing around in, and you haven’t had any issues, why not push it a little bit further and see what else you can get away with?” Dennis adds.

His thinking is in line with findings from Booz Allen Hamilton, which released the report When the Lights Went Out: A Comprehensive Review of the 2015 Attacks on Ukrainian Critical Infrastructure. The report says the December 2015 cyberattack was just the latest in a series of attacks.

“This long-running campaign likely reflects a significant, concerted effort by a single threat actor with a well-organized capability and interest in using cyberattacks to undermine Ukraine’s socio-political fabric,” the report says.

For instance, other cyberattacks were carried out against Ukraine’s electric sector, railway sector, television sector, mining sector, and regional government and public archives beginning in 2014. BlackEnergy—the malware used in the December 2015 cyberattack—was used in some of these previous attacks.

These attacks could have been undertaken to send a message because they were not designed to provide the attackers with a financial return, says the report.

“While politically motivated cyberattacks are not a novel foreign policy tool, the industries and organizations that serve as potential targets are expanding,” the report says. “Cyberattacks present a powerful political tool, particularly those against critical infrastructure providers. Industrial control systems operators are not above the fray in geopolitical rows, and may in fact be the new primary target.”

WHAT THE HACK MEANS FOR DEFENDERS

While it’s not definite who was behind the December 2015 cyberattack, the culprit was well-resourced, well-organized, and able to identify the biggest points of failure in Ukraine’s electric grid system: the operator’s security posture that allowed remote access to the control environment without two-factor authentication.

The attack also marked an escalation from previous destructive attacks that targeted computers and servers—like the Saudi Aramco hack in 2012 and the Sony Pictures attack in 2014.

“Several lines were crossed in the conduct of these attacks, as the targets could be described as solely civilian infrastructure,” the SANS report found. “Historic attacks, such as Stuxnet [attack on Iran’s nuclear program]…could be argued as being surg­ically targeted against a military target.”

Some areas of the world also might be at greater risk of a similar type of cyberattack, Dennis says.

“If someone really wanted to affect Africa and take out the power, I believe that they would have similar success to what they did in Ukraine,” he explains. “The reason why the United States and the European Union are so headstrong about their power infrastructure is because they know for a fact that they’ve taken the time, money, and effort to make it robust and secure, in light of ongoing thoughts of doom and gloom that it could happen any day.”

A destructive cyberattack has not hit U.S. critical infrastructure, but in fiscal year 2015, members of the U.S. energy sector reported 46 cybersecurity incidents to the Industrial Control Systems Cyber Emergency Response Team (ICS-CERT), according to the Booz Allen report.

“ICS-CERT does not publish a breakdown of the types of incidents by sector, but it revealed that 31 percent of total incidents reported across all sectors involved successful intrusion into operators’ assets, a third of which included accessing control systems,” the report says.

One of the few disclosed incidents was a BlackEnergy campaign that the U.S. government suspected was sponsored by the Russian government. However, the campaign did not attempt to “damage, modify, or otherwise disrupt” the electric grid.

This type of campaign is in line with the findings from a DHS Office of Intelligence and Analysis intelligence assessment that found that the “threat of a damaging or disrupting cyberattack against the U.S. energy sector is low.”

Nation-state cyber actors are targeting the U.S. energy sector enterprise networks, the report found, but mainly to conduct cyber espionage.

“The APT activity directed against sector industrial control system networks probably is focused on acquiring and maintaining persistent access to facilitate the introduction of malware, and likely is part of nation-state contingency planning that would only be implemented to conduct a damaging or disruptive attack in the event of hostilities with the United States,” the assessment says.

The DHS analysis was released in the spring of 2016, and DHS did not respond to requests for an updated threat analysis for this article.

However, other experts doubt that an attack—like the one against Ukraine—would be effective against the U.S. or Canadian electric grids because regulators have taken steps to address cyber risks to the grid.

In 2006, NERC started the effort to create reliability standards for cybersecurity for the North American bulk power system, which is a major target with more than 450,000 miles of high voltage transmission lines and more than 55,000 transmission substations, says Brian Harrell, CPP, director of security and risk management for Navigant Consulting and former director of critical infrastructure protection programs at NERC.

“NERC and the industry have gone through multiple iterations of mandatory Critical Infrastructure Protection Standards (CIPS) that focus on security protections,” Harrell says. Not complying with these standards can result in fines of up to $1 million per day, per violation.

And, Harrell adds, “it’s important to remember that these are minimum standards, and should be looked

at as a baseline from which to im­prove. Utilities should constantly be assessing their systems, patching their software, and testing their recovery procedures.”

Also aiding the United States in preventing a similar attack from being effective is a robust information sharing system between NERC, the E-ISAC, the federal government, and the private sector.

“Over the past few years, DHS, the FBI, and the U.S. Department of Energy have made considerable strides in improving information sharing and giving classified access to intelligence products, such as bulletins, alerts, and secret-level briefings,” Harrell says. “These data points have been used to mitigate threats, reduce risk, and update internal security policies.”

This system exists in the United States and NERC is working with the Canadian government and Canadian power companies to create a similar information sharing network, Sachs says.

However, Sachs says it’s important that these information sharing centers remain a voluntary practice for private companies to participate in.

“There’s very little critical infrastructure that’s government owned, and that’s frustrating because you can’t really demand the private sector share with the government, because if you do that, they will only share the bare minimum required to meet the law,” Sachs explains. “You want to encourage voluntary sharing, that way they’ll share more.”

To help bolster the electric grid in the United States and Canada, NERC has sponsored four biennial exercises, called GridEx, to provide utility operators with the opportunity to demonstrate how they would respond to and recover from a simulated coordinated cyber and physical security threat.

The first exercise took place in November 2011, and NERC will hold its next exercise—GridEx IV—in November 2017. NERC will provide participants with a detailed scenario that grid operators can then adapt to their own training needs, Sachs says.

“We try to build an exercise that stresses the operator community, makes them think about how they would respond and not so much looking into how the electricity is turned off,” Sachs says. “This helps eliminate people reading into a scenario and saying, ‘Well, that physically can’t happen.’”

But the final factor that bolsters North America’s electric grid security is the fact that it is a mostly privately owned and operated system that **is diverse,** despite its regulatory framework.

“Even though we may agree on what the outcome needs to look like, we will allow an asset owner to have **maximum flexibility** in designing a system that can achieve that outcome,” Sachs says. “So then you have all these **different approaches**, and a bad actor who is trying to get in, if he finds success somewhere, that success isn’t necessarily going to work elsewhere because the approaches were different.”

The North American system wasn’t initially designed to be diverse, Sachs says, but was instead designed to be resilient and adapt to problems.

“What tends to work here is you adapt the design of the grid to the **local conditions**, and working on our behalf in North America is the culture in the U.S. and Canada of diversity—a culture that says, ‘It’s okay to do things differently. We don’t have to be uniform, by the book, precise,’” Sachs says.

And this diversity in the design and implementation of security makes the North American grid **more secure**, Sachs says, because an attacker couldn’t use the exact same approach to take down multiple aspects of the grid.

### 2NC---AT: Infra !

### 2NC---AT: Cyber !

## Adv---Dependency Trap

### 2NC---A/C

#### I’ll finish the card

to a downward development trajectory. A new resource governance regime for data therefore becomes a cornerstone policy agenda for development in the twenty-first century.

Legal scholarship on resource governance underlines the role of appropriate private and public ownership frameworks (Epstein, 1987), with room for context-specific resource management tenets (such as access rights for forest-based communities). This is vital for the public interest, and a precondition for the realization of social good. Unfortunately, mainstream policy discussions on data governance (for instance, the World Bank’s concept note for its 2021 World Development Report – Data for Better Lives and ongoing conversations at the WIPO (2020) on exploring a sui generis patents regime for AI generated outputs) assume as a given, the de facto private ownership regime that operates in data resources.

As illustrated in Section 2b, in global and plurilateral negotiations on digital trade, the contestation between the dominant data economies and the rest of the world is primarily over the extent of liberalization of data flows and market access in e-commerce and digital services. The enclosure of data by first-mover digital firms leaves the majority of developing countries with no other option than to integrate into the e-commerce/digital services status quo.

In order to effectively address the resource governance vacuum that has created the data wild west, we need a “global constitutionalism for data” that lays down the first principles to inform data’s entry and movement through the value chain (Gurumurthy & Chami, forthcoming). As the Digital Justice Manifesto (2019) mooted by the progressive South-centric network, Just Net Coalition, recognizes, this would involve making normative decisions around a range of issues: determination of the boundaries of the data and the intelligence economy based on rights and inclusive development considerations, allocation of rights in data and intelligence resources, and the prevention of state/corporate abuse of data power. As more and more sectors of economic and social life get datafied, these questions occupy center-stage in many policy debates at the global and national level, and indeed, in each and every sector.

In order to effectively address the resource governance vacuum that has created the data wild west, we need a “global constitutionalism for data” that lays down the first principles to inform data’s entry and movement through the value chain.

A data economy based exclusively on safeguards through privacy rights cannot stall data extractivism. On the contrary, the privacy ‘shield’ becomes a minimalist, and even reductionist, means to allow data to flow ‘freely’ to the already powerful private hoarders dominating the global data value chains. Representing the embedded relationalities in which people, natural resources, things and phenomena share existence, data is a ‘system resource’ harnessed through intelligence infrastructures.

The commercial exploitation of advances in synthetic biology serves as a cautionary tale about the connection between value capture from digital intelligence and data theft from communities. Digital gene sequencing techniques enable Big Pharma and Big Agriculture to extract value from genetic resources (flora, fauna, microorganisms), without having to physically access genetic samples that attract various obligations – prior and informed consent of the ‘source communities’, benefits sharing mandates etc. – under the Convention on Biological Diversity. As the fourth industrial revolution transforms production chains in a range of sectors, the lack of ‘system resource’ frameworks for non-personal data sets will legitimize data theft, transferring control of the economic (and social) activity to digital (and digitally-emboldened)15 behemoths. Similarly, aggregate, anonymized personal data footprints of a community may be deployed to design commercial interventions that erode group privacy.16

Data discussions have a disproportionate focus on government open data frameworks for economic development, eclipsing the role of privately captured data for public and social value creation. Without appropriate data governance frameworks, Big Tech firms that exercise de facto ownership and control over valuable data and intelligence resources will have little incentive to share data voluntarily. IT for Change’s work, which has also informed national level policy processes on non-personal data governance in India, has underlined how a sui generis ‘community data’ regime grounded in the Ostromian idea of common property resource governance may be able to address these quandaries (Singh & Vipra, 2019; Singh & Gurumurthy, 2020). Drawing upon common property resource governance traditions in biodiversity, genetic, and traditional knowledge resources, we also propose five core principles of a community data regime: (1) the community’s right over data resources associated collectively with it, (2) prior informed consent of the community for use of such resources, (3) benefit sharing with the community, (4) transparency in the form of community data resource registers to prevent misuse and enable legitimate access, and (5) the community’s participation in governance of community data resources, including through non-profit trusts.17

Future research is required in a range of areas to build upon these directions:

 A model framework law for community data rights that outlines nested and overlapping sovereignties, including jurisdictional, indigenous, etc.

 Exploration of an equity-centered resource/benefit allocation regime for AI technologies based on community data rights and of a FRAND regime for essential AI building blocks for future innovation.

 Implications of digital trade agreements on resource governance regimes for data.

 Data market regulation to recognize social relationality and collective autonomy implicated in data transactions.

 Parameters of ‘relevant data communities’ and resolution of context-specific ambiguities of the notion.

 Application of community data claims in different categories of data resources.

 Issues of trusteeship for effective data stewardship models.

 Prior informed consent at the individual and collective level in aggregate, anonymized nonpersonal data resources.

Area 3. Data infrastructure capabilities for the Global South

Without endogenous capacities to process data and generate digital intelligence and thereby move into the high value segments of data value chains, most developing countries can only realize the “first-order benefits” of accessing global digital trade markets (UNCTAD, 2019). Investments in domestic digital and data infrastructure are hence vital to bridge the “digital capability gap” between domestic firms (in digital and other sectors) and transnational corporations, and to leverage the “second-order benefits” of productivity, wealth and well-being that the data revolution brings (UNIDO, 2020; UNCTAD, 2019). Official Development Assistance (ODA) has an important role to play in bridging this gap. But as current studies of the nexus between ODA, digital economies and sustainable development suggest, not enough attention has been paid to the potential downsides of ODA projects in the digital sector: harmful concentration and monopoly, rising inequality, or state and corporate use of digital technologies to control rather than empower citizens (Bennett, 2019). As a response to this deficit in global development cooperation, the UNCTAD has been advocating for stronger South-South cooperation in digital industrialization: development of public broadband and connectivity programs, investment in cloud infrastructure, and creation of regional level single digital markets that can contribute to the strategic integration of non-personal data flows for development of regional AI capacity (Banga & Kozul-Wright, 2018).

South-South cooperation is no simple mantra for the realization of inclusive and equitable growth. Policy choices must catalyze alternative platform business models, nudging data value chains towards a fairer and equitable distribution of data value across the economy (Gurumurthy et al., 2019). National data and AI strategies could support plural imaginaries of platform ecosystems that socialize data value

It is increasingly evident that the development of data public goods – including open digital/data ecosystems – is critical, especially to promote domestic innovation. At the same time, there is a very real risk that without clear access and use guidelines and licensing conditionalities for innovators, powerful transnational digital corporations may appropriate the value of such public goods (Walker, 2019; IT for Change, 2020). Also, a superficial extension of open access regimes for information and knowledge resources and software public goods to the data domain is not appropriate, with the latter needing institutional governance frameworks to ensure both safeguards and enabling conditions.

Learning labs that promote collaborative South-South research can bring significant, evidence based perspectives to understand national digital infrastructure policy pathways. Research is needed to explore the following issues:

 Global overview of standards development (including platform and data interoperability) and access-and-use regimes for public/national open/shared data infrastructures.

 Risk assessment and impact studies of ODA in national digital infrastructures.

 Development implications of regional single digital markets.

 Predisposing factors enabling virtuous cycles between intelligence infrastructures and economic development.

 Case studies of digital/data public goods initiatives (in health, agriculture, mobility, and transportation) to evolve progressive visions for national intelligence infrastructure development.

Table 1. A policy research agenda for unskewing data value chains: Indicative thematics

Table

Description automatically generated

#### Mergers thump---MSU is blue.

Buthelezi & Hodgeet ’21 [Thembalethu, James; Principal Economist at the Economic Research Bureau of the Competition Commission of South Africa.Chief Economist at the Economic Research Bureau of the Competition Commission of South Africa.; “Competition and Consumer Protection Policies”; The United Nations; <https://unctad.org/system/files/official-document/ditccplp2021d2_en_0.pdf>; AS]

Conglomeration is a clear trend in digital markets, with larger digital platforms rapidly moving into adjacent markets, including producing or providing the products sold on their platforms. This is in stark contrast with the most recent trend of the industrial age, which is to focus on core competencies and abandon conglomeration which was often punished by investors. Various factors are driving this trend. One is the economies of scope associated with data gathered or consumers accessing those platforms, which can then be monetized in various ways. Rather than exchanging this data, firms have sought to exploit it themselves. Amazon’s move from online retailing of books to all other products, including its own brands, is a classic case. A second is the enormous resources at their disposal. For example, Amazon invested early in data centres to support the development of its e-commerce activities but then later decided to enter the market for cloud services (through Amazon Web services).44 The third way that inclusion 44 Bourreau M and de Streel A. (2019). Digital Conglomerates and EU Competition Policy. CRIDS Namur Digital Institute. can be undermined is that the control of consumer access enables platforms to displace those that depend on it. Amazon and Google shopping are examples for commercial goods, but Facebook and Apple do the same with apps.45 Finally, the observation of global trends indicate that digital conglomerates are much more likely to acquire start-ups than be challenged by them.46 Conglomeration is not only a global platform phenomenon. The same economic forces can support local conglomeration. South Africa has its own Internet giant, Naspers, which built its position through acquiring shares in Chinese social networking and gaming firm Tencent early on. Naspers has been building its local e-commerce and digital online platforms, in part through a series of acquisitions. It has also been expanding the product range of such platforms. Furthermore, the gradual expansion of the highly successful South African healthcare insurer Discovery into life insurance, short-term insurance and now banking is a more “old economy” example of how such data and consumer access can be leveraged into adjacent markets.

Conglomeration by global and local digital market firms has the potential to negatively impact inclusion, even if there is sufficient competition among these larger players to maintain price and non-price market outcomes at competitive levels. This is particularly concerning in the South African context, where market concentration levels are already high, and the likely impact of increased conglomeration are heightened barriers to entry for potential entrants since the large digital platforms become “gatekeepers” to access markets.

Therefore, from a competition policy perspective, more needs to be done to ensure that digital markets are also open to domestic start-ups and challengers, and that global firms share in the rewards that they derive from developing markets. Locally, additional tools will be required to address the threat of conglomeration. For example, merger control needs to be revisited not only for killer acquisitions, which have attracted most attention, but also to combat increased conglomeration through merger creep. Such acquisitions do not necessarily kill a potential competitor, but rather gives the conglomerate platform a foothold in an adjacent market that can be leveraged later.47

Merger control also needs to be alert to the removal of a potential entrant of another sort. In a developing country context, there is also a tendency for global platforms to acquire the largest local home-grown platform rather than enter themselves. Such mergers deny consumers the benefit of additional competition and a potentially less concentrated market in the future. In addition, taking a tougher stance on conglomerate strategies, such as self-preferencing, exclusive and most favoured nation agreements, may also be appropriate. In its draft buyer-power enforcement guidelines48 the CCSA has already highlighted that behaviour such as self-preferencing would be considered as unfair trading practice by dominant online platforms that bring together thirdparty suppliers and consumers, such as e-commerce platforms.

# 1NR

## Ov

### Turns case

#### Bedoya confirmation key to rulemaking

Conley et al 1/19 Wiley Rein LLP: Stephen Conley, Duane Pozza, and Kathleen Scott. “‘An Avalanche of Rulemakings’ – The FTC Gears Up for an Active 2022.” January 19, 2022. <https://www.jdsupra.com/legalnews/an-avalanche-of-rulemakings-the-ftc-1324181/> {DK}

Much of the FTC’s Expansive Rulemaking Agenda Likely Hinges on Confirmation of a Fifth Commissioner

President Biden originally nominated Alvaro Bedoya on September 13, 2021 to fill the FTC Commissioner seat vacated by former Commissioner Rohit Chopra upon his confirmation as Director of the Consumer Financial Protection Bureau on September 30. Bedoya is the founding director of the Center on Privacy & Technology at Georgetown Law and previously served as the first Chief Counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. He faced opposition from Republican senators on the U.S. Senate Committee on Commerce, Science, & Transportation (Committee) during his November 17, 2021 confirmation hearing, but President Biden renominated him to the FTC Commissioner spot on January 4, 2022. He appears likely to be the swing vote on many of these proposed rulemaking initiatives – not just whether they will go forward, but also their scope and ambition if they do so.

### ! A/Os – Bees

#### Bees are dying off---extinction

Gomez 18 – Jacy Gomez, Associate at Keybridge Communications, Contributor at U.S. News & World Report, Contributor to the Washington Examiner's Beltway Confidential Blog, Communications Specialist and Former Congressional Staffer for U.S. Sen. Chuck Grassley, “Bees are Critical to our Survival”, The Gazette, 2-1-2018, http://www.thegazette.com/subject/opinion/guest-columnist/bees-are-critical-to-our-survival-20180201

An attack on these important insects is exceedingly problematic. Wild bees are critical to safeguarding U.S. food supplies and growing our economy. Such utter disregard for bees — whether domestic or wild — puts the species one step closer to extinction.

Wild bee populations have dramatically declined in recent years. At least 37 percent of bee species are declining, according a 2015 United Nations report. Worse still, roughly 9 percent of bee species are facing extinction.

Within the past two decades, some bee populations declined by more than 90 percent.

There are several reasons. Take pesticides. More than 1 billion pounds of pesticides are used in the United States each year. Worldwide, that number is 5.6 billion pounds.

Pesticides can be poisonous to bees. In Oregon, for example, at least 50,000 bumblebees died suddenly after their tree habitat was sprayed with a neonic dinoteguran to control aphids.

Loss of habitat also is a major threat. Here in the United States, we lose about 6,000 acres of habitat per day thanks to land development projects, ethanol production and farm crops. The lack of available habitat makes it nearly impossible for bees and other pollinators to survive.

Climate change is another reason. As Defenders of Wildlife explains, “Shifting temperature and precipitation patterns (alter) the distribution of plants and their flowering times.” This makes it difficult for bees to receive proper nourishment.

Regardless of the cause of their demise, diminishing bee populations are a major threat to human survival.

For starters, bees are critical to safeguarding the global food supply. By transporting pollen between flowers and crops, bees are responsible for producing many important crops that humans enjoy daily. In the United States, bees pollinate more than 90 commercial crops. These crops include nuts, fruits and vegetables.

The same is true worldwide. In fact, the United Nations’ Food and Agriculture Organization reports that roughly 90 percent of the global food supply originates from 100 crop species. Of those species, more than 71 percent rely on bees for pollination.

You can thank bees for one of every three bites of food you eat in your lifetime. According to a June 2014 White House report, bees contribute more than $15 billion to our economy through their role as pollinators.

California’s almond industry, almost exclusively pollinated by honeybees, was valued at roughly $533 billion in 2015.

It may seem counterintuitive to care about bugs, but bees are a critical part of human survival.

### ! A/Os – Topsoil

#### Topsoil is depleting---extinction

Shah 18 – Vaidehi Shah, Media Advisor at Climate Media Centre at the University of Warwick, Associate Editor at Eco-Business, Master’s in Gender and International Development from the University of Warwick, BSci in Geography from the University of Singapore, Former Policy Executive at the National Climate Change Secretariat, “Our Dying Soils: The Invisible Crisis Under Our Feet”, Eco-Business Special Report, 3-19-2018, http://www.eco-business.com/news/our-dying-soils-the-invisible-crisis-under-our-feet/

The world relies on healthy soils for food, water, and a liveable climate. But soils are rapidly losing the ability to support life thanks to unsustainable development and industrial agriculture. Is enough being done to address this crisis?

Ana Maria dos Santos Suares, a farmer in Timor Leste’s Ermera municipality, has much more free time on her hands now than she did a few years ago. Where she once spent day after day weeding in her maize fields, she now only needs to do so once in a planting season.

“We use the remaining time to plant other crops such as potato and taro, cook, feed the pigs, look after the children, and rest,” says Suares in a documentary by the Food and Agricultural Organization of the United Nations (FAO).

This change is thanks to a project FAO has been conducting in districts across Timor Leste since 2013 to promote an alternative farming method to burning the land, ploughing it, and weeding it regularly.

Instead of this traditional practice, FAO encourages three strategies: First, minimising soil disturbance by inserting seeds directly into the soil; second, covering the soil with a layer of crop residue, or mulch—this is what prevents weed growth—and third, planting a variety of crops on the soil.

Suares, who is one of several farmers involved in the FAO project, says that switching to these practices has improved the quality of maize on her farm. And because the mulch retains water for several weeks, she still gets a good yield even if there is a long drought, or seeds are planted late in the season.

She offers an analogy for the difference between traditional practices and the ones FAO advocates: “Just like humans will burn in the sun without clothes, the ground needs to be covered with mulch.”

Suares adds: “If we do not keep the soil fertile, then over time our children will have problems. They will not have enough food, and will suffer.”

An invisible crisis

This is a reality that FAO knows all too well, and is at the heart of its work to preserve and restore the health of the world’s soils.

The UN agency estimates that a quarter of the Earth’s surface—land that could feed 1.5 billion people—has already become degraded, and a further 24 billion tonnes of fertile topsoil are lost to erosion, deforestation, and unsustainable farming practices every year.

This boils down to one disturbing prediction: The world could have as little as 60 years of harvests left, a scenario that would have knock-on effects on global food security—as well as geopolitics and security—and affect the crucial role soil plays in regulating the global climate and maintaining biodiversity.

So what is a healthy soil? It is a complex measurement that involves assessing physical, biological, and chemical properties. According to FAO, the most relevant qualities are “nutrient availability, workability—that is, the readiness of the soil to be tilled and cultivated, contingent on factors such as water content and structural sability—oxygen availability to roots, nutrient retention capacity, toxicity, salinity and rooting conditions”.

Problems with soil health also take various forms ranging from nutrient loss, erosion, acidification, and contamination by pollutants and toxic chemicals, to name a few. Often, these go hand in hand; for example, when soil erosion takes place, the most fertile layer—topsoil—is the first to be lost, thereby reducing the nutrient content of the soil.

As David Montgomery, professor of earth and space sciences at the University of Washington, intones: “Soil health is like human health; it is hard to define, but you sure know when you don’t have it.”

Definitions may be elusive, but experts agree on two things: first, that intense, large-scale industrial agriculture has been a key driver of soil degradation in recent decades; and second, the world isn’t paying nearly enough attention to this looming crisis.

Yuji Niino, technical officer, FAO, explains: “We recognise that soil degradation is due to the loss of organic carbon.” Essentially, this is the sum of biologically diverse organisms found in the soil including microbes, fungi, invertebrates such as worms, slugs and insects, root matter, and decomposing vegetation.

Soil carbon is widely considered to be the most important component of soil because it is the main source of micro-organisms that live in the soil, determines the availability of nutrients for plant growth, and even affects how resistant soil is to erosion.

In the past, traditional farming methods would return organic carbon to the soil after each harvest by applying manure or crop residue, says FAO’s Niino.

“But modern, mechanised, industrialised farming has eliminated this,” he notes. Today, a major portion of crop residues is usually used for other purposes such as making biofuels and animal feed.

“Three to four decades of not returning this organic matter to the soil has almost completely depleted the soil organic carbon in some regions in Africa and South Asia as well as tropical semi-arid regions with intensive farming practices,” says Niino.

The consequences of soil degradation are severe, and range from exacerbating global hunger to causing biodiversity loss, and contributing to climate change when soil carbon is released into the atmosphere.

A 2015 report by Economics of Land Degradation, a global initiative, estimates that land degradation costs the global economy between US$6.3 trillion and 10.6 trillion annually.

Given the severity of soil degradation and its impacts, and the rapidly depleting lifespan of the world’s soils, Niino observes that the issue “has been ignored for a long time”. There was virtually no international focus on the issue until 2002, when the United Nations declared December 5 as World Soil Day.

More than a decade later, 2015 was designated as the International Year of Soils.

Niino explains that a lack of global attention to the issue of soil degradation is likely because it is a slow-onset and relatively invisible crisis. There have been decades of heated debate about water scarcity because of falling water levels, drying lakes and riverbeds, and dying vegetation are instant and noticeable symptoms of the problem, notes Niino.

“In contrast, farmers and everyone else cannot see the immediate impact of land degradation and soil productivity losses,” he says. “They may notice declining yields if they compare to the past decade or two, but it’s not an immediate impact they can see.”

Soil health is like human health; it is hard to define, but you sure know when you don’t have it.

David Montgomery, professor of earth and space sciences, University of Washington

Asia’s soil future

Niino notes that soil degradation is especially severe in South Asia and Southeast Asia. Years of mono-cropping staples such as rice and the rise of industrial agriculture—for example, a shift from traditional crops such as rain-fed paddy to cash crops such as palm oil, sugarcane, and cassava— in Southeast Asia have exacerbated soil degradation in the region.

Demographic and economic pressures such as urbanisation, population growth, and economic development have also led to land use change and put further pressure on Asia’s soil resources, says Niino. To promote sustainable soil management practies, FAO published a set of voluntary guidelines in 2017, which recommend best practices from both a technical and policy perspective.

A global map of the constraints placed on soil health. Image: FAO

In a 2015 report on the State of the World’s Soul Resources, FAO notes that Asia has the highest percentage of human-caused land degradation of any region globally. Deforestation has been a key cause of this, followed by agriculture and overgrazing.

Currently, FAO says that for most criteria such as erosion, contamination, acidification and nutrient imbalance, the quality of soil is broadly poor and deteriorating. For soil carbon content, the status is classified as poor but variable.

A better way

To address the soil degradation crisis in Asia and globally, FAO has been working with governments and communities to manage soil more sustainably.

A key solution FAO has promoted is conservation agriculture, which entails the three principles the UN agency is promoting in Timor Leste and other project areas: no tillage—that is, disturbing or ploughing the soil—keeping the soil covered with crop residue or plants at all times, and growing a variety of crops on a rotational basis rather than constant cultivation of a single crop.

### ! A/Os – ABR

#### Industrial ag causes antibiotic resistant pandemics---extinction

Pamlin 15 – Dennis Pamlin, Entrepreneur and Founder of 21st Century Frontiers, Senior Associate at Chinese Academy of Social Sciences, Visiting Research Fellow at the Research Center of Journalism and Social Development at Renmin University, Advisor to Centre for Sustainable Development at Confederation of Indian Industries, Stuart Armstrong, DPhil from Oxford University, James Martin Research Fellow at the Future of Humanity Institute at Oxford University, “Global Challenges, 12 Risks That Threaten Human Civilization: The Case for a New Risk Category”, Global Challenges Foundation, February, https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

3.1.4.1 Expected impact disaggregation

3.1.4.2 Probability

Influenza subtypes266

Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261

These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic.

Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267

There are other grounds for suspecting that such a high impact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme.

Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275

Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade).

Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics).

Five important factors in estimating the probabilities and impacts of the challenge:

1. What the true probability distribution for pandemics is, especially at the tail.

2. The capacity of modern international health systems to deal with an extreme pandemic.

3. How fast medical research can proceed in an emergency.

4. How mobility of goods and people, as well as population density, will affect pandemic transmission.

5. Whether humans can develop novel and effective anti-pandemic solutions.

1. Extensive medical research will be key to preventing and combatting large scale pandemics. The drawbacks are the possibility of accidental release of dangerous pathogens from laboratories and of bioterrorism.

2. As so much is known about pandemic risks compared with other risks, there are more possibilities for specific prepandemic contingency plans.

3. The effectiveness of healthcare systems will be important, especially in less developed nations where the pandemic may overwhelm the system, and then transmit from there to other nations.

4. Global coordination in detection, analysis and treatment are vital for stopping a pandemic in its early stages, and for implementing measures such as quarantines and more advanced countermeasures.

5. Poverty will affect the quality of national healthcare systems, population density and sanitation quality, the movement of local goods and people, and the effectiveness of the political response.

6. Bioterrorists may unleash a pathogen held in storage, such as smallpox.

7. Laboratory security at the top labs is insufficient for the danger at hand, and accidental release is a nonnegligible possibility.

8. Pandemics are one of the risks where there is a possibility for a very large number of direct casualties, depending on the severity of the pathogen.

9. Mass casualties and finger-pointing could destabilise the world political and economic systems.

10. If the pathogen is transmissible to farm animals, this could affect the world food supply.

11. It is unlikely the pathogen would be a recurrent, long-term risk, but variants of it could continue to affect people and animals for many years, dependent on its transmissibility and life cycle.

12. Small pandemic scares could improve global coordination on the issue.

13. Increased population density causes increased transmissibility of the pathogen, especially in urban slums.

14. Some pathogens, such as bird flu, depend on regular contact between humans and “reservoir species” in order to evolve into periodically dangerous strains.

15. If antibiotic resistance develops, humanity could see the resurgence of bacteria-based pandemics.

16. The increased movement of people and products increases the speed and spread of pandemic transmission.

17. Sanitation or its lack will strongly affect the spread of certain pathogens in key areas.

18. The efficiency of global reaction to a new pandemic will be strongly determined by the speed of research on the pathogen during the pandemic.

19. A great risk will arise if a pathogen combines the different dangerous features of current viruses or bacteria.

20. The improvements to surveillance and sensing technologies (including indirect detection via web queries or social media) open the possibility of smarter interventions (such as microquarantines) and faster understanding of the pathogen’s transmissibility.

21. Post-pandemic politics will be important for preventing a civilisation collapse or enabling reconstruction.

22. Many pathogens incubate in species close to humans, before leaping the species barrier.

23. Monoculture food systems make it easier to transmit any pathogen infecting human food animals.

24. The mode of transmission of the pathogen will be critical to its ultimate reach and impact.

25. Various countermeasures are available in terms of detection, virus analysis, treatment, and quarantining. Future research, technological and political developments may open up new methods of fighting the pathogen.

26. Many of the current factors determining pathogen transmission are unprecedented, such as movements of goods and people, the quality of healthcare systems, and the existence of a centralised political response. This means that data from past pandemics will not be as reliable for computing probability distributions.

27. The pandemic risk lies in the “tails” – the extreme events – and these tails must be estimated from few data points, making them tricky and uncertain.

3.1 Current risks during 2013

3.1.4.3 Main events

10-Jun-13: Pandemic Influenza Risk Management: WHO Interim Guidance 278 – Policy

This is an updated document that replaces the 2009 Pandemic Influenza Preparedness and Response: a WHO guidance document.279 It updates its recommendations based on lessons from the influenza A(H1N1) 2009 pandemic (swine flu),280 the adoption by the Sixty-fourth World Health Assembly of the Pandemic Influenza Preparedness Framework281 (for the sharing of influenza viruses and access to vaccines and other benefits), and the States Parties’ obligations on capacity strengthening contained in the International Health Regulations of 2005.282

Of significance was the Report of the Review Committee on the Functioning of the International Health Regulations (2005) on the A(H1N1) 2009 pandemic,283 which concluded: “We were lucky this time, but as the report concludes, the world is ill-prepared to respond to a severe influenza pandemic or to any similarly global, sustained and threatening public-health emergency.” This is reinforced by the fact that the 2009 pandemic is alleged to have infected 24% of the population.284

The main lesson the WHO drew from that epidemic was that member states generally had communication issues (between ministries of health and decision,makers, and with the public), and were prepared for a pandemic of high severity and appeared unable to adapt their national and subnational responses adequately to a more moderate event.

The guidance paper indicates simultaneously the weaknesses of pandemic preparations, the improvements in these preparations, and the continued role of the WHO as global directing and coordinating authority.

24-Jul-13: Bacteria become resistant to some of the last remaining antibiotics 285 – Event

Bacterial infections, such as the Black Death, 286 syphilis, 287 and tuberculosis, 288 have been responsible for millions of deaths, over the thousands of years they have co-existed with humanity. Though these diseases have not been eradicated – overall, a third of the world is currently infected with the tuberculosis bacillus289 – they have been controlled since the introduction of antibiotics, and prognostics have improved tremendously. But recently a rising number of bacteria have developed antibiotic resistance, due mainly to antibiotic over-prescription290 and use in livestock feed.291 This Nature report highlights the worrying way in which Enterobacteriaceae (bacteria with a 50% mortality rate) have become resistant to carbapenems, one of the last remaining antibiotics that had been effective against them.

## 2AC 1

### A2: “Card’s about Garland”

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

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.

#### DOJ fails

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.

## 2AC 2 - UQ

### 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.

#### It’s likely – BUT needs every Dem

DiMolfetta 1-31-22 (David DiMolfetta, Tech Policy Reporter, S&P Global Market Intelligence; **internally quoting Aurelien Portuese, director of antitrust and competition policy at the Information Technology and Innovation Foundation**; “Contentious FCC, FTC nominees face Senate Commerce Committee vote,” S&P Global Market Intelligence, 1-31-2022, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/contentious-fcc-ftc-nominees-face-senate-commerce-committee-vote-68598408)

Two critical nominations for President Joe Biden's tech and telecom agenda will stand for a vote this week that will determine the likelihood of their confirmation.

Gigi Sohn and Alvaro Bedoya, selected by the White House as commissioners to the Federal Communications Commission and Federal Trade Commission, respectively, will face their nomination votes in the Senate Commerce Committee on Feb. 2.

If advanced to a full Senate vote, the nominees will be one step away from giving their respective agencies Democratic majorities. Both the FCC and FTC are locked in a 2-2 partisan split. The FCC, in particular, has been down one commissioner for over a year.

"We are now a year into the Biden Administration and the FCC has important work to do on broadband, public safety, and restoring the agency's oversight of our communications networks," Public Knowledge Government Affairs Director Greg Guice said in an email to S&P Global Market Intelligence. Guice added that Sohn's "expertise and experience" would greatly benefit the FCC as it tackles those issues.

From 2001 to 2013, Sohn served as the co-founder and CEO of Public Knowledge, a communications and intellectual property policy advocacy organization.

Sohn faces a difficult path to confirmation. Senators from both sides of the aisle have expressed pushback on confirming the progressive net neutrality advocate who served as an adviser to former FCC Chairman Tom Wheeler.

Moderate Democratic Senator Kyrsten Sinema of Arizona will be a major determinant in Sohn's path to the commissioner post. Sinema, who has tended to side with GOP colleagues on FCC matters, has criticized Sohn's pro-net neutrality views. Sinema's office did not respond to a request for comment by the time of publication.

Republicans have also questioned Sohn's tweets criticizing FOX News Channel (US). Sohn argued that her opinions as a public interest advocate will not have bearing on her policymaking decisions.

Sen. Roger Wicker, R-Miss., the Commerce Committee's chief Republican member, has called out Sohn for her involvement in now-defunct TV streaming service Locast, where Sohn served as a board member. Locast was found by a court to be illegally streaming broadcasts without permission or compensation.

In an effort to offset bias concerns, Sohn late last week wrote a letter to the FCC saying she would recuse herself from any commission items relating to retransmission consent and TV broadcast copyright for the first four years of her tenure, assuming successful confirmation to the vacant seat.

As for Bedoya, he testified last year before the Commerce Committee, touting his past consumer privacy advocacy efforts and his support for oversight of facial recognition technologies. His post-testimony approval vote in the Commerce Committee was met on party lines, and the Senate decided to not take up his confirmation vote. At the start of 2022, his nomination, as well as Sohn's, was re-upped.

Aurelien Portuese, director of antitrust and competition policy at the Information Technology and Innovation Foundation, told Market Intelligence that Bedoya's confirmation is likely. Portuese, however, has concerns about how Bedoya would change the agency's approach to consumer protection and antitrust enforcement.

"With Alvaro's possible confirmation as FTC Commissioner, the blurred lines between consumer protection and antitrust are likely to marginalize, if not undermine, the rule of reason inherent to antitrust rules at the expense of efficiency considerations raised by companies, and ultimately at the expense of consumer welfare," Portuese wrote in an email.

#### Currently, pressure on swing Senators tilts in favor of confirmation – 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.

### AT: No Confirmation – Committee Will Deadlock Again

#### The Commerce Committee vote is irrelevant – they ARE expected to end up in another 14-14 tie like in December – BUT this time, he’ll get a floor vote using a discharge petition – that floor vote is all that matters

ACA 2-1-22 (ACA International, The Association of Credit and Collection Professionals, “FCC and FTC Nominations Delayed,” 2-1-2022, https://www.acainternational.org/news/take-two-on-fcc-and-ftc-nominations/)

The Senate Commerce Committee, led by U.S. Sen. Maria Cantwell, D-Wash., was also slated to consider the nomination of Alvaro Bedoya to serve on the Federal Trade Commission during the Feb. 2 hearing. Bedoya was nominated in place of Rohit Chopra after he started his term as director of the Consumer Financial Protection Bureau.

The committee did vote on his nomination in December, but along party lines, according to Politico.

“The committee deadlocked along partisan lines when it voted on him in December, with every Republican siding against,” according to the article. “He could still advance to the floor with unified Democratic support, but Democrats would need to find the time for three roll call votes. (In addition to cloture and confirmation votes, Bedoya would need one simply to discharge him from the Senate Commerce Committee—and that adds up to a lot of floor time.)”

## 2AC 3 – Thumpers

### 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.

#### If it’s controversial enough with Senate centrists to trigger our link, then it won’t happen, and everyone knows it due to public Commissioner dissents – if it IS going to happen, then it won’t be controversial OR will have been sufficiently watered down through the process of making it past deadlock to ensure it does NOT link – only plan changes that dynamic by fiating through Republican Commissioners’ objections

Conley et al 1-19-22 (Stephen Conley, Associate at Wiley Rein LLP, former Law Clerk at the FCC, JD George Washington University Law School; Duane Pozza, Partner at Wiley Rein LLP, former FTC Assistant Director of the Bureau of Consumer Protection, JD Stanford Law School; Kathleen Scott, Partner at Wiley Rein LLP, JD American University Washington College of Law; “’An Avalanche of Rulemakings’ – The FTC Gears Up for an Active 2022,” Privacy In Focus, JD Supra, 1-19-2022, https://www.jdsupra.com/legalnews/an-avalanche-of-rulemakings-the-ftc-1324181/)

FTC Commissioner Christine Wilson dissented from the Annual Regulatory Plan, arguing that it “extends far beyond” the agency’s routine review of existing rules and that many of the existing rules “should be abolished in any event.”[6] She further characterized the Annual Regulatory Plan as ushering in “an avalanche of rulemakings” and rejected Chair Khan’s depiction of the economy as being “hyper-concentrated.”[7] Indeed, in a subsequent statement made at the agency’s December 16 Open Meeting, Commissioner Wilson referred to the FTC’s 2022 agenda as a “Rule-a-Palooza.”[8] Commissioner Wilson’s dissent signals likely uniform Republican Commissioner opposition to most of the agency’s planned rulemakings, leaving the body in a 2-2 Democrat-Republican split on many of the proposals. That said, proposals like the Safeguards Rule SNPRM have drawn some bipartisan support and may point to some additional rulemaking even without a fifth Commissioner.

Much of the FTC’s Expansive Rulemaking Agenda Likely Hinges on Confirmation of a Fifth Commissioner

President Biden originally nominated Alvaro Bedoya on September 13, 2021 to fill the FTC Commissioner seat vacated by former Commissioner Rohit Chopra upon his confirmation as Director of the Consumer Financial Protection Bureau on September 30. Bedoya is the founding director of the Center on Privacy & Technology at Georgetown Law and previously served as the first Chief Counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. He faced opposition from Republican senators on the U.S. Senate Committee on Commerce, Science, & Transportation (Committee) during his November 17, 2021 confirmation hearing, but President Biden renominated him to the FTC Commissioner spot on January 4, 2022. He appears likely to be the swing vote on many of these proposed rulemaking initiatives – not just whether they will go forward, but also their scope and ambition if they do so.

### AT: Thumper – Khan / Overreach Inevitable

#### Deadlock stalled all controversial agenda items – can’t move without Bedoya

Davis 1-28-22 (Wendy Davis, Senior Writer at MediaPost, “Senate Committee To Vote Wednesday On FTC, FCC Nominees,” MediaPost, 1-28-2022, https://www.mediapost.com/publications/article/370721/senate-committee-to-vote-wednesday-on-ftc-fcc-nom.html)

The Senate Commerce Committee has scheduled a vote for Wednesday on whether to approve the nominations of Gigi Sohn to the Federal Communications Commission and Alvaro Bedoya to the Federal Trade Commission.

President Biden nominated Sohn and Bedoya last year, but the Senate didn't confirm either before the session ended, leaving both the FTC and FCC deadlocked with two Republicans and two Democrats. Until a fifth, tie-breaking commissioner joins both agencies, they're not likely to advance the more controversial items on their leaders' agendas -- including FCC Chair Jessica Rosenworcel's plan to restore the Obama-era net neutrality rules.

#### AND, everyone knows it – perception’s that the entire agenda is now in doubt

Bordelon 2-1-22 (Brendan Bordelon, tech policy reporter, Morning Tech author at Politico, MA International Science and Tech Policy, George Washington University, “House girds for battle on China competition bill- POLITICO | #socialmedia,” National Cybersecurity News Today, 2-1-2022, https://nationalcybersecuritynews.today/house-girds-for-battle-on-china-competition-bill-politico-socialmedia/)

TAKE 2 FOR BEDOYA AT FTC: With Democrats and their allies increasingly anxious over the ongoing failure to secure an FTC majority, on Wednesday the Senate Commerce Committee will vote — again — on privacy advocate Alvaro Bedoya’s nomination to serve as the third Democrat on the Federal Trade Commission.

The do-over comes after the committee split 14-14 on Bedoya’s nomination in December, with every Republican senator voting against the Georgetown Law School professor’s nomination. Several Republicans, including ranking member Sen. Roger Wicker (R-MS), took umbrage at Bedoya’s “divisive” social media presence.

The deadlock would’ve required Sen. Majority Leader Chuck Schumer to expend valuable floor time on a discharge petition to force a floor vote on Bedoya. But Bedoya’s nomination expired before that could take place. Biden renominated Bedoya on Jan. 4, along with Gigi Sohn (her nomination to serve as Democratic commissioner at the Federal Communications Commission will receive its first vote on Wednesday).

— Delays on delays: There’s little indication that Wednesday’s vote will be much different for Bedoya than the one in December. With the Senate already staring down a packed calendar, the prospect of a significant delay on Bedoya’s nomination throws into doubt the ambitious plans rumored to be brewing under FTC Chair Lina Khan’s leadership. In addition to serving as a crucial third Democratic vote, Bedoya — a privacy expert — will likely play a key role in any eventual privacy rulemakings at the FTC.

## 2AC 4 – More UQ

#### Perception’s that Khan’s all bark BUT no bite YET – only plan changes perceptions

Gold 12-20-21 (Ashley Gold, tech and policy reporter at Axios, “Six months with Lina Khan's FTC,” Axios, 12-20-2021, https://www.axios.com/lina-khan-ftc-six-months-4a5c4ba6-cef1-4a1f-b1dc-a528b2b41471.html)

Why it matters: As Biden's first year ends, many are watching Khan's FTC to see whether it really can fundamentally change how the U.S. regulates big companies and how tech should treat consumers.

Entering the role, the 32-year-old, known for her scholarship in antitrust and competition policy, targeted what she sees as monopolistic behavior in Big Tech and beyond. Under her, the agency re-filed its case accusing Facebook of buying up competitors to maintain dominance.

It sued to block a $40 billion semiconductor chip merger between Nvidia and Arm, arguing it would stifle competing next-generation technologies.

It launched an investigative study into supply change disruptions, targeting retailers like Walmart and Amazon.

It reached a settlement agreement with an ad platform that allegedly violated the Children's Online Privacy Act.

The big picture: Khan's tenure so far has seen more table-setting for future actions than major high-profile antitrust cases.

Those who want to see Big Tech taken to task hope to see Khan bring major cases that would spin off prior acquisitions and block proposed mergers. And the clock is ticking.

"We are really feeling a sense of urgency and are hopeful [Khan] will be doing as much as possible as quickly as possible because of the potential threat of a hostile Republican Congress," Alex Harman, competition policy advocate at Public Citizen, told Axios.

#### Khan’s aware of the political risks that our ev identifies and is tactically moderating to preserve PC – that’s Salvino – AND…

Brody 10-5 (Ben Brody, senior reporter at Protocol, focusing on tech policy and lobbying, antitrust and privacy, former reporter at Bloomberg News, CNNMoney and AdAge, “The FTC's next privacy move is a dangerous game years in the making,” Protocol, 10-5-2021, https://www.protocol.com/policy/ftc-privacy-rules)

Litigation could tie up any new rules up for years, but from the commission's perspective it may be the lesser evil as compared to drawing ire from Congress. Critics of FTC inaction trace the agency's timidity to the 1980s. At the time, many saw the FTC's attempts to regulate children's advertising as the height of nanny-state overreach, in part thanks to a campaign by advertisers. In response to "kidvid," Congress reined in the agency's regulatory powers — and in the process taught generations of FTC staff to tiptoe around lawmakers.

It's a cycle that's recurred throughout FTC's existence, and Khan, who loves the agency's history, has made clear she's well aware of it.

#### AND, Bedoya confirmation functionally counterplans uniqueness – he’ll be a moderating influence, solving future overreach

Abbott 12-15-21 (Alden Abbott, Senior Research Fellow at the Mercatus Center at George Mason University, former FTC General Counsel, former adjunct professor at Mason’s Antonin Scalia Law School, JD Harvard Law School, MA economics, Georgetown University, “FTC Statement of Regulatory Priorities: Storm Clouds Are Looming,” Truth on the Market, 12-15-2021, <https://truthonthemarket.com/2021/12/15/ftc-statement-of-regulatory-priorities-storm-clouds-are-looming/>)

I have only scratched the surface of the problems raised by the SRP’s novel rule proposals. Fortunately, none of the troublesome rulemakings are yet under way. One may hope that the eventual confirmation of a fifth commissioner will lay the groundwork for a reconsideration of the wisdom of new and overly expansive rulemaking proceedings.

### AT: N/L – T/L

#### 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.

#### 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).

### DOJ Fails

### AT: USDA Solves

#### USDA fails – capture ensures circumvention

OCM 20, Organization for Competitive Markets, 08/24/20, Captured: How Agribusiness Controls Regulatory Agencies and Harms Producers and Consumers, https://competitivemarkets.com/wp-content/uploads/2020/08/Regulatory-Capture-Paper\_Final.pdf

Introduction

When Georgia Governor Sonny Perdue was nominated to be U.S. secretary of agriculture, American family farmers who had believed in President Trump’s promises to “drain the swamp” and protect domestic agriculture felt a surge of disappointment. Secretary Perdue had spent his career in government advocating for and benefiting from the interests of Big Ag. With Perdue at the helm of the U.S. Department of Agriculture (USDA), what checks and balances would exist in the federal government to counteract the consolidation, collusion, and corruption that have become customary in the U.S. agriculture economy?

Thomas Jefferson had foreseen America as a democratic republic of small farmers. Sadly, “we the farmers” now have little or no say in a government that was constituted to represent us. The America that existed as an agrarian utopia of regulated fair-market capitalism in the mind of Jefferson has become a very different America: one where the federal government is neither limited nor limiting, but instead allows corporations to influence policy, aided and abetted by despotic regulators and enforcers motivated by self-interest.

How did the federal government come to support international conglomerates instead of hardworking American farmers? In Congress, the clearest way government supports the interests of the powerful is with the money spent by lobbyists and given to politicians through campaign contributions. In the executive branch, where policy makers are appointed rather than elected, the interests of Big Ag predominate when governmental appointees are “captured” by the industry. Executive branch regulatory capture is the topic of this report.

Secretary Perdue is just one example of regulatory capture, whereby government officials tasked with enforcing laws for all choose to support the private interests of a few. From top to bottom, USDA is rife with petty and personal corruption. An April 2019 investigation described a conversation with a USDA official about the Food Safety and Inspection Service (FSIS). The official noted rather straightforwardly that “large meat producers like Cargill, Tyson, Smithfield, Swift (JBS) and Sanderson Farms are often given a ‘pass’ thanks to their high-paid lobbyists.”1 The anonymous whistleblower further characterized USDA as an old boys club with a revolving door “between the USDA and FSIS, and the captains of the meat industry.” Through repeated gifts of pro-corporate policy making, nonenforcement, and deregulation, the refrain is indisputable: the USDA advocates for special interests and ignores ordinary people for financial reasons.

Free-market capitalism relies on government to create a level playing field that encourages entrepreneurship. However, free-market capitalism and what President Reagan called “the magic of the market” cannot function as intended when government enforcers are captured and special interests tilt the playing field away from working people.

The Organization for Competitive Markets (OCM) advocates for the rights of family farmers, and we support fighters like Connie and Jonathan Buttram who want to make a living free from government and industry coercion. Their stories and those of people like them compel action and inspire hope.

The people at the top of the federal government are not an anonymous mass of bureaucrats; they are individuals like Sonny Perdue, who make decisions that have pernicious consequences for people like Connie and Jonathan Buttram. When OCM, and thousands of other groups and individuals, reach out to our representatives so family farmers like the Buttrams can have a fighting chance, we are merely ignored, time and again.

This report describes how the executive branch of the federal government supports policies contrary to the interests of American family farmers by installing “captured” bureaucrats in positions of power.

Section I – Passing Through the Revolving Door

Brink Lindsey and Steven Teles define regulatory capture as “private industries co-opt[ing] governmental power for their own competitive benefit.”2 A quintessential example is “the revolving door,” wherein decision makers cycle from government positions to the industries they regulate and back again. Along the way, these individuals adopt attitudes and beliefs that benefit their position in that particular private business, which, of course, they will soon rejoin upon completion of their putatively “public” service. This cycle is all the more insidious for the omnipresent promise of higher pay in the private sector. Hence, there is continuing economic pressure through which personal self-interest morphs through a wink and a nod into the self-interest of the private company. In the wake of such lucrative paydays, family farmers cannot compete for the attention of public officials who favor personal wealth over public service.

The USDA is more prone to regulatory capture than many other agencies because “the USDA provides grading, certification and verification services intended to improve agricultural companies’ marketing of a variety of farm products.”3 This makes the agency, and especially certain oversight mechanisms within it, dependent on the industry they work with through user fees and a broader mission to promote the agricultural industry. 4 Similarly, there are a limited number of people with the requisite technical skills necessary to hold high-level regulatory jobs, and one way to get such experience is through private industry. The intertwining of USDA with private industry is to some degree inevitable; nevertheless, this does not excuse the brazen self-dealing we explore in the following sections.

#### Prefer empirics

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.