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### 1NC---OFF

Death Cult K

#### **Invocation of death impacts is an obsession with body counts that culminates in genocidal violence---rejecting it is a gateway issue**

Bjork 93 [Rebecca Bjork, Former College Debater and Former Associate Professor at the University of Utah, Where She Taught Graduate and Undergraduate Courses in Communication and Women in Debate, Reflections on the Ongoing Struggle, Debater's Research Guide 1992-1993: Wake Forest University, Symposium, <http://groups.wfu.edu/debate/MiscSites/DRGArticles/Oudingetal1992Pollution.htm>]

While reflecting on my experiences as a woman in academic debate in preparation for this essay, I realized that I have been involved in debate for more than half of my life.  I debated for four years in high school, for four years in college, and I have been coaching intercollegiate debate for nine years.  Not surprisingly, much of my identity as an individual has been shaped by these experiences in debate.  I am a person who strongly believes that debate empowers people to be committed and involved individuals in the communities in which they live.  I am a person who thrives on the intellectual stimulation involved in teaching and traveling with the brightest students on my campus.  I am a person who looks forward to the opportunities for active engagement of ideas with debaters and coaches from around the country.  I am also, however, a college professor, a "feminist," and a peace activist who is increasingly frustrated and disturbed by some of the practices I see being perpetuated and rewarded in academic debate.  I find that I can no longer separate my involvement in debate from the rest of who I am as an individual. Northwestern I remember listening to a lecture a few years ago given by Tom Goodnight at the University summer debate camp.  Goodnight lamented what he saw as the debate community's participation in, and unthinking perpetuation of what he termed the "death culture." He argued that the embracing of "big impact" arguments--nuclear war, environmental destruction, genocide, famine, and the like-by debaters and coaches signals a morbid and detached fascination with such events, one that views these real human tragedies as part of a "game" in which so-called "objective and neutral" advocates actively seek to find in their research the "impact to outweigh all other impacts"--the round-winning argument that will carry them to their goal of winning tournament X, Y, or Z. He concluded that our "use" of such events in this way is tantamount to a celebration of them; our detached, rational discussions reinforce a detached, rational viewpoint, when emotional and moral outrage may be a more appropriate response.  In the last few years, my academic research has led me to be persuaded by Goodnight's unspoken assumption; language is not merely some transparent tool used to transmit information, but rather is an incredibly powerful medium, the use of which inevitably has real political and material consequences. Given this assumption, I believe that it is important for us to examine the "discourse of debate practice:" that is, the language, discourses, and meanings that we, as a community of debaters and coaches, unthinkingly employ in academic debate.  If it is the case that the language we use has real implications for how we view the world, how we view others, and how we act in the world, then it is imperative that we critically examine our own discourse practices with an eye to how our language does violence to others.  I am shocked and surprised when I hear myself saying things like, "we killed them," or "take no prisoners," or "let's blow them out of the water."  I am tired of the "ideal" debater being defined as one who has mastered the art of verbal assault to the point where accusing opponents of lying, cheating, or being deliberately misleading is a sign of strength. But what I am most tired of is how women debaters are marginalized and rendered voiceless in such a discourse community.  Women who verbally assault their opponents are labeled "bitches" because it is not socially acceptable for women to be verbally aggressive.  Women who get angry and storm out of a room when a disappointing decision is rendered are labeled "hysterical" because, as we all know, women are more emotional then men.  I am tired of hearing comments like, "those 'girls' from school X aren't really interested in debate; they just want to meet men."  We can all point to examples (although only a few) of women who have succeeded at the top levels of debate.  But I find myself wondering how many more women gave up because they were tired of negotiating the mine field of discrimination, sexual harassment, and isolation they found in the debate community. As members of this community, however, we have great freedom to define it in whatever ways we see fit.  After all, what is debate except a collection of shared understandings and explicit or implicit rules for interaction?  What I am calling for is a critical examination of how we, as individual members of this community, characterize our activity, ourselves, and our interactions with others through language.  We must become aware of the ways in which our mostly hidden and unspoken assumptions about what "good" debate is function to exclude not only women, but ethnic minorities from the amazing intellectual opportunities that training in debate provides.  Our nation and indeed, our planet, faces incredibly difficult challenges in the years ahead.  I believe that it is not acceptable anymore for us to go along as we always have, assuming that things will straighten themselves out. If the rioting in Los Angeles taught us anything, it is that complacency breeds resentment and frustration.  We may not be able to change the world, but we can change our own community, and if we fail to do so, we give up the only real power that we have.

### 1NC---OFF

T Scope

#### The scope of antitrust law is exclusively bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The AFF just intensifies the application of antitrust to already covered activities---it does NOT curtail an exemption or immunity

#### Vote NEG---eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity

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T Subsets

#### ‘Antitrust law’ is an exclusively general terms---that excludes subsets

Gerber ’20 [David; October; Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity,” Ch. 1, p. 14-15]

C. A Core Definition

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

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

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

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

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

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

#### Violation---the aff only applies under limited circumstances

#### Voting Issue---explodes the topic to infinite sectoral and case-specific affs the neg can never meaningfully prepare for

### 1NC---OFF

States CP

#### The fifty states and relevant subnational entities should adopt the principle of separating platforms from commerce for platforms in the private sector

#### States can break up Big Tech---litigation is fast, empirically successful, AND better resourced

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/>]

Introduction

Recently the Federal Trade Commission (FTC) and Department of Justice (DoJ) brought antitrust claims against Facebook and Google respectively, but calls to “break up Big Tech” are coming from far more than federal policymakers, and so too are the antitrust claims. Eleven Republican attorneys general joined the DoJ antitrust case against Google and 48 state and district attorneys general filed an antitrust case against Facebook on the same day as the FTC. Additionally, nine other states joined Texas in filing [additional antitrust claims against Google](https://www.reuters.com/article/us-tech-antitrust-google/texas-nine-u-s-states-accuse-google-of-working-with-facebook-to-break-antitrust-law-idUSKBN28Q2RL#:~:text=in%205%20hours-,Texas%2C%20nine%20U.S.%20states%20accuse%20Google%20of%20working,Facebook%20to%20break%20antitrust%20law&text=WASHINGTON%20(Reuters)%20%2D%20Texas%20and,already%2Ddominant%20online%20advertising%20business.) concerning advertising, 38 states, districts, and territories have joined a [case led by Colorado](https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf) claiming Google engages in self-dealing to preserve its dominance in search and search ads, and a [case filed by Epic Games](https://www.nytimes.com/2020/08/13/technology/apple-fortnite-ban.html) alleges that Apple is engaging in anticompetitive behavior with its app store practices. While observers have largely focused on the federal level—both the proposed changes to federal antitrust standards and the results of federal antitrust actions—states and private litigants also have a substantial ability to impact both the technology industry and the trajectory of competition law as a whole.

State Antitrust Investigations and Complaints

In addition to the federal investigations, groups of state attorneys general have investigated potential antitrust violations against Google and Facebook. The states’ investigation into Facebook resulted in a separate complaint from the FTC’s. While some states joined the DoJ complaint against Google, more investigations by state attorneys general are ongoing meaning additional cases from these states are also likely to come later. But we are seeing a proliferation of multi-state litigation separate from the federal actions regarding antitrust claims against tech giants. . While states can provide additional resources for antitrust investigations and have their own interests in consumer protection, the current state-level cases alleging antitrust violations by “Big Tech” do not reveal a strong argument of monopolistic behavior and, like the federal cases, could create more disruption to both competition policy and innovation than benefits to consumers.

This is not the first time the states have been involved in antitrust investigations or calls to break up tech companies. During the 1990s, a group of 20 states, joined the DoJ in the investigation and an antitrust case against Microsoft After just over 3 years of litigation and following the Court of Appeals for the D.C. Circuit overturning a lower court’s ruling against Microsoft, Microsoft and the federal government settled. While this settlement avoided some of the potentially concerning penalties and interference in a competitive market that the courts could have brought, it still had an impact both on Microsoft’s opportunities in certain emerging areas such as mobile and in the overall competitive landscape. Nevertheless, some states felt the settlement was insufficient. Massachusetts led a group of nine states that argued the judge’s agreement of the settlement did not adequately address Microsoft’s monopolization or resolve the anti-competitive behavior related to tying, but they failed to convince the court.

States are once again taking an aggressive view on antitrust in the tech industry, but the divergence in arguments could lead to more confusion and disruption in an industry that has provided consumers with beneficial and free services. Currently, the attorneys general of many states disagree with one another and the federal government regarding the nature of anticompetitive behavior and consumer harm by the tech giants’ actions. As we are starting to see with the new claim led by Texas Attorney General Ken Paxton, this split is likely to result separate cases with different theories of antitrust that seek not to apply current standards but embrace more expansive policy uses of this powerful tool. Often the animus behind these claims is not clear evidence of anti-competitive behavior but a desire to solve other concerns regarding tech policy, such as data privacy or alleged anti-conservative bias. This desire to solve non-competition-related issues could give rise to divergent theories of antitrust action that are incompatible with one another and not based in the traditional elements of consumer welfare and competition policy.

### 1NC---OFF

Statute-Independent Common Law CP

#### Without reference to the laws of the United States, the United States federal government should determine that unseparated platforms and commerce constitutes an unlawful restraint on trade and commerce. The FTC should issue clear guidelines for what threshold of platform separation is anti-competitive and the Supreme Court should announce it will abide by them. The United States Congress should restrict the scope of its core antitrust laws to exclude increasing prohibitions on private unseparated platforms and commerce.

#### The CP creates federally preemptive statute-independent common law with the same effect as the plan.

HLR 20, Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” 133 Harv. L. Rev. 2557, Lexis

None of this is to say that ERISA preemption fails to raise federalism concerns or that the concerns addressed in Part II are unique to anti- trust. In its decision to expressly preempt state law in ERISA, a wise Congress should have considered the difficulties of preemption via judge-made law. Part II’s concerns with preemption via judge-made law could be applied to any delegation to the judiciary that overrides the states’ will. But given the brevity of federal antitrust statutes and the relative lack of executive branch involvement, Congress should be even more wary if it decides to preempt state antitrust law.159 [FOOTNOTE 159 BEGINS] 159 Complaints about brevity and lack of executive branch involvement land an even stronger blow against preemption via statute-independent federal common law. A grant of federal common lawmaking power does not have to be statutory. All that is needed to support the development of federal common law is “some expressed or implied affirmative grant of power to the national government by the Constitution or a statute enacted pursuant to it.” 19 MILLER, supra note 132, § 4514. When courts make law from a constitutional grant, there may not even be a brief statute. See, e.g., Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943) (“When the United States disburses its funds . . . it is exercising a constitutional function or power. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); see also 19 MILLER, supra note 132, § 4515; Volokh, supra note 94, at 1429 (discussing courts’ “statute-independent federal common-lawmaking powers”). Because statute-independent common law is created completely by the courts, preemption via statute- independent common law will preempt the states while also excluding the federal executive branch.

Part II’s critique then undermines statute-independent common law preemption even more than it undermines a preemptive Sherman Act. But Part II proffers only an argument that weighs against preemption; that argument must be balanced against the various pro-preemption critiques of Part I. When it comes to statute-independent common law, the pro-preemption arguments may simply be greater than they are in the antitrust arena. After all, such statute-independent common-lawmaking power exists only “in suits implicating a sufficiently strong interest of the national government.” 19 MILLER, supra note 132, § 4515. And it makes sense that common law grounded in the Constitution has more sway than does common law grounded in statute. Although antitrust law has sometimes been likened to the Constitution or other founding documents, see United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“Antitrust laws . . . are the Magna Carta of free enterprise.”); Thomas B. Nachbar, The Antitrust Constitution, 99 IOWA L. REV. 57, 69 (2013), courts simply give its commands less weight than those of the Constitution. Compare, for example, the (limited) deference given to professionals in the antitrust sphere, see Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 696 (1978) (analyzing agreements by professionals under the rule of reason), to the zero deference given to professionals under the First Amendment, see Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371–72 (2018). Even if statute-independent common law’s complete lack of input from the democratic branches increases the power of the federalism critique, that increase is rebutted by an increase in the power of the pro-preemption arguments. [FOOTNOTE 159 ENDS]

CONCLUSION

There is little doubt that Congress could decide to preempt state antitrust law. However, although the merits of avoiding a patchwork antitrust regime are compelling, Congress would trigger federalism pitfalls if it were to reform antitrust law by expressly preempting state antitrust law. A preempting Congress should weigh any benefits against the complications of federalism’s procedural and political safeguards and of the judiciary’s weak policymaking ability.

Of course, there is reason to believe that if Congress were to expressly preempt state antitrust law, it would do so as part of a more major antitrust reform effort. Recently, federal antitrust policy has been the subject of critique. Fed up with the seeming omnipresence of corporate giants, some scholarly160 and journalistic161 discourse has turned on the federal government’s antitrust policies. As things stand, if Congress decides to preempt state antitrust law with current federal antitrust jurisprudence, it would have to decide that the pros of preemption mentioned in Part I outweigh the federalism cons of Part II. But if Congress were to reform antitrust law by creating a new, detailed antitrust regime for courts to interpret, preemption of state antitrust law could avoid the perils of preemption via judge-made law.

#### Revitalizing non-statutory common law as binding spurs quick climate mitigation---extinction

Mark P. Nevitt & Robert V. Percival 19, Mark P. Nevitt is the George Sharswood Fellow at the University of Pennsylvania Law School and a former active duty Navy Judge Advocate General (JAG) officer who served in the rank of commander; Robert V. Percival is the Robert F. Stanton Professor of Law & Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law, “Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?,” Washington University Law Review, Vol. 96, No. 3, pp 441-494

“Global warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time.’ Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.”

— Chief Justice John Roberts, dissenting in Massachusetts v. EPA (2007)1

“The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”

— Donald J. Trump, Nov. 6, 20122

INTRODUCTION

Prior to the advent of comprehensive regulatory programs to protect the environment, the common law served as the primary vehicle for redressing environmental harm. More than a century ago, states used the common law of interstate nuisance to seek redress for the most serious transboundary pollution problems.3 Exercising its original jurisdiction over disputes between states, the U.S. Supreme Court issued injunctions limiting smelter emissions4 and requiring cities to build sewage treatment plants5 and garbage incinerators.6

Today the common law has been eclipsed by the enactment of federal legislation requiring agencies to regulate sources of pollution. These statutes have been interpreted broadly to give agencies great power to respond to emerging problems. For example, in Massachusetts v. EPA the U.S. Supreme Court held that the Clean Air Act (CAA) gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) emissions if they “endanger public health or welfare”7 by contributing to global warming and climate change.8 The Court rejected not only the claim that EPA lacked such authority, but also the agency’s other rationales for refusing to take action. 9 Following the ruling, EPA had to decide “whether sufficient information exist[ed] to make an endangerment finding.”10 It made the endangerment finding two years later.11

In a series of cases beginning in the 1970s, the Court has held that the comprehensive regulatory programs erected by the Clean Water Act (CWA) and the CAA displace federal common law nuisance claims.12 When states sought to use public nuisance law to address the threats posed by climate change, industry groups urged the Court to bar such actions on constitutional grounds. 13 Instead, in June 2011 the Court held in American Electric Power Co., Inc. v. Connecticut (AEP) that the CAA displaced federal common law nuisance claims in the context of regulating GHG emissions. At the time of the ruling, the Obama Administration EPA was moving aggressively to regulate GHG emissions. But, writing for a unanimous Court, Justice Ginsburg warned that a decision by the EPA not to regulate greenhouse gas emissions would invite litigation and would be subject to judicial review.14

With the election of President Trump, federal environmental policy has sharply shifted. The President has announced his intent to withdraw the U.S. from the Paris Agreement that every other country in the world has accepted as a global response to climate change.15 EPA is moving aggressively to repeal the Obama Administration’s Clean Power Plan, 16 roll back Corporate Average Fuel Economy (CAFE) standards, and attempt to preempt state programs to reduce GHG emissions. 17 Many Trump supporters want EPA to reverse its finding that GHG emissions endanger public health and welfare by contributing to climate change.18

If the Trump EPA reverses the 2009 endangerment finding, this would foreclose the EPA’s ability to use the CAA to regulate GHG emissions. This Article considers whether such an action unwittingly could revive the federal common law of nuisance as a regulatory backstop. While the Supreme Court ruled in AEP that the CAA displaces any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuelfired power plants, this was predicated on EPA actually making a reasoned and informed judgment of GHG emission dangers—not jettisoning agency expertise in favor of politics.19 This litigation, particularly if brought by states as quasi-sovereigns against EPA, could serve as a powerful prod to force federal action on climate change. After all, states have the “last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air.”20

In light of the Trump EPA’s current stance on environmental regulations, the Court’s decision in AEP, and other nuisance cases decided by federal appellate courts, 21 this is a propitious time to reconsider the use of public nuisance law to redress environmental problems. This Article focuses on what we call “the common law of interstate nuisance”—a body of law developed when states, acting in a parens patriae capacity, sought to protect their citizens from environmental harm originating in other states through public nuisance actions under either federal or state common law.22

### 1NC---OFF

Adv CP

#### The United States federal government should require large digital platforms to:

#### integrate non-shareholder members into ownership and management;

#### limit acquisition of intellectual property;

* have the CFIUS block transactions between technology companies and the Chinese government that harm national security;
* enact Bazel III regulations for platforms, including prohibiting them from centralizing essential services and enforcing transparency requirement;
* develop risk mitigation measures, including grid and reactor resilience, moderation of cyber-attack response, and promotion of internet openness; and

#### invest in global digital inclusion.

#### Structural separation fails. Pro-competitive requirements retain integration but diminish

Hovenkamp ’21 [Herbert; June; Law Professor at the University of Pennsylvania; Yale Law Journal, “Antitrust and Platform Monopoly,” vol. 130, no. 8]

One reason divestiture has performed so poorly as an antitrust remedy is that it has been overly focused on the dismantling of assets whose effects on scale or scope are often harmful. We should be paying more attention to remedies that permit firms to perform better rather than worse, but in more competitive environments. One possibility is to transfer firms’ internal decision making to groups of participants that can be subjected to antitrust control under section 1 of the Sherman Act. As markets become more competitive, their aggregate output increases. Another possibility is to administer interconnection rules that serve to increase rather than diminish the positive network effects that are ubiquitous in digital platforms. The first of these might work best in a platform such as Amazon, in which competitive sales of traditional physical products are made on the same platform. The second is more appropriate for platforms such as Google or Facebook, which involve large databases of digitized information.

#### CFIUS stops big tech from colluding with China.

Phillips ’20 [Noah Joshua; December 8; former Commissioner for the Federal Trade Commission and served as Chief Counsel to U.S. Sen. John Cornyn, of Texas, on the Senate Judiciary Committee; The Hudson Institute, “Championing Competition: The Role of National Security in Antitrust Enforcement,” <https://www.ftc.gov/system/files/documents/public_statements/1584378/championing_competition_final_12-8-20_for_posting.pdf>; KP]

National security best left for national security laws, not antitrust ones

So should we use antitrust to pursue national security goals, or forbear in enforcing it because of them? As the U.S. Constitution itself makes clear, there is no responsibility more essential for a government than the protection of its citizens. My humble premise is that, like other non-competition considerations, antitrust is an imperfect tool. And, when it comes to national security, the U.S. government has other tools. We have, for example, separate and distinct systems requiring mergers to be notified to one set of enforcers who monitor antitrust concerns and to another set of government officials responsible for national security review. This is not a bug, but a feature, of our government and economic policies more generally.

The Committee on Foreign Investment in the United Stated (CFIUS) is authorized to review national security implications of certain cross-border transactions.23 Note that CFIUS is not an antitrust tool, but a national security one. And a very effective one at that. Look no further than Broadcom’s recent (unsuccessful) bid for Qualcomm.

Broadcom, the eighth-largest chipmaker in the world, formerly named Avago, is the product of numerous acquisitions, most notably its $37 billion acquisition of California-based Broadcom in 2016.24 Avago was incorporated in Singapore, but the majority of its personnel and facilities were in the United States.25 On November 2, 2017, Broadcom CEO Hock Tan stood in the Oval Office alongside President Trump and announced Broadcom’s plan to redomicile in the United States from Singapore.26 Within days, Broadcom disclosed a hostile bid for Qualcomm.27 Qualcomm requested that CFIUS review the bid, which CFIUS did.28 And, on March 5th, 2018, CFIUS expressed several concerns with the transaction that it believed warranted a full investigation: primarily, that (i) Broadcom would drastically cut Qualcomm’s investment in 5G wireless technology research and development, opening the door to Chinese dominance; and (ii) a potential disruption in supply to critical Department of Defense and other government contracts.29 One week later, after CFIUS had met with Broadcom, the President issued an order blocking the transaction, one of only five such orders ever and the first one in which a transaction was blocked before an agreement was even entered into.30

Even the threat of a CFIUS action can scuttle a deal that is problematic for national security, as it did in 2005, when China National Offshore Oil Company (CNOOC) proposed to acquire Unocal31; or in 2006, when Dubai Ports World considered purchasing the right to operate six major U.S. ports, including terminals in the New York/New Jersey area, Philadelphia, and New Orleans.32

CFIUS is effective and efficient, and Congress—led by my former boss, U.S. Senator John Cornyn—added to the quiver in August 2018 with the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA broadened CFIUS’s jurisdiction to include investment in a U.S. business that “maintains or collects personal data of United States citizens that may be exploited in a manner that threatens national security.”33 In the spring of last year, CFIUS informed the Chinese company Kunlun that its ownership of the popular gay dating app, Grindr, constituted a national security risk, prompting Kunlun to divest the app.34 CFIUS was apparently motivated by concerns that the Chinese government could blackmail individuals with security clearances or use its location data to help unmask intelligence agents.35

The U.S. government has other tools beyond CFIUS to address national security risks in the private sector. On August 6, 2020, President Trump signed an executive order banning China’s TikTok and WeChat services from mobile app stores in the U.S.36 The order relied upon the International Emergency Economic Powers Act and the National Emergencies Act.37 And earlier this year, we all saw the Defense Production Act being put into use on multiple occasions in response to the COVID-19 pandemic.38 The DPA can be used under certain circumstances to allow other-wise illegal coordination by companies, in the service of national defense.39 Critically, the DPA also provides for oversight of agreements among companies by the antitrust agencies, an important input to ensure that national security needs account for competition.

The U.S. government is equipped with tools to monitor and, if need be, take action with respect to national security goals as they arise the private sector. I am glad it has these tools, to provide for the national defense. I am also glad that the national security experts are in charge of these processes, and that they are politically-accountable for their decisions. Charging antitrust authorities with vindicating national security goals would undermine both.

#### Regulations solve. They can reinforce society AND prevent platforms from being able to cause extinction in the first place.

Bohn ’20 [Stephan, Nicolas Friederici, and Ali Aslan Gümüsay; August 11; PhD in organization studies from the Friedrich Schiller University Jena, Germany, project leader at the Humboldt institute for Internet and Society; postdoctoral researcher at the Oxford Internet Institute, Senior Researcher and Lead of the Platform Alternatives and DaPla projects at HIIG; Head of the Innovation, Entrepreneurship & Society Research Group at the Humboldt Institute for Internet and Society, Postdoctoral Researcher at the University of Hamburg, DPhil from Saïd Business School, University of Oxford; Internet Policy Review, “Too big to fail us? Platforms as systemically relevant,” https://policyreview.info/articles/news/too-big-fail-us-platforms-systemically-relevant/1489]

Of course, the idea that digital platforms need to be regulated is not new (Gorwa, 2019). Latest since the tech lash, it has become something of a received wisdom that digital platforms are “big, anti-competitive, addictive, and destructive to democracy” (The Economist, 2018), as they engage in “harmful, extractive, and monopolistic business practices” (Nachtwey & Seidl, 2020, p. 2). But these legal debates – whether focusing on antitrust, labour protection, or tax issues – maintain a perspective on platforms that sees them rather as private entities separate from society and off limits for collective governance (see van Dijck, Poell, & de Waal, 2018; Kenney, Bearson, & Zysman, 2019).

We feel that the current crisis forces us to take platforms’ far-reaching infrastructural character more seriously than the different prevailing national regulations have done until now. We argue that we can productively employ the idea of systemic relevance to determine platforms’ policy relevance and appropriate responses. The pithy notion of banks becoming “too big to fail” led to Basel III, the most recent European banking regulation. In the case of the financial sector, regulation was introduced to prevent systemic collapse with the help of a two-step procedure. First, Basel III defined which banks are systemically relevant on the global and national level, assessing five characteristics: size, cross-border activities, intertwining, substitutability, and complexity. Second, organisations meeting these criteria are more closely monitored and regulated. For example, they must have additional capital buffers; as soon as the buffers fall below a certain level, automatic restrictions apply.

We can treat platforms similarly. COVID-19 is an example of a socio-economic shock triggered by a deadly infectious disease: ‘after’ this crisis will be ‘before’ the next crisis. The systemic centrality of platforms and their evolving role before, during, and after crisis should thus be taken into account in policy regulation. In particular, we can distinguish between pre-crisis and in-crisis regulation of systemically relevant platforms.

Pre-crisis regulation may ensure that private platforms do not become essential infrastructures to begin with, or that they are already regulated for public benefit as they become more essential. To prepare platform regulation for the next crisis, we need a Basel III for platforms. In contrast to banks, however, systemically relevant platforms would not aim at capital buffers but would have to commit themselves to more transparency, for example by setting up API interfaces, disclosing algorithms, making filter decisions transparent, or sharing findings from the analysis of user data, also and especially with competitors.

In-crisis regulation can add stronger direct interventions in platform governance, making sure that platforms’ centrality is not misused. For example, it would then be necessary to ensure that obvious misinformation, as in the case of COVID-19 and social media, could be effectively filtered because it is a matter of life and death. Or to use the example of Uber, supply and demand should no longer be allocated according to pure market criteria, but should also include social or health issues e.g., in emergency situations when driving to the doctor or for persons with disabilities. Similarly, food delivery platforms can be subsidised and turned into universal service providers at city level, ensuring that the elderly or poor people receive food during lockdowns.

#### Solves the dependency trap.

Runde ’21 [Daniel, Romina Bandura, and Sundar Ramanujam; March 30; director of the Office of Global Development Alliances at the U.S. Agency for International Development (2005-2007); M.P.A. in international development from Harvard University’s Kennedy School of Government; research associate with the Project on Prosperity and Development at CSIS; Center for Strategic and International Studies, “The United States Has an Opportunity to Lead in Digital Development,” https://www.csis.org/analysis/united-states-has-opportunity-lead-digital-development]

Without significant leadership and investment from the United States, low- and lower middle-income countries find themselves drawn toward alternative digital models offered by China and other more authoritarian-minded actors. These models subvert civil liberties such as the rights to privacy and free expression, undermine the rule of law, and enable social oppression. Moreover, these forms of digital infrastructure often come with strings attached, which not only undermines the sovereignty of countries but also incentivizes them to pursue a model of development that does not serve the strategic and security interests of the United States and its allies. The United States has an opportunity to engage in—even lead—the digital financial and ID infrastructure space, helping countries unlock their full economic and social potential. At the same time, investments abroad can help the United States achieve its own national security priorities while creating new markets for U.S. goods and services.

Global Benefits of Investing in Digital Financial and ID Infrastructure Systems

Investing in safe and secure digital financial and digital ID infrastructure can have substantial positive economic and social impacts in the developing world. As the world becomes increasingly digital, secure infrastructure can significantly expand access to capital and information, both of which are critical for the sustained growth of markets. It will also be catalytic in achieving the United Nations’ Sustainable Development Goals (SDGs) by 2030.

### 1NC---OFF

BBB DA

#### Biden PC gets BBB back on track.

Nichols ’1/2 [Hans; 1/2/22; writer for Axios News; "Scoop: Manchin returns to Build Back Better negotiations with demands," https://www.axios.com/scoop-manchin-new-play-2cb59ff0-1577-44bf-81a4-a0d72b7e9be2.html]

Sen. Joe Manchin (D-W.Va.) is open to reengaging on the climate and child care provisions in President Biden's Build Back Better agenda if the White House removes the enhanced child tax credit from the $1.75 trillion package — or dramatically lowers the income caps for eligible families, people familiar with the matter tell Axios.

Why it matters: The holdback senator's engagement on specifics indicates negotiations between him and the White House could get back on track, even after Manchin declared he was a “no” on the package on Dec. 19.

The senator’s concerns with the size and the scope of the package remain.

His belief that it could cost more than $4 trillion over 10 years extends beyond the CTC issue, and he continues to tell colleagues he’s concerned about the inflationary effects of so much government spending, Axios is told.

The Bureau of Labor Statistics will release its next Consumer Price Index on Jan. 12. Last month's reading put inflation at 6.8% for the year — fueling Manchin's opposition.

The big picture: Manchin and top White House aides traded recriminations after their negotiations fell apart — but President Biden and the senator subsequently spoke by phone late in the evening of Dec. 19.

They agreed to continue to talk, and Manchin stayed in touch with senior White House officials over the holidays.

The week before Christmas, reports emerged about how close he and Biden were on a potential deal.

The details included a $1.8 trillion offer from Manchin that contained money for universal preschool and green tax credits but nothing for the child tax credit, which provides families up to $3,600 per child per year.

Families who make up to $400,000 had been receiving some CTC payments under the program that ended Jan. 1.

Between the lines: One possible solution to the stalemate would be to remove the CTC from the Build Back Better legislation, which the Senate plans to pass with only Democratic votes.

The chamber could then have a separate, focused debate during a midterm year about making the tax credits permanent.

Some Republicans, like Sen. Mitt Romney (R-Utah), are supportive of the CTC, but it’s unclear if Democrats could find all 10 Republicans needed to clear the 60-vote threshold for passing major legislation.

#### Antitrust sinks it

Carstensen ’21 [Peter; February 2021; Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School; Concurrences, “The ‘Ought’ and ‘Is Likely’ of Biden Antitrust,” <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen>]

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

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

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

#### Prevents existential climate disaster

Moncrief ’11-11 [Aliki; 2021; executive director of Florida Conservation Voters; Orlando Sentinel, “Build Back Better Act would help in climate crisis,” https://www.orlandosentinel.com/opinion/guest-commentary/os-op-climate-change-congress-act-now-20211111-44u6bgyn5fdvnp3eqievkebqpe-story.html]

Last week, Congress passed the Infrastructure Investment and Jobs Act. This bipartisan bill will address upgrades to things like our transportation system, rural broadband, public transit, and clean-water infrastructure. These are badly needed, overdue investments that will make our communities more resilient to the climate impacts we are already seeing. But we know much more is needed.

It’s not enough to just respond to extreme weather — we need to cut the pollution driving it in the first place. That’s why Congress must also pass the Build Back Better Act, the most transformational climate and jobs legislation in our nation’s history. By investing in clean energy and things like electric vehicles and more energy-efficient homes and businesses, we can stop making the problem worse and avoid a growing disaster. We don’t have time for half measures, and Floridians know it — more than 75% of registered voters in the state support bold congressional action on climate change.

The Build Back Better Act takes bold steps to dramatically reduce climate pollution for everyone. But it also centers those who have been disproportionately impacted by this crisis by taking steps to address the decades of unchecked environmental injustice, ensuring at least 40% of the benefits of this bill go to those communities hardest hit by pollution and climate change.

Building a clean energy economy is an investment that will pay dividends for families today and for generations to come. Preventing the most catastrophic hurricanes, floods and heat waves will help ensure that we still bring people from all over the world to our beaches, the Everglades, and every amazing destination across our state that supports our multi-billion dollar tourism industry.

And the robust clean-energy investments in the Build Back Better Act will create millions of good-paying jobs for Floridians in every corner of our state. Florida already ranks fourth in the nation for clean-energy employment, and this legislation would help this industry grow exponentially by tapping into the Sunshine State’s solar power potential.

Orlando has some great members of Congress who understand that climate change is an existential threat to our state and they ran on being a part of the solution to this crisis. Now, we are counting on them to take bold action and pass the Build Back Better Act. This is a win-win-win that creates jobs, lowers energy bills for Floridians, and begins to address the climate crisis at the same time.

## Adv---Dynamism

### Slow Growth---1NC

#### No recession incoming.

Barbera ’21 [Robert J; July 20; Director of the Center for Financial Economics, PhD from John Hopkins University, 30 years as a Wall Street economist; Center for Financial Economics, “Does the 2021 Boom Lock the U.S. into 2023-2025 Gloom?” https://krieger.jhu.edu/financial-economics/2021/07/20/does-the-2021-boom-lock-the-u-s-into-2023-2025-gloom/]

Is it *likely*? The CBO forecasters had to acknowledge the reality of recent surging labor productivity. But rather than view that change as significant, they chose to insist that their earlier guess for sustainable productivity gains was correct. That completely arbitrary decision led them to forecast meagre prospective productivity growth ahead, and is central to their forecast of a swoon for 2023-2025 real GDP growth.

CBO’s insistence on this dour view forces them into pretty improbable territory. Glance at the chart below. It reveals that the flow of output, second half 2021, is deemed to already be well above the economy’s potential. With unemployment still close to 6% and with labor force participation still quite depressed, declaring that the economy is already in excessive territory, seems hard to support. I think it is flat out wrong.

Real GDP forecast and real potential GDP for 2020 to 2025

Deconstructing CBO’s Potential Output estimate

CBO’s characterization of potential is driven by three assumptions. Sustainable annual gains for U.S. labor productivity will average around 1.8%. Full employment for the U.S. economy is centered a bit above 4%. At full employment U.S. labor force growth is capped at around 0.3% per year. Combine these three items and you end up sketching out CBO’s version of the upside boundary for U.S. real GDP.

Again, however, embracing these assumptions forces you to assert that the economy, as we enter the second half of 2021, is already operating above its sustainable level, strikingly at odds with common sense amid very high joblessness, very low labor force participation and very low levels of capacity utilization for our industrial sector.

How might we modify an estimate of potential, so that it squares with the notion of ample excess labor and production capacity, mid-2021? Simply acknowledge that the spurt for productivity, over the past 6 quarters, need not be followed by a productivity swoon.

Additionally, we can revisit the question of full employment. CBO asserts that employment levels extended beyond safe levels, throughout 2018 and 2019. But there was little evidence of wage and or price pressures in late 2019. Labor force conditions then may have been at, but not beyond full employment after all, at that time.

Consider those two factors, and a post-boom 2%, not 1%, real GDP growth performance is easy to pencil in.

Productivity’s Trajectory Need Not Mean Revert.

CBO embraces the pre-pandemic consensus view on sustainable productivity gains, 1.8% per year. But over the 6 quarters ending in 2021:Q2, labor productivity wildly outstripped this performance, rising at around a 3.4% annualized pace, nearly double CBO’s sustainable rate.

Does it make sense to be adamant about sustainable productivity levels? Not really. Since 1950, long run average growth rates for labor productivity are neither stable nor predictable. They range anywhere from 1.6% to 2.6%, putting CBO’s figure on the very low end of post war history.

Histogram showing rolling average of productivity growth, 1952-2018.

Where did CBO come up with 1.8%? That is the bad news performance of the previous expansion. But CBO’s insistence on continued poor performance, despite nearly two years of boom, seems awfully conservative. Indeed, it amounts to insisting that good productivity news today, rather than a reason to revise up expectations for prospective productivity, necessitates a forecast of dastardly productivity performance and depressing economic growth news tomorrow.

CBO could have taken a somewhat less dour approach. They could have stuck to their guns about full employment levels and sustainable long-term productivity and labor force trajectories. But they could have attached theses trend trajectories to the elevated output levels achieved amid the boom. Simply allowing the economy to pocket the gains delivered by recent great productivity news would put 2025:Q4 3% higher than CBO’s current forecast.

Optimists could go further. They could envision an important upshift in the longer run trajectory for economic growth. Can two years of boom help us break out of the doldrums of piddling productivity growth and depressed labor force participation—the U.S. economic reality of the past two decades? Lift labor productivity to the mid-point of its post war range, 2.3% per year, and real GDP, 2025:Q4, is 5% higher than CBO’s current projection.

Reconsidering Full employment Levels

Similarly, CBO identifies 2018:Q1 as the period in which the U.S. economy slightly eclipsed full employment. At that time the jobless rate was at 4% and 25-to-54-year-old—prime age—workers’ participation rates stood at 82%. By 2019:Q4 the jobless rate had fallen to 3.5% and prime age participation had rebounded to 83%, and amid these further gains for employment no discernable wage acceleration appeared. If we choose to identify 2019:Q4 as full employment, then the potential labor force, 2025:Q4 is roughly 1% higher than CBO’s estimate, offering more room for growth before hitting labor market ceilings.

Worshipping at the Altar of No Free Lunches.

Why does CBO insist that short term gains require outyear pains? Take a step back and the message embedded in the updated CBO forecast is clear. CBO, and many conventional analysts will not allow short-term stimulus to change their guesses about the economy’s long-term trajectory. They must embed today’s stimulus supported boom, because we are knee deep in it. But they marry to it mean reverting arithmetic that force the economy back to their pre-boom guess for its sustainable level. The economist mantra, there is no such thing as a free lunch, is a powerful notion, and it leads many economists to insist on dangers that they simply should acknowledge are largely speculative.

### Separation Turn---1NC

#### The aff’s economically backwards. Platforms have no incentive to ‘gatekeep’ goods because they want to maximize two-way profits.

Yun ’20 [John M; Winter; Law Professor at George Mason University; the South Carolina Law Review, “Does Antitrust Have Digital Blind Spots?” vol. 72]

Splitting a platform into two separate markets for the purpose of antitrust analysis, however, runs afoul of a simple reality: no platform maximizes profit over just one side. 302Rather, profit maximization is determined through a joint [\*353] consideration of both sides. A platform, by its very nature, balances the interests of multiple sides and structures its price and non-price terms to achieve this balance. Further, as the Court emphasized, credit card networks are "transaction platforms," 303which are platforms where both sides share a common level of output. This also illustrates that artificially bifurcating the two sides into separate competitive effects analyses does not align with how firms actually make decisions. Antitrust law must start from these economic realities and fit the administration of the rule of reason analysis around them.

Conceptually, perhaps one of the strongest criticisms of the Court's approach is that it effectively eliminates step two of the rule of reason analysis--where the defendant bears the burden of justifying its conduct as procompetitive. 304Instead, that burden is shifted to the plaintiff in step one during which, in order to meet its prima facie burden, the plaintiff must show that the net effect is negative. 305This is an important criticism. Ultimately, the Court had to weigh two possible regimes. The first regime involves a framework where the prima facie burden is met simply with a price increase on one side. 306The second regime, which was adopted by the Court, involves a framework where the plaintiff's burden must not only include a one-sided price increase but also include "evidence of anticompetitive effects . . . such as reduced output, increased prices, or decreased quality." 307In other words, is a one-sided price increase actually and reliably evidence of anticompetitive harm? The integrated nature of the two sides does not support this proposition; consequently, the second regime better aligns with the economic realities of platforms. Importantly, Professors David Evans and Richard Schmalensee assert the following:

This is not a matter of burden-shifting. There is simply no way to know, especially in the case of a platform that provides a service that customers on each side consume jointly, whether a practice is anticompetitive without at least considering both types of customers and the overall competition among platforms. That analysis must, [\*354] therefore, happen at the first stage of the rule of reason to assess whether the conduct is anticompetitive or not. 308

Additionally, under a framework where the prima facie burden is met simply with a price increase on one side, this "distorts the assignment of burdens in the form of placing a thumb on the scale for plaintiffs in platform cases by redefining 'competitive harm' to mean any harm to any group of consumers." 309The reality is that such an alternate framework would result in no real ability of the defendant to offer procompetitive justifications in step two. Evans and Schmalensee, for example, observe:

First, it isn't clear that the court could consider the other side-specific market in the second stage of the rule of reason inquiry. The trial court judge noted that pro-competitive benefits on the consumer side, in "a separate, though intertwined antitrust market," could not be used to offset anti-competitive effects on the merchant side. Second, after finding that a practice is anti-competitive in the first stage, courts seldom give much weight to pro-competitive benefits in the second stage. 310

Further, it is not entirely clear that the burden is actually higher for plaintiffs in step one--particularly for transaction platforms. For instance, output, which is shared by both sides of a transaction platform, could serve as a reliable guide to welfare effects. This focus on output is something that conforms with both the law and economics of assessing markets and market power. 311

[\*355] In sum, the interrelationship between the various sides of a platform is critical. 312Specifically, for a platform like American Express, changes in cardholders' terms have a material impact on the number of transactions that merchants will enjoy. These feedback effects between the two sides are central to assessing conduct on the platform. The rule of reason framework established by the Court in Amex properly assessed and incorporated the economic literature on platforms into an administrable, coherent approach by shifting the burden of production. Rather than increasing the burden on plaintiffs, it requires plaintiffs to do a complete analysis of the effects of a given conduct on the platform instead of on an unnatural and narrowly focused segment of an integrated market. 313

V. CONCLUSION

Presently, antitrust law is among its most unprecedented times where there is a chorus--albeit lacking complete consonance--from various stakeholders seeking significant antitrust reforms. This chorus is comprised of myriad groups of academics, politicians from across the political divide, and various digital reports. 314

Ultimately, these calls for reform too often lack completeness and are too broad and general to form a reliable guide for agencies, courts, and legislatures. This is not to say questions regarding large platforms are completely and categorically settled. Network effects are certainly a key consideration in assessing certain digital markets, but it is important to understand precisely how and to what extent they are affecting these markets. Rather than being a presumptive source of market failure, network effects are more properly assessed as a market feature that must be accounted for in order to understand firm conduct. Similarly, there is a paucity of evidence [\*356] demonstrating that the conduct of digital platforms is actually reducing welfare and harming consumers. Finally, a close reading of the Court's Amex decision reveals an opinion that carefully treads the economic literature on platforms and implements that learning into a coherent rule of reason framework.

The most radical claim being made today is perhaps the most controversial one: that current antitrust law and enforcement actually are sufficient to properly assess and adjudicate conduct involving digital platforms. Antitrust law has always had an evolutionary character that recognizes the need to adjust to new learnings. 315This does not mean that the law is necessarily efficient or always moving in the right direction. Still, as long as antitrust law is tied to measures of economic efficiency and welfare and so long as it continues to carefully examine actual evidence rather than fall victim to unfounded presumptions, it provides a more reliable body of law for fostering innovation and economic progress than do the alternatives being proposed by its critics.

### Separation Fails---1NC

#### Structural separation fails.

Yoo ’14 [Chris and Daniel Spulber; 2014; Law Professor at the University of Pennsylvania; Daniel F. Spulber, Business Professor at Northwestern; the Oxford Handbook of International Antitrust Economics, “Antitrust, the Internet, and the Economics of Networks,” Ch. 17]

Structural separation requirements have proven exceedingly difficult to administer. For example, the court overseeing the implementation of the 1982 decree breaking up AT&T was bombarded with hundreds of requests to waive the decree’s line of business restrictions (Huber, Kellogg, and Thorne 1999). These requests often took from three to four years to process, with estimates of the total welfare loss associated with these delays exceeding $1 billion (Rubin and Dezhbakhsh 1995, Hausman 1997).

### Rulemaking Turn---1NC

#### Agency adjudication guarantees rent seeking and corruption.

Lambert ’22 [Thomas; forthcoming; Law Professor at Missouri Law School; Southern Methodist Law Review, “Peering Beyond Nirvana: A Comparative Institutional Analysis of Proposed Means of Addressing the Market Power of Digital Platforms,” vol. 75]

The agency oversight approach, however, is not simply “faster antitrust with expert adjudicators.” While standards-based and flexible, the approach differs from antitrust along three significant dimensions: focus, political susceptibility, and duration of control. Taken together, antitrust courts’ more narrowly focused objectives, greater insulation from political influences, and limited jurisdiction over their subjects render them far less susceptible to adverse public choice concerns than are agencies like the U.K.’s DMU.

In crafting remedies for anticompetitive harm, antitrust courts have a tremendous reservoir of authority.183 But antitrust’s focus—and the objective of any court-ordered remedy—is narrow: the restoration of market output to competitive levels for the benefit of consumers.184 This precludes successful claims by, and remedies in favor of, parties seeking some private benefit apart from the enhancement of market output. A digital markets regulator is unlikely to be as laser-focused on output effects as an antitrust court and will therefore be a more attractive target to rent-seeking firms. The DMU’s “open choices” objective, for example, invites a laggard competitor that might otherwise be driven out of business to seek some rule hindering its more efficient rivals on the ground that preserving its own offering will create a broader range of options for consumers.

A second important difference between antitrust courts and agencies relates to the decisionmakers’ incentives. The federal judges determining liability and imposing remedies in antitrust cases have little reason to please the parties before them. Possessing life tenure and fearing no retribution save possible reversal, they are insulated from outside pressure and motivated to make decisions calculated to enhance market output and thereby benefit consumers. The bureaucrats staffing agencies, by contrast, do not enjoy this level of political insulation. Many will have been appointed by or have ties to a political leader, whom they will wish to please. They may also contemplate future employment at one of their regulatees or at a regulatee’s rival. Even absent contemplation of a job change, they may have a stake in one regulatory outcome over another, as the budget or prestige of their agency may be affected by the regulatory choices they make. Their personal interests are therefore less aligned with the public’s interest in maximizing overall market output.

### Concentration Turn---1NC

#### Concentration breeds productivity with no negative effects.

Peltzman ’18 [Sam; May 10; Economics Professor at the University of Chicago; SSRN, “Productivity and Prices in Manufacturing During an Era of Rising Concentration,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3168877]

Cross tabulations in Table 2 give a rough first cut of the relevant co-movements. The three panels classify data by HHI change, HHI level and combination of these two respectively. The columns give results for two productivity measures and prices. The consideration of both the change and level of concentration is motivated by antitrust policy and ambiguity in some of the motivating stories outlined above.27 The last line in each panel or sub-panel gives the mean difference (DIFF) and its t-ratio in each outcome for the different market structures under consideration.

The outcomes are annual averages over the entire sample period. These long periods probably capture best the more permanent relationships we are interested in. They are long enough to make plausible a working hypothesis of long-run constant cost supply conditions in typical manufacturing markets. Collaterally, constant costs would be changed point-for-point by MFP and input price changes. Also, as a practical matter, the higher frequency outcome data within sample periods are noisy in potentially misleading ways.28

It is best to begin with the last triplet of columns (9-11) in Table 2, which focus on prices. The differences here range on both sides of zero, and there is no clear pattern. For example, in panel I increasing concentration seems to raise prices in the NAICS period but not in the SIC sample; on the other side, large increases in concentration have no greater (possibly a lesser) effect than small increases (line 4c). Similarly, panel III, which incorporates the Merger Guidelines focus on both change and level, shows little consistency. Within the more concentrated industries, prices do rise more when concentration increases, but only for the NAICS period (line 3, panel III). And, within the NAICS period, the price increases associated with rising concentration are about the same for the less concentrated industries than for the more concentrated industries. The lack of any pattern in the simple correlation of concentration and price changes, let alone one consistent with the specific concerns of the Merger Guidelines, will be a consistent feature of these data.

The productivity data in columns (3) through (8) show a more consistent pattern consistent with a benign effect of concentration. With the conspicuous exception of MFP growth in the SIC period, the relevant differences are well bounded away from zero in the benign direction. That is, high and rising concentration tend to be associated with greater productivity growth. There is no consistent overall effect from changes (line 3, panel I), but industries with large increases in concentration (line 4c, panel I) as well as highly concentrated industries (line 3, panel II) tend to have superior productivity growth.

The contrast between the productivity and price effects hints at another feature of subsequent data. Productivity growth implies lower costs. So if there are benign productivity effects from concentration but no price effects, the implication is that the cost effects are offset by rising margins. This is the possible dilemma for antitrust enforcement raised a long time ago by Oliver Williamson (1968).

Subsequent tables refine these cross-tabs by allowing the level and change in concentration to be continuous rather than dichotomous and by taking account of some industry background conditions. 29 Table 3 summarizes the connection between productivity and concentration. Specifically, the dependent variables are average annual growth rates of multi-factor productivity and labor productivity. The independent variables are the level and change of concentration. For this and subsequent tables, concentration is measured as the square root of HHI. This transformation removes most of the extreme skewness in both the level and change of the HHI.30 Summary statistics for the transformed variables are on lines 7 and 8 of table 1.

Each triplet of regressions begins with an analogue to the cross-tabs that includes only the HHI level and change on the right. The second regression adds sector (SIC 2 digit or NAICS 3 digit industry) fixed effects, and the third adds interaction between high and rising concentration. The fixed effects are meant to capture background conditions affecting productivity and concentration over broad groups of industries (e.g., food products), so the regressions then capture the correlations across the industries within these groups (i.e., across dog and cat food, confectionary products, etc.). The separation of concentration changes between high and low levels of concentration addresses the distinction central to the Merger Guidelines.

The results in Table 3 reinforce the cross-tabs. Again with the exception of MFP growth in the SIC sample, both the level and change of concentration tend to be positively correlated with productivity growth. This is true across the whole sample and within industry sectors. There is no meaningful difference between effects of changes in more or less concentrated markets. The implied magnitudes can be substantial. For example, consider a NAICS industry that begins the period with concentration one standard deviation below the mean and ends with concentration one standard deviation above the mean. The NAICS regression (2) coefficients would imply an improvement in MFP growth of .37 standard deviations, which exceeds the mean slowdown of MFP growth between the two sample periods.31

The next two tables (4A and 4B) explore the interaction of prices, productivity and concentration. The dependent variable here is the average annual log percentage change in the price of shipments. Aside from sector fixed effects, there is only one plausibly exogenous control. This is the average annual change in an input cost index, which is a weighted average of labor, material and capital good prices. Details are in the note to Table 1. The weights are cost shares at the beginning of each sample period, so they are unaffected by (possibly endogenous) within-period changes in cost shares. Also, to avoid issues about (also possibly endogenous) division of value added between labor and capital, I use sector wide rather than industry specific labor costs.32 This exogenous cost shifter is always important empirically with coefficients often around the benchmark of +1 implied by constant cost competition.

Table 4A is in two parts. The first three regressions show concentration effects controlling only for input costs. These concentration effects are uniformly weak statistically (and economically, but I defer discussion of magnitudes until later). Again, there is nothing exceptional about more concentrated industries. The last four regressions (columns (4) through (7) ) add productivity growth controls. These have the expected negative coefficients, and their inclusion changes the concentration effects. The change in concentration (but not the level) now has a significantly positive partial effect on price in both samples and with either MFP or labor productivity growth as controls. Once more, there is no support for the Merger Guidelines concern about highly concentrated industries (regression (5) or (7)). The regressions say that once the change in the level of costs is comprehensively controlled – the upward shift due to input prices and the offsetting downward shift due to productivity growth33 – the margin of price over cost has widened where concentration has increased. The hitch in this interpretation is that, as we have seen, the level of costs may not be independent of the concentration increase.

This hitch also creates a potential estimation issue. In principle a point of MFP growth shifts costs down as much as a point of input cost growth shifts costs up. This implies equal and opposite signed coefficients on the two in regression (4) or (5). Instead we find somewhat smaller MFP effects and (t-test not shown) we can comfortably reject the null. To see if results might be sensitive to the disparity in the size of the two coefficients I imposed equality on them, with results show in Table 4B. The first two regressions in this table impose a benchmark of textbook constant cost competition – i.e., prices completely determined by the level of costs in the long run, which implies coefficients of +1 and - 1 on the input cost and MFP changes respectively. The last two regressions impose the looser constraint that the two coefficients should be equal and opposite signed, as might be implied by, say, imperfect competition.34 The constrained regressions yield the same pattern of results (and similar magnitudes) as the previous table – i.e., significant concentration change effects when holding changes in input costs and productivity constant. 5. Summary and Implications

Industrial concentration has been increasing over the entire period since the promulgation of the Merger Guidelines in 1982. It is unclear whether this trend has yet run its course. There is concern about weaker competition as a result of these trends as evidenced, e.g., by higher prices in the wake of many mergers. There is also concern about the possibly reinforcing interplay between rising concentration and declining business dynamism and productivity (e.g., Council of Economic Advisers, 2016). I have tried to inform these concerns by describing salient trends in one sector – US manufacturing – over the long period since the first Merger Guidelines.

Specifically, instead of looking only at mergers in a few industries, I ask whether more concentration however arrived at is usually associated with higher prices across many manufacturing industries. I also ask about the productivity-concentration nexus. Have the newly concentrated industries been more or less productive than other industries? And how does the answer fit with the previous one about prices? The answers are meant to put the discussion of concentration into empirical perspective, not to settle questions of whether concentration is cause, effect or common symptom of any association with prices and productivity. For example, we are going to worry more about lax merger enforcement if increased concentration is more often found alongside rising prices and falling productivity than the reverse.

That is not the kind of world we have been in for the last 30 or so years, at least in the manufacturing industries whose data I have summarized. There is no systematic pattern in prices – they are about as likely to rise as fall in more concentrated industries. This seems to be the resultant of opposing tendencies that roughly cancel: the more concentrated industries seem to be more productive but firms in these industries also seem to retain most of the resulting efficiency gain in higher margins.

There is variety in the underlying results depending on sample periods, definitions of productivity and the like. But if we put the variety to one side and look at the point estimates a fairly consistent empirical story emerges. This is summarized in table 5, which walks through two scenarios - one involving an increase in concentration and the other comparing industries with different levels of concentration. Table 5 does this separately for each 15 year sample period, using results from the previous tables, as indicated in column (1), as the steps in this walk. In panel I, I work through the case of a one standard deviation increase in the change of concentration (which translates into around 90 extra HHI points in either period), and in panel II I compare industries with average and one SD above average concentration (a difference that works out to around 700 HHI points). To keep things simple I’ll focus on the results involving MFP growth and measure everything in SD units.

Panel I starts with the productivity effect of increased concentration (A.1): +.161 SD extra MFP growth in the NAICS period. The relevant price regression implies a .085 SD price reduction (panel I, B.1) from this much MFP growth. Then I add back the markup effect (i.e., price effect holding productivity and input costs constant) of .108 SD (panel I, C. 1). The net implied effect (-.085+.108) is the .023 shown on line a) of panel 1, D. a). The pattern of extra productivity and extra markup netting out to a small price increase (.046 SD) holds for the SIC regressions. For comparison I also show results for the “reduced form” regression of price on productivity (panel I, D .c).

Panel II does the same exercise for the level of concentration. Here we get consistently favorable productivity effects and inconsistent price effects that sum to small price reductions in both periods (-.077 SD and -.052 SD; panel II, D. a). The table does not include the interaction between the two concentration effects (rising concentration also increases the average level), which would reduce or essentially eliminate the already small positive price effects in panel I.

In short, the exercise tells of trivial net price effects arising from sometimes more sizeable productivity and markup effects that roughly offset each other. This pattern has been in place for 30 years or more. If it hasn’t run its course by now, there are at least two important implications. One is for the sources of increased concentration. Perhaps relaxed antitrust enforcement is part of the story, but it is not the whole story. Operating at large scale seems to have become a lower cost way of doing business, and increased concentration is a way of achieving large scale. This is a broad generalization with, no doubt, numerous exceptions. But it seems true enough in many industries to dominate the data. The efficiency advantages stimulating concentration are enhanced if, as also seems more true than not, higher concentration entails margin expansion.

The other implication is for antitrust merger policy. I find no evidence here consistent with the central tenet of that policy, which is that more concentration is only worrisome in already concentrated industries. Yet, ironically or paradoxically, neither is there is support for change, if current policy is read as more relaxed than alternatives. Calls for a revival of tough enforcement appear premature, since this runs the risk of reducing productivity without helping consumers.

### Concentration OK---1NC

#### No widespread evidence of concentration even exists.

Werden ’18 [Gregory J. Werden and Luke M. Froeb; Economics PhD at the University of Wisconsin-Madison, 42-year Economic Counsel of the Department of Justice’s Antitrust Division; Entrepreneurship and Free Enterprise at Vanderbilt University, Deputy Assistant Attorney General of the Department of Justice’s Antitrust Division; Vanderbilt Owen Graduate School of Management Research Paper, “Don’t Panic: A Guide to Claims of increasing Concentration,” No. 3156912]

Excessive Aggregation Makes Observed Concentration Trends Meaningless

Simple thought experiments prove that concentration trends for market aggregates are not informative of concentration trends in the underlying markets.16 We posit particular compositions for 1998 and 2018 of NAICS 3-digit subsectors, on which some academics have focused in identifying concentration trends.17 In our experiment, each subsector spans ten markets, and each market had ten firms in 1998. The far left panel in Figure 4 is a representation of each 1998 subsector, with the ten columns representing the ten distinct markets and each cell representing a firm. The areas of the cells reflect firm size, e.g., sales. We posit that each subsector has ten equal-sized firms in 2018. The other panels in Figure 4 depict two very different ten-firm subsector configurations for 2018.

Figure 4. Aggregation Can Completely Mask Market Concentration Trends, omitted.

The middle panel in Figure 4 depicts the result of one firm in each market acquiring every other firm in its market. The ten cells in each column are merged in 2018 A to reflect merger to monopoly in each market: Each market has an HHI of 10,000, which is a huge increase in concentration from HHI of 1,000 in 1998. The panel on the far right in Figure 4 depicts the result of non-horizontal mergers, with each firm in one market acquiring a firm in every other market in the subsector: Each market in 2018 B has an HHI of 1,000, just as it did in 1998. Although horizontal and non-horizontal mergers have completely different effects on market concentration, here they have exactly the same effect on the concentration of NAICS 3-digit subsectors. And they can have exactly the same effect on NAICS 6-digit industries, especially if markets are local.

Excessive aggregation also leads to fallacies associated with averaging. To see this, change the experiment so that, in 1998, half of the markets in each subsector had 5 equal-sized firms and half had 10 equal-sized firms, and assume that the former firms were twice the size of the latter, so all markets were of equal size. Each subsector is represented by the left-hand panel in Figure 5. In 1998 the HHIs were 2,000 for half of the markets and 1,000 for half of them, while the subsector HHI was 150.

Figure 5. Market Growth Affects Aggregations of Markets, omitted.

Suppose now that there were no mergers since 1998, and that no market shares changed but the 5-firm markets all grew twice as fast as the 10-firm markets. The 2018 situation is depicted in the right-hand panel of Figure 5. The subsector HHIs have increased to 200, but the market HHIs have remained just as they were in 1998. Changes in composition of the economy easily can lead to changes in subsector concentration without corresponding changes in market concentration.

Figure 6. Market and Sector Concentration Can Move in Opposite Directions, omitted.

Subsector concentration also can increase even if the concentration of every market in a subsector decreases. To see this, suppose everything is the same as in the second thought experiment except that every market experienced entry, with the 5-firm markets ending up with 6 equal-sized firms, and the 10-firm markets ending up with 12 equalsized firms. In Figure 6, the left-hand panel is exactly the same as in Figure 5, and the right-hand panel is the same as that in Figure 5 but for the new firms. Every market in the economy is now less concentrated than in 1998; the market HHIs are 1,667 and 833 rather than 2,000 and 1,000. But the change in composition causes every subsector to be more concentrated; the HHI for every subsector increased from 150 to 167.

What Do We Know about Trends in Market Concentration?

Data suitable for investigating trends in market concentration are not available for most of the U.S. economy. A few industries, however, are particularly rich in data because they are regulated in some way by the federal government. For three such industries, useful information on concentration trends has been compiled.

The airline industry experienced great change since deregulation in the late 1970s, including many mergers, but examinations of market concentration—at the route level— have not found systematic increases. Over the period 1984–90, the weighted average route-level HHI on domestic U.S. routes decreased slightly.18 During 1995–2009, the HHIs “for the largest 1000 short-, medium- and long-haul routes revealed a general downward trend in concentration.”19 And for 2007–12, “a slight reduction in concentration in the highest-traveled markets” was observed.20

Since 1980 the U.S. banking industry experienced more than 10,000 mergers, yet economists at the Federal Reserve System’s Board of Governors found that local market concentration, measured by the HHI, did not increase.21 One study reported that “average local market concentration measures . . . hardly budged throughout 1980–98.”22 Another study found that “average local market concentration decreased” from 2000 to 2010, although the decrease was slight.23

The Federal Communications Commission (FCC) tracks concentration in local wireless telecommunications markets.24 The FCC reported that the population-weighted average HHI increased from 2423 in 2004 to 3111 in 2015.25 In the Economist’s analysis, this industry stood out as the only one with high revenues, high concentration, and a large increase in concentration. It is notable that major mergers that would have caused substantial additional increases in concentration were remedied or blocked. The Justice Department secured divestitures in 2004 and 2005 that prevented increases in market concentration from the acquisition of AT&T Wireless by Cingular26 and from the acquisition of Western Wireless by ALLTEL.27 The proposed acquisition of T-Mobile by AT&T was abandoned in 2011 when the Department filed suit to block it,28 and the 2017 merger or Sprint and T-Mobile was called off in the face of antitrust opposition.

How Concerned Should We Be about Increases in Market Concentration?

No evidence we have uncovered substantiates a broad upward trend in the market concentration in the United States, but market concentration undoubtedly has increased significantly in some sectors, such as wireless telephony. Such increases in concentration, however, do not warrant alarm or imply a failure of antitrust.

Increases in market concentration are not a concern of competition policy when concentration remains low, yet low levels of concentration are being cited by those alarmed about increasing concentration. The Economist’s analysis mentioned above deemed an industry concentrated if the CR4 exceeded 1/3, yet a CR4 of 1/3 implies an HHI of at most 1,111, and the federal antitrust enforcement agencies consider a market unconcentrated as long as its HHI is below 1500. An essay from the Brookings Institution decrying increasing concentration also cited HHIs in the unconcentrated range.29 In the 1960s, merger enforcement in the United States was directed largely at unconcentrated markets, but most of those merger challenges would be rejected by courts today.

Moreover, no new merger legislation could prevent increases in market concentration. Prohibiting mergers does not alter the natural evolution of industry structure in which some firms thrive and grow while others languish or fail. An old literature in industrial organization economics explains that, when success and failure are random events, markets become concentrated over time.30

More importantly, market concentration naturally results from the growth of firms that are more innovative and efficient than their peers.31 A group of academics reporting increased industry concentration cite the rise of “superstar firms” as the cause of increasing concentration and as a major force reshaping the economy.32 But if superior skill and industry account for the spectacular success of these firms, both the competitive process and antitrust law are working as intended.

Digital media dramatically increased the speed of information dissemination even if it is unreliable. Without careful review of the claims or the underlying data, questionable claims of increasing concentration have become policy axioms.33 The evidence does not show increasing *market* concentration, so DON’T PANIC. However, the wisdom of existing antitrust law and policy always should be subject to continuous re-evaluation.

### Cyber---1NC

#### No cyber impacts.

Lewis ’20 [James Andrew; 8/17/20; senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies; "Dismissing Cyber Catastrophe," https://www.csis.org/analysis/dismissing-cyber-catastrophe]

More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are:

Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals.

There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.)

No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare.

State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war.

This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation.

The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability.

One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1

This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often?

Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer.

The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

## Adv---Systemic Risk

### Systemic Risk---1NC

#### Systemic risk is a hoax.

Moosa ’10 [Imad; October 4; Finance Professor at RMIT in Melbourne, Australia; Journal of Banking Regulation, “The myth of too big to fail,” vol. 11]

There is only one argument for TBTF, the argument of systemic risk and failure. But there is no support in history for the proposition that the failure of one institution could bring about havoc on the financial system and the economy at large. There are numerous cases of financial institutions that were allowed to fail without significant systemic problems. The resulting losses were shared by a large number of investors and creditors, who would have been making good returns in previous years. Then some managers who had been accumulating huge personal fortunes through parasitic activities would lose their jobs and most likely find others. A failed institution would then disappear because of serious errors of judgements, so what? Is not this a feature of capitalism? Is not this the corporate version of the survival of the fittest? Is this not what Adam Smith believed in? Failure is necessary in a free market as it improves economic efficiency. When a company fails, a more successful company can buy its good assets, releasing them from incompetent management. The same applies to the labour force. It is a hoax to believe that catastrophic systemic losses can result from the failure of a badly managed financial institution.

### Cyber---1NC

#### Cyberattacks murder small firms.

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 initial public offering 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

### Meltdowns---1NC

#### 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.

### Grid---1NC

#### 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.

## Adv---Dependancy Trap

### Digital Divide---1NC

#### The ‘digital divide’ has nothing to do with American platforms.

Li ’21 [Cheng; October 11; Political Science PhD at Princeton University, director of the John L. Thornton China Center; the Brookings Institution, “Worsening global digital divide as the US and China continue zero-sum competitions,” https://www.brookings.edu/blog/order-from-chaos/2021/10/11/worsening-global-digital-divide-as-the-us-and-china-continue-zero-sum-competitions/]

THE EXPANSION OF DIGITAL DIVIDES IN LDCS

Despite the global growth of digital technologies, a 2021 United Nations report noted that nearly half of the world’s population, 3.7 billion people, lack internet access. Deficiency of digital connectivity is especially prevalent within LDCs, where more than 80% of the population are still offline. In comparison, the unconnected population in developed countries and developing countries stands at 13% and 53%, respectively.

LDCs account for about 14% of the world’s population, and they comprise more than half of the world’s extremely poor. Digital divides both reflect and reinforce socioeconomic disparities. The pandemic has aggravated existing inequalities, often resulting in a widening gap of digital skills.

### LIO---1NC

#### Order’s resilient, BUT alt causes.

Hirsh ’19 [Michael; December 27; senior correspondent; Foreign Policy, “Why the Liberal International Order Will Endure Into the Next Decade,” <https://foreignpolicy.com/2019/12/27/why-liberal-international-order-will-endure-next-decade-2020-democracy/>]

Title: Why the Liberal International Order Will Endure Into the Next Decade

Subtitle: It’s true that democracy, globalism, and free trade are under assault, but they may prove stronger than the forces arrayed against them in the 2020s.

It’s become fashionable to wonder whether the liberal international order can survive the malign forces that have been lining up against it during the 2010s—what the Wall Street Journal called the “Decade of Disruption.” But based on recent trends, it’s a fair bet that democracy, globalism, and open trade will endure handily into the third decade of the 21st century.

Start with the state of democracy. Nothing has been more alarming to internationalists than the one-two punch of U.S. President Donald Trump and British Prime Minister Boris Johnson, who have taken power in two of the world’s oldest and most important democracies by awakening the old demons of nationalism. With Trump focusing his ire on NATO and the World Trade Organization, and Johnson stalking out of the European Union, the two leaders have transformed the once-hallowed “special relationship” from a bulwark of global stability (sullied though it was by the Iraq War) into what looks more like a wrecking ball. Elsewhere, illiberalism has overtaken young democracies, such as Hungary and Poland, and even threatened mature ones with the rapid rise of nationalist parties such as the Alternative for Germany and Norbert Hofer’s anti-immigrant Freedom Party of Austria. In the world’s largest democracy, India, Prime Minister Narendra Modi and his Hindu nationalist Bharatiya Janata Party appear to be sending the same message. And there are considerable doubts about whether the democratic body politic possesses an immune system strong enough to fight off a plague of cyber-generated misinformation and disinformation, and systemic hacking by such autocrats as Russian President Vladimir Putin.

But democracy just won’t give up, and in 2019—which could justly be called the year of global protest—it kept reinventing itself at the grassroots. This has been happening in the most unlikely of places around the globe, in countries such as Iran, Lebanon, Iraq, Chile, and above all in Hong Kong, where thousands of determined protesters have braved bullets and tear gas, embarrassing Chinese President Xi Jinping even as he brutally consolidates his autocratic rule on the mainland. Perhaps the U.S. and British democracies are becoming decadent—and 2020 will tell us a lot about that question come November—but the idea of democracy remains a powerful, ever-replenishing urge that, as sociologists and political scientists have long told us, only gets stronger the more that income and educational levels increase around the world.

The international economy is also undergoing some severe stress tests—and surviving remarkably intact. The year 2019 began with deep-seated fears that Trump’s trade wars would help trigger a global recession—and among the most concerned was Federal Reserve Chairman Jerome Powell, who midway through the year suggested he and other central bank chiefs simply didn’t know how bad things could get. “The thing is,” Powell said, “there isn’t a lot of experience in responding to global trade tensions.” Growth and investment are still slowing due in large part to the uncertainty Trump has created, but fears of a recession have receded. It turns out the U.S. president cannot single-handedly return the United States to the days of Smoot-Hawley—even his fellow neonationalist Boris Johnson believes in free trade—and the domino effect of retaliatory tariffs that followed in the 1930s, setting the stage for world war. (In June 1930, under the Smoot-Hawley Act, the United States raised tariffs to an average of 59 percent on more than 25,000 imports; just about every other nation reacted in tit-for-tat protectionist fashion, severely depressing the global economy.)

Today, the complexities of a deeply integrated global economy and its supply chains may prove too much to undo—even for the most powerful person on the planet.

And what of the institutions of the international system? The United States has always had an uneasy relationship with its post-World War II progeny, principally the United Nations, the WTO, and NATO—despite helping create them—and Trump only gave expression to an American id that was long seething under the surface. True, Trump is demeaning these institutions to an unprecedented degree and demanding far more of them. But he’s only saying more stridently what was said by, say, President Barack Obama, who also criticized the NATO allies for being free-riders, and former President George W. Bush, whose administration privately mocked the alliance and sneered at the U.N. (Another little-remembered precursor to Trump was President Bill Clinton’s feisty first-term trade representative, Mickey Kantor, who once said he wasn’t interested in free-trade “theology” and preferred that Americans behave like mercantilists.)

Trump is making a serious run at denuding the WTO by taking down its appellate court, but even that institution is likely to outlast a 73-year-old president who, at most, has only four more years in office to wreak havoc on the global system. This is especially likely because he is now mostly alone in his anti-globalist passion with the departure of his deeply ideological national security advisor, the militant John Bolton.

Let’s not forget either that the advent of Trump and Johnson represents a legitimate backlash to major policy errors made by the elites who have dominated the international system. George W. Bush led the Republican Party badly astray with his strategically disastrous Iraq War and fecklessness over the deregulation of Wall Street, which set the stage for the biggest financial crash since 1929 and the Great Recession. That turned voters off to traditional Republican thinking and opened the door to Trump’s unlikely takeover of the party. Something similar happened in Britain, when Bush’s partner in these neoliberal economic delusions and his ally in an unnecessary war, the once-popular Labour leader Tony Blair, set the stage for Labour’s eventual handoff to the socialist Jeremy Corbyn. (A shift that was, in turn, analogous to the ascent of Sen. Bernie Sanders, Sen. Elizabeth Warren, and the left inside the U.S. Democratic Party in response to the rise of Trump’s 2016 presidential rival Hillary Clinton, who was seen as pro-war and too friendly to Wall Street.)

But the larger point is that Trump and Johnson are only the latest stresses to a system that, since the end of the Cold War, has suffered some pretty major ones and yet endured. In the quarter-century since then, financial markets collapsed several times, and the global economy has remained intact. Islamist terrorists have struck at major capitals around the world, and a clash of civilizations hasn’t ensued. The world’s two largest economies, the United States and China, incessantly bicker, but they’re still doing business. Ivory tower realists continue to be dead wrong in their predictions that the international system will fall back into anarchy, even when politicians like Trump are doing their best to make that happen. On the realist view, the so-called West and its institutions should have disintegrated after the Cold War with the disappearance of the Soviet Union; as Owen Harries wrote in Foreign Affairs in 1993, “The political ‘West’ is not a natural construct but a highly artificial one. It took the presence of a life-threatening, overtly hostile ‘East’ to bring it into existence and to maintain its unity. It is extremely doubtful whether it can now survive the disappearance of that enemy.”

# 2NC

## CP---Common Law

### 2NC---Impact---Overview

#### Warming causes extinction---outweighs on magnitude

McDonald 19 [Samuel; January 1; Writer and geography PhD student at University of Oxford studying the intersection of grassroots movements and energy transition; “Deathly Salvation,” https://www.the-trouble.com/content/2019/1/4/deathly-salvation]

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices. An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive. In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less ~~suicidal~~ civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows? What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

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

#### The perm is ‘statutory gap filling’---it does NOT expand the scope of federal common law.

Abbe R. Gluck 11, Associate Professor of Law, Columbia Law School, “Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine,” 120 Yale L.J. 1898, Lexis

Consider how well the Court's typical arguments justifying federal common-lawmaking apply to statutory interpretation methodology. There is a uniquely federal interest involved (the meaning of federal statutes); it is grounded in a federal source (federal statutes); 45 [FOOTNOTE 45 BEGINS] See Bradley et al., supra note 18, at 879 ("There is widespread agreement that federal common law must be grounded in a federal law source."); see also Field, supra note 18, at 887 (arguing for a broad understanding of federal common-lawmaking authority but still acknowledging that the "limitation … is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule"). [FOOTNOTE 45 ENDS] and there is a clear need for federal-law uniformity. As with other types of approved federal common-lawmaking, this type also would be restrained: it would be limited to filling interstitial gaps in a statutory scheme. 46 [FOOTNOTE 46 BEGINS] See Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("The Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law.' These instances … fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." (citations omitted)); Bradley et al., supra note 18, at 921 ("This sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law."). [FOOTNOTE 46 ENDS] And, similar to arguments made for [\*1915] common-law authority in other areas, the source of federal judicial authority to create these interpretive principles derives from the power - given to the federal courts by the jurisdictional statutes and Article III - to adjudicate statutory cases. 47 In fact, this same kind of inherent authority is used to justify the Court's methodological work in the constitutional law context.

#### DOESN’T SOLVE---even if the perm retains a claim of statute-independent common law---that claim won’t set precedent

Michael B. Abramowicz & Maxwell L. Stearns 5, Abramowicz is Associate Professor, George Washington University Law School; Stearns is Professor, George Mason University School of Law, “Defining Dicta,” 2005, 57 Stan. L. Rev. 953, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1201&context=faculty\_publications

A judge’s failure to delineate the scope of the holding within an opinion might not be a disservice to the judicial process. Even punctilious judges arguably should not be allowed the final word on the extent of their authority to resolve legal issues, and even a judge’s claim to have produced a holding on a particular issue should perhaps be open to challenge when the issue seems distant from the central concerns of the case. The failure of a judicial opinion to supply reliable guidance distinguishing its holdings from its dicta, moreover, poses little difficulty to the extent that legal actors agree upon the definitions of holding and dicta. With shared understandings, future courts could be expected to follow a case’s holdings and consider its dicta only to the extent that such discussions prove helpful.

Although judges and scholars share intuitions that frequently lead them to the same conclusions in particular case settings, our analysis will reveal the absence of a shared conceptual foundation for analyzing even modestly complex cases.4 This deficiency might reflect the tendency in recent decades of scholars interested in precedent to focus significant attention on the nature of stare decisis. A considerable literature studies the emergence, scope, and limits of stare decisis,5 the doctrine through which courts use opinions not merely to resolve cases, but also to make law in the form of at least presumptively binding precedents.6 [FOOTNOTE 6 BEGINS] 6 See, e.g., Thomas Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 CARDOZO L. REV. 43, 65 (1993) (“Although horizontal stare decisis creates a strong presumption that prior judicial articulations of the law are correct and should generally be followed by the rendering court, the rule is far from absolute.”); Abner Mikva, The Shifting Sands of Legal Topography, 96 HARV. L. REV. 534 (1982) (reviewing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)) (positing that “such common law doctrines as stare decisis would presumably constrain courts applying statutes to the same extent that they constrain courts making common law decisions”); Rafael Gely, Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis, 60 U. PITT. L. REV. 89, 109 (2003) (observing that “common law precedents enjoy a presumption of correctness stronger than applied to constitutional cases, but not as constraining as that enjoyed by statutory precedents”). In his famous Commentaries on American Law, James Kent provided a similar early account of stare decisis. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 475 (O.,W. Holmes, Jr. ed., 14th ed. Boston, Little Brown, & Co. 1896) (explaining that “[i]f a decision has been made upon solemn argument and mature deliberation, the presumption is in favor it its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it”). [FOOTNOTE 6 ENDS] Stare decisis plays a central role in our common law system, whether in horizontal form, for example within the Supreme Court and across federal circuit court panels, or in vertical form, for example from the Supreme Court to lower federal courts and from circuit courts to district courts.7 This scholarly attention is thus warranted.

As a practical matter, however, judicial analyses of precedent rarely require that courts test the contours of stare decisis doctrine directly. When stare decisis applies, a court rarely needs to consider the relatively narrow exceptions to stare decisis. Vertical stare decisis is generally considered absolute,8 and in the federal appellate system, en banc rehearing is required before a circuit court can overturn the precedent of a panel or an earlier en banc court. Even the Supreme Court overturns its precedents only rarely, and it debates the scope of stare decisis even more rarely.9 In contrast, evaluating a claimed precedent to determine whether an identified proposition is holding or dicta occupies a great deal of judicial attention. Indeed, before a court can decide whether to apply the doctrine of stare decisis to a given case, it must first determine just what that case purports to establish. Because holdings in prior cases are at least presumptively binding, while dicta is not, this task requires an understanding of these terms.10

While the literature on stare decisis is broad, despite the growing need for a clear distinction to accommodate increasingly complex opinions, in recent decades the literature on the distinction between holding and dicta has been comparatively tiny.11 An earlier generation of scholars, in contrast, devoted considerable attention to the holding-dicta distinction.12 While no satisfactory definition has yet to emerge, legal scholars have largely turned their attention elsewhere. The questions whether to apply precedent, and how to construe a particular precedent in a given case, are intertwined. But they are not the same inquiry. Even an opinion without precedential value contains a holding. If anything, the more relevant inquiry in most cases is the one that has been given scant attention among the current generation of legal scholars. Courts themselves have not filled the theoretical void, and so the American judicial system lacks clearly defined rules on an important aspect of the process through which judges resolve cases and make law. Through a loose set of practices that vary considerably from jurisdiction to jurisdiction, and, perhaps more problematically, from court to court and case to case, judges define such terms as needed to assist in the task of resolving particular cases entirely on their own.

Despite the absence of any single governing source or universal agreement on how to define dicta, the legal system does not threaten to devolve into chaos or general incoherence. Rather, disagreements as to whether a claimed proposition is part of a court’s holding, or is instead merely dicta, surface in discrete disagreements over particular cases without unraveling the fabric of the law. There is no denying, however, the importance of understanding—both as a matter of theory and at the level of practice—how to approach such a central task as sorting holding and dicta. This query goes to the heart of the business of judging, which itself goes to the essence of the Anglo-American system of interpreting and making positive law. Even if there is broad agreement on a range of issues related to decoding dicta and holdings, it should not be surprising that in the cases in which these issues matter most, the conceptual uncertainties that result from a lack of rigor in categorizing holding and dicta give rise to the greatest practical difficulties.

One difficulty in developing theoretically satisfying, and operational, understandings of the terms holding and dicta is that the most commonplace—and frequently cited—definitions of these terms are problematic in profound ways. Appreciating both why these definitions emerged and what is problematic about them is essential to our project. Consider, as perhaps the most prominent illustration, the definition of “Obiter dictum” in Black’s Law Dictionary: “[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.”13 We will argue that the definition is indefensible,14 and at least inconsistent with the general understanding that alternative holdings in a case all count as holdings.15 In fact, we will demonstrate that as a core element in the definition of holding, necessity, is itself not necessary,16 and might not even be sufficient to ensure holding status to a given proposition.17 The intuition that underlies the definition, however, is easy to appreciate, because the definition works well for simple cases. In a case in which there is just one issue, and just one logical argument that can take a court from the facts to the judgment, discussions that do not lie along that path are unnecessary to the decision and are therefore dicta.

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

#### “core antitrust laws” are the Sherman, Clayton, and FTC acts.

FTC ‘ND [Federal Trade Commission; “The Antitrust Laws”; https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws; AS]

The Antitrust Laws

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

#### The CP proscribes behavior based on antitrust LAW, NOT by expanding the CORE antitrust LAWS.

Robert R. Gasaway & Ashley C. Parrish 13, Partner, Kirkland & Ellis LLP; Partner, King & Spalding LLP, “IN PRAISE OF ERIE--AND ITS EVENTUAL DEMISE,” 10 J.L. Econ. & Pol'y 225, Lexis

Interpreting the Federal Rules of Decision Act in Swift, Justice Story relied on the statute's plain meaning, emphasizing that its reference to the "laws of the several states" in the plural was meant to refer to the "positive statutes of the state, and the construction thereof adopted by local tribunals." 46 According to Swift, the Rules of Decision Act did not apply to "questions of a more general nature, . . . especially to questions of general commercial law." 47 Significantly, Justice Brandeis's Erie decision offers no response to Swift's textual analysis. And, as noted above, Justice Friendly abandons any defense of Erie on statutory grounds.

Part of the reason Justice Brandeis failed to engage in meaningful textual analysis of the Rules of Decision Act lies hidden in the Erie opinion itself. In a portion of the opinion criticizing Swift, Justice Brandeis cites John Chipman Gray's classic, The Nature and Sources of Law. 48 But Gray's book provides a fascinating kernel of support for Swift's statutory interpretation as against Erie's. Gray recognized that the "meaning of 'Law,' when preceded by the indefinite, is to be distinguished from that which it bears when preceded by the definite, article." As Gray explained, "A law ordinarily means a statute passed by the legislature of a State." In contrast, "'The Law' is the whole system of rules applied by the courts." 49 This same distinction was recognized in a slightly different form by the Supreme Court in Sprietsma v. Mercury Marine. 50 There, the Court interpreted the express preemption provision in the Federal Boat Safety Act of [\*235] 1971, which applied to "a [state or local] law or regulation." 51 The Court held that the provision did not encompass common law claims because "the article 'a' before 'law or regulation' implies a discreteness--which is embodied in statutes and regulations--that is not present in the common law." 52

These principles are also relevant to interpreting the Constitution's Supremacy Clause, which refers, in the plural, to "the Laws of the United States." 53 By referring to "laws" (plural), the Supremacy Clause refers to the group of positive Congressional enactments, not to the singular and integrated body of general common law. As scholars have recognized, before Erie, the common law applied by federal courts sitting in diversity under the Swift regime did not preempt state law because a federal judicial decision was not a "federal law"; it was "merely the federal judge's interpretation of the principles constituting the distinct field of common law." 54 In other words, before Erie, the general common law was subordinate to state statutory law, 55 a result grounded ultimately in the plural usage ("the Laws of the United States") found in the Supremacy Clause.

Justice Brandeis's Erie decision overlooks this interpretive evidence drawn from Swift, Gray, and the Constitution. But even more significantly, Justice Brandeis's opinion is forced by the logic of its argument to recast--slightly but tellingly--the language of the Rules of Decision Act. The Rules of Decision Act states as follows:

The laws of the several States, except where the Constitution, treaties, or statute of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. 56

[\*236] As recast by Justice Brandeis, however, this statutory text becomes the following:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. 57

Almost through an absence of mind (or perhaps a sleight of hand), Justice Brandeis's formulation importantly alters the meaning of the statutory text it paraphrases. First, the Brandeis formulation transmutes the word "laws" (plural) of the statute into "law" (singular) for purposes of the opinion. But as Justice Brandeis ought to have recognized, whereas the plural statutory language--"laws of the several states"--is most naturally read to refer to the collective group of each state's positive laws, it is awkward and unnatural to read the statutory term "laws" as referring to and encompassing a unitary body of "common law." 58 To be sure, the general common law was typically received into state law via a statute or constitutional provision. But such positive enactments, while they might provide rules of decision for state courts, could not be read constitutionally or by their terms to apply to cases in federal court. Put in terms of the Rules of Decision Act, federal court cases would not have been "cases where" such state incorporation statutes would properly "apply." It is difficult to see how, especially after Swift, Gray, and the Supremacy Clause, Justice Brandeis could have overlooked this important interpretive evidence.

#### Courts are T, but only insofar as they’re interpreting statutory commands.

Andrew T. Hyman 14, The Institute for Intermediate Study (tifis.org), 2010 to present, Associate Attorney, 2000-2009, Ware Fressola, Van Der Sluys and Adolphson, LLP; J.D., 1994, Lewis and Clark Law School; B.S., 1987, University of Massachusetts at Amherst, “THE SUBSTANTIVE ROLE OF CONGRESS UNDER THE EQUAL PROTECTION CLAUSE,” 42 S.U. L. Rev. 79, Lexis

Part III focuses on the last three words of the EPC, emphasizing the meaning of the word "laws" that was firmly established as of 1868. Lawyers understood the word "laws" (plural) to exclude the decisions of courts, except insofar as courts construe positive laws. The deliberate choice of the words "of the laws," instead of the narrower language "of its laws," envisioned a pivotal role for laws made by Congress.

#### The CP’s distinct---it does NOT affect the ‘laws’---instead, it has judges create new liability under common law without reference to statute.

Alexander Volokh 17, Assistant Professor, Emory Law School, “Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law,” 66 Emory L.J. 1391, Lexis

On the other hand, Oldham writes, the statute would violate the non-delegation doctrine "even if the Sherman Act means what modern interpreters assert." 384 He grants that a standard like promoting consumer welfare would qualify as an intelligible principle under the delegation standards that apply to the executive branch, but argues (as I do) that judicial delegations should be policed more tightly. 385 Perhaps that's true; maybe there would be a violation of the non-delegation doctrine if Congress had truly written a statute providing that "courts shall ban any economic transactions or business practices that do not promote consumer welfare." And perhaps some judges really do think about antitrust that way. For instance, Judge Posner has written that "the modern rationale for antitrust law … is that cartelizing and other anticompetitive practices reduce welfare"; this judgment is supported by "simple cost-benefit analysis" and "provides an uncontroversial basis for modern antitrust law." 386 Judge Easterbrook, too, argues that antitrust law should promote efficiency, 387 though he counsels that judges should be appropriately humble as to how much they can understand about practices that appear to be anticompetitive. 388

But there's another possibility - one that the Supreme Court itself has repeatedly endorsed: Congress meant to refer to the prior restraint-of-trade caselaw; that caselaw is determinate enough to guide us; and we continue to develop that caselaw. But because the statute bans a result, not particular practices, antitrust rules can legitimately change with new understanding.

[\*1456] This is crucial for determining what, if anything, has been violated if judges have it wrong. Suppose the Court is wrong that the Sherman Act is about economic efficiency and consumer welfare; 389 perhaps we should give more credence to other principles present in both the legislative history and the common law, like "fairness and economic independence," 390 protecting competitors (even less efficient ones) from being forced from the business, 391 and preventing undue concentrations of political influence. 392 Perhaps modern-day doctrine can't really be justified as a series of steps since 1890 developing the original common-law standard. 393

But if so, that's the courts' fault, not Congress's. It's a problem of judges acting ultra vires, not of Congress delegating away its legislative power. Congress gave the courts a coherent common-law standard; at that point, the non-delegation doctrine was satisfied. Any later misapplication of that standard by others implicates different norms.

### 2NC---Solvency---OV

#### It’s identically solvent to the plan---all antitrust policy’s interpreted and enforced through a common-law-like legislative delegation to the judiciary---all deficits link to the plan

Daniel A. Crane 21, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlrScholars and judges widely agree that the U.S. antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating.1 [FOOTNOTE 1 BEGINS] 1 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 372–75, 409 (1978) (describing antitrust statutes as “open-textured”); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 4 (Random House 1965) (1954) (“From the beginning many men have criticized the [Sherman] Act as vague, its meaning as elusive, its commands as ambiguous.”); Roger D. Blair & John E. Lopatka, Albrecht Overruled—At Last, 66 ANTITRUST L.J. 537, 552 (1998) (critiquing the Sherman Act’s “indefinite language” and “elusive meaning”); Douglas H. Ginsburg, An Introduction to Bork (1966), COMPETITION POL’Y INT’L, Spring 2006, at 225, 225 (“The open textured nature of the [Sherman] Act—not unlike a general principle of common law— vests the judiciary with considerable responsibility . . . to choose among competing values.”); William H. Page, Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation, 1987 DUKE L.J. 618, 659 (“[T]he Sherman Act is so open textured and the legislative history so vague, that any standard the Court adopts is ultimately a judicial creation.”). [FOOTNOTE 1 ENDS] They further agree that little use can be made of the statutes’ legislative histories.2 [FOOTNOTE 2 BEGINS] 2 Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations.”); THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 20–160 (E. Thomas Sullivan ed., 1991); George E. Garvey, The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions, 29 CATH. U. L. REV. 389, 390, 417 (1980) (noting that the Sherman Act’s legislative history demonstrates that the Sherman Act “was deliberately intended to be indefinite with specificity to be provided by the judiciary”); Michael S. Jacobs, An Essay on the Normative Foundations of Antitrust Economics, 74 N.C. L. REV. 219, 232 (1995) (describing prevailing views that the Sherman Act’s legislative history is “confused” (quoting From Von’s to Schwinn to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals, ANTITRUST, Spring 1992, at 4, 4)). [FOOTNOTE 2 ENDS] It follows that the antitrust statutes are best understood as a legislative delegation to the courts to create an evolutionary and dynamic common law of competition.3 [FOOTNOTE 3 BEGINS] 3 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 62 (3d ed. 2006) (stating that the Sherman Act “invest[ed] the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law, 60 TEX. L. REV. 661, 663 (1982) (“Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.”); Frank H. Easterbrook, Statutes’ Domains, 50 U. CHI. L. REV. 533, 544 (1983) (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”); Frank H. Easterbrook, Workable Antitrust Policy, 84 MICH. L. REV. 1696, 1705 (1986) (“The Sherman Act set up a common law system in antitrust.”); Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 44–45 (1985) (describing antitrust statutes as delegating to courts power to develop common law of antitrust). [FOOTNOTE 3 ENDS] As the Supreme Court explained in its landmark Leegin decision on resale price maintenance, “From the beginning the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.” 4 In other words, the statutory texts disclose little of importance; the action is all in dynamic judicial interpretation.

#### It’s optically identical

Jonathan B. Baker 19, Research Professor of Law, American University Washington College of Law, “Accommodating Competition: Harmonizing National Economic Commitments,” 60 Wm. & Mary L. Rev. 1149, March 2019, WestLaw

Were the courts to seek to interpret the Constitution to assure competition, moreover, that would be unlikely to make much practical difference to the way the competition commitment is enforced. The resulting constitutional jurisprudence would probably look like the judicial elaboration of the antitrust laws. If so, judicial \*1173 enforcement of a constitutional mandate for competitive markets would turn out to be no more protective of the competition commitment than is the interpretation and enforcement of the antitrust statutes. The national economic commitment to assuring competitive markets must be protected, and antitrust enforcement needs to be strengthened, but we should look to the political branches and judicial interpretation of the antitrust statutes as the vehicle for doing so, not to the Constitution.

### 2NC---Solvency---AT: Courts Fail

#### Statute-independent common law changes are actually clearer than the plan

Milton Handler 82, Professor Emeritus of Law, Columbia University, A.B. 1924, L.L.B. 1926, Columbia University; L.L.D. (honoris causa) 1965 Hebrew University Senior Partner, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, “Reforming the Antitrust Laws,” November 1982, 82 Colum. L. Rev. 1287, Lexis

A. Background

The in pari delicto defense -- from the Latin maxim "in pari delicto potior est conditio defendentis" 445 -- arose at English common law as an expression of a moral judgment that a party should not be permitted to profit from his own misconduct. One cannot understand in pari delicto without relating it to the defenses of illegality and unclean hands. In wholly executory contract situations, where a party sues to enforce an illegal contract, illegality is a complete defense -- the courts will not enforce the illegal bargain. 446 Where the illegal contract has been executed and where one party sues for rescission or for damages, that party may recover if he is not in pari delicto; if he is in pari delicto, his suit is barred. 447 In other words, in pari delicto is the name given to the illegality defense to actions for rescission or damages in executed contract situations.

In pari delicto is distinct from the equitable doctrine of "unclean hands." The doctrine of unclean hands -- a defense in equity only -- looks not only to plaintiff's involvement in the transaction comprising plaintiff's claim, but also to misconduct by plaintiff generally relating to plaintiff's allegations in suit. If the misconduct by plaintiff is sufficiently relating to plaintiff's allegations in suit. If the misconduct by plaintiff is sufficiently related to the relief that plaintiff seeks, plaintiff will be denied equitable relief. 448 Unclean hands merely requires [\*1360] a nexus between plaintiff's misconduct and the relief that plaintiff seeks; it does not go so far as in pari delicto and require that plaintiff have equally participated with defendant in the very illegality which is the subject of plaintiff's suit.

The in pari delicto defense was recognized in the United States from the earliest days of the Republic. 449 It was applied in the antitrust context beginning in 1900 in Bishop v. American Preservers Co. 450 Over the years, however, the courts began to stray from the common law ambit of the defense. Many courts were confused by the distinction at common law between in pari delicto and unclean hands. 451 Another troubling application (or misapplication) of the in pari delicto defense arose in cases where the courts did not fully analyze the respective fault of the parties regarding the illegality or the coercive circumstances involved in plaintiff's participation in the specific challenged conduct. 452

B. The Perma Life Case

The Supreme Court was faced with a confusing disarray of decisions misconstruing and misapplying the in pari delicto defense when it granted certiorari to review the Seventh Circuit's decision in Perma Life. Given the common law limitations on that doctrine and the facts of that case, 453 it is small wonder that the Supreme Court unanimously reversed. What is baffling is that the Court spoke with so many voices, thus dissipating a golden opportunity to give proper guidance to the lower courts.

It is difficult to ferret out a true majority holding from the five opinions in Perma Life. 454 Despite Justice Black's clear language rejecting in pari [\*1361] delicto as an antitrust defense, the fact that a plaintiff equally and voluntarily participated in the challenged misconduct remained an antitrust defense under Perma Life. Five of the Justices were explicit on this score, 455 and the remaining four Justices did not close the door to such a defense. 456 In other related areas, the full Court was in agreement. All of the Justices agreed that the lower courts had incorrectly applied the common law standards for an in pari delicto defense; 457 and that a defense did not properly lie where the plaintiff was as responsible as the defendant for the challenged illegality or where the plaintiff had been coerced (literally or under concepts of economic coercion, unequal bargaining power, or business necessity) into participating in the illegality. 458

C. The Legacy of Perma Life

What is the legacy of Perma Life? In part, the problems generated by the Perma Life opinions have been semantic. Courts have struggled with a label for the "equal fault" defense in view of Justice Black's absolute repudiation of in pari delicto. 459 In addition, at least one court has correctly rejected the defense as a matter of law in a situation where economic coercion was practiced; 460 it failed, however, to explain that the result was not a matter of [\*1362] the total inapplicability of in pari delicto, but simply of the nonexistence of equal fault in cases where plaintiff has been subject to economic coercion. 461

The problems go deeper than semantics, however. Courts in the Ninth Circuit (followed by the Eighth Circuit) permit suit against co-conspirators where the plaintiff, a free and equal participant, was not a party to the initial creation of the conspiracy. 462 Courts have continued to confuse in pari delicto and unclean hands and to suggest that in pari delicto (under that or any other label) is no longer a defense in antitrust cases. 463 Finally, courts in several circuits have expended considerable effort speculating on the deterrent effect of applying or rejecting in pari delicto in various categories of securities cases. 464

D. Reconciling Antitrust and In Pari Delicto

An effort to reconcile the competing policies of the antitrust laws and the in pari delicto doctrine is long overdue. The rejection of in pari delicto as a defense subverts the very goals of the antitrust laws. Justice Black's formulation, if applied literally, would require a court to grant a plaintiff treble damages where both parties are equal participants in an unlawful scheme without even compelling plaintiff to cease the very illegality of which he is complaining. If one assumes, for example, that the provisions in a franchise agreement beneficial to the franchisee were unlawful, the franchisee could obtain treble damages and an injunction against the restraints upon his freedom of action while continuing those restraints affecting the franchisor. Moreover, Justice Black also encouraged illegal conduct by plaintiff, by offering a "heads-I-win, tails-you-lose" protection if plaintiff violated the antitrust laws -- if the conspiracy is successful, plaintiff profits from the illegality; if it is unsuccessful, it sues for treble damages. The policies of the antitrust laws and the in pari delicto doctrine are thus not entirely inconsistent.

[\*1363] Moreover, to the extent that the policies of the antitrust laws do conflict somewhat with those of the in pari delicto doctrine, the two sets of policies can be accommodated. Courts have not found it difficult to accommodate competing policies in other antitrust contexts. For example, in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 465 the Supreme Court reconciled the patent and antitrust laws by declaring that misrepresentations in patent applications could give rise to a section 2 violation of the Sherman Act only if the patent was "procured by intentional fraud" and if all of the other elements of a section 2 violation were shown. 466 Limiting antitrust recovery to instances of intentional fraud was required, according to the Court, because exposing a broader classification of misstatements to potential antitrust liability "might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits." 467 But if intentional fraud resulted in obtaining monopoly power (or a dangerous probability of monopoly power) in a property defined relevant market, the full panoply of antitrust sanctions might be invoked against the recreant patentee. Similarly, in the patent misuse area, if a patent holder is guilty of misuse, he cannot recover damages from an infringer. If, however, the patent holder purges his misuse, he may enforce his patent against infringers in the future. 468 In that manner, antitrust policy is fostered by penalizing the patent misuse; and the policy of the patent laws is furthered by allowing an inventor to continue to reap the rewards resulting from the disclosure of his invention after he purges the misuse.

The key to situations where two competing policies collide is not to engage in absolutes and entirely sacrifice one policy in favor of another. It is, rather, to reconcile the demands of both policies to the maximum extent possible -- in the case of antitrust and in pari delicto, to promote free and open competition while preventing a wrongdoer from benefiting from his own misconduct. That can be accomplished by paying strict attention to the common law scope of the in pari delicto doctrine and by holding that the in pari delicto defense can bar treble-damage actions in instances of equal fault but should not preclude suits for injunctive relief against the defendant's continued wrongdoing where the plaintiff has voluntarily ceased to participate in the challenged arrangement. 469 It is one thing to bar a plaintiff's damage recovery [\*1364] because the law does not reward wrongdoers for their own voluntary wrong-doings. It is entirely another to deny the plaintiff a right to bring the illegal scheme to an end. A rule limiting the in pari delicto defense to suits for damages would effectuate the purposes of the antitrust laws while preserving the fundamental notions of fairness that underlie the in pari delicto defense. The court, by conditioning rejection of the defense to injunctive claims on a voluntary cessation by plaintiff of his own part in the challenged conduct, 470 and by enjoining continued wrongdoing by defendant, would in one fell swoop bring the violations of both parties to a halt, thus advancing the cause of antitrust that the negative philosophy of Perma Life does not accomplish.

CONCLUSION

Most of the changes that I have advocated can be accomplished by the courts without the enactment of new legislative revision were kept to a minimum, lest the simplicity of the Sherman law be replaced by superseding amendments in the modern pattern of a complex tax code. We now have an excellent body of antitrust doctrines that, over all, have worked extremely well for almost a century. There has been no diminution in the nation's solid support of the salutary objectives of antitrust or in sound and effective methods of enforcement. It would be tragic if we were to weaken the rules pertaining to the hard core antitrust offenses by amendments that are not faithful to our antitrust traditions. What I propose is of modest dimension. It amounts to little more than a correction of some serious aberrations and would not alter the fundamental purposes and scope of our existing jurisprudence. There are in the wind many other reform proposals, many of which merit the most careful consideration. There unhappily are some that are inspired by special interest purposes and that are antithetical to sound antitrust policy. In my view, all serious proposals should be publicly debated. Out of such a debate should emerge a constructive program of antitrust reform.

#### Uncertainty is inevitable, BUT common law is predictable and sufficiently certain

David McGowan 1, Associate Professor of Law, University of Minnesota Law School, “Innovation, Uncertainty, and Stability in Antitrust Law,” 16 Berkeley Tech. L.J. 729, Lexis

3. Antitrust and Common-Law Adjudication

Debates over the origins and original meaning of the Sherman Act are a notorious quagmire; debates over the congressional purposes behind the Cellar-Kefauver Amendments are a little clearer, 65 but the grammatical change in the original section 7 language left the statute as open-ended as it had been before. 66 That left it to the courts to discern which mergers threatened to limit competition substantially. The highlights of legislative history we have seen in the last two sections illustrate a problem for courts interpreting the antitrust laws. The statutes emerged from political struggles involving conflicting economic interests, but the statutory language does not resolve the conflicts. This lack of direction in the statutory language has both by congressional design and by default given considerable power and responsibility to courts to choose among a range of interests. The upshot is that neither the statutory language nor the legislative history provides courts with a clear rule of decision for evaluating innovation claims or weighing innovation as against other considerations.

[\*753] Judges have long concluded that the Sherman Act gives them common-law authority to interpret the statute in a dynamic manner, taking changes in economic practices and understanding into account. Chief Justice Hughes's famous dictum that "as a charter of freedom, the [Sherman] act has a generality and adaptability comparable to that found to be desirable in constitutional provisions" is a strong, but representative statement. 67 In the modern era, the Court has said that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition,'" and that "the term "restraint of trade,' as used in 1, also "invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.'" 68

Antitrust scholars have tended to agree with this assessment. Judge Posner has written that "the body of antitrust doctrine is largely the product of judicial interpretation of the vague provisions of the antitrust laws and thus can be changed by the courts within the very broad limits set by the language and what we know of the intent behind it." 69 Judge Easterbrook gave the Sherman Act as an example of a law that "effectively authorizes courts to create new lines of common law" 70 and has elsewhere said that the statute "does not contain a program; it is a blank check." 71 Professor Baxter analogized antitrust courts to Congress; 72 and Professor Hovenkamp has suggested that we regard the Sherman Act as ""enabling' legislation - an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways." 73 This position is reasonable, 74 particularly because the statute adopted common-law terminology and its [\*754] leading proponent insisted that the bill merely enacted into federal law the existing common law of each state.

Most commentators who note the common-law nature of Sherman Act interpretation emphasize the flexibility of the common-law approach, as does the Court. 75 From the judicial perspective, this emphasis is useful to explain to readers why opinions in a field resting nominally on statutes spend so little time on the statutory language. Where the statutory command is to engage in common-law analysis, that analysis is itself a proper form of statutory interpretation.

But the common-law method is not about flexibility alone. A reasonable degree of stability and a high degree of reasoned evolution are at least as important as flexibility, though any serious participant in common-law adjudication will acknowledge that perfect certainty is neither achievable nor required. 76 Lawyers cannot advise clients, and clients cannot obey the law, if the "dynamic potential" of common-law antitrust decisionmaking is not balanced by constraints that render the decisions reasonably predictable.

Reasonable predictability requires that each decision rest on reasons that identify the purposes the law seeks to advance, orders them to resolve conflicts, and classifies the behavior at issue relative to those purposes in an analytically rigorous manner that can be understood and replicated by attorneys advising clients. The clarity with which purposes are identified and ranked and the rigor of the analysis of behavior relative to those purposes are what allow lawyers operating in the real world to advise clients with a degree of confidence that, while not reaching certainty, allows business to get done.

### 2NC---AT: Democracy

#### Court checks over congress bolster democacy

Ndumele 18 “Trump’s War On the Courts is a War on Democracy Itself” Nicole Ndumele - J.D. from Harvard Law School, previously worked for DOJ, February 28, 2018, https://takecareblog.com/blog/trump-s-war-on-the-courts-is-a-war-on-democracy-itself

Since the founding of the republic, the courts have played a vital role in ensuring that the fundamental rights and liberties etched in our Constitution are made real for all Americans. By reviewing congressional and executive actions, the courts help preserve the delicate balance of power between the branches of our government and ensure that government officials do not abuse the power given to them by the American people.

Courts are a critical bulwark of our democracy. When government officials attempt to circumvent the courts’ authority to review their actions, to impeach the judges who rule against them, or to defy court orders, Americans of all stripes should be concerned. We must band together to preserve our courts and protect our democracy.

#### No causal relationship between democracy and peace---best studies.

Michael Mousseau 18. Professor of International Relations Theory at the University of Central Florida. 2018, "Grasping the scientific evidence: The contractualist peace supersedes the democratic peace," SAGE Journals, https://journals-sagepub-com.libproxy2.usc.edu/doi/abs/10.1177/0738894215616408, accessed 3-4-2019//JDi

No one has challenged the multiple reports that contractualist economy is the strongest nontrivial predictor of peace both within (Mousseau, 2012b) and between nations (Mousseau, 2013; see also Nieman, 2015). The only matter in controversy is whether democracy has any impact on peace after consideration of contractualist economy. I investigated all five reasons offered in the literature (excluding already-refuted arguments) to think democracy causes peace, and found no support for any of them. The correlation of democracy with peace is zero regardless of how contractualist economy or interstate conflict is measured; the disaggregation of the data yields no support for a causal interaction of democracy with contractualist economy, and the state of knowledge offers no evidence of causation from democracy to contractualist economy and peace. While some correlation of democracy with peace appears in analyses of all disputes (at the 0.10 level), this appears to be a statistical artifact, since democracy is near zero in analyses of wars, fatal-only disputes (Mousseau, 2009, 2012a, 2013 and above), and militarized crises (Mousseau et al., 2013a, b). Analyses of all-disputes are less accurate than those of fatal disputes and crises because they are more likely to include events that are not state-to-state confrontations, and more likely to under-report events occurring in clientelist dyads. We saw that clientelist democracies tend to be geographically dispersed, and this may account for the non-fatal peace, which does not exist in bordering dyads where everyone has an equal chance to fight. The non-fatal correlation of democracy with peace is also marginal, as we saw in Table 4 that it includes only 27% of dyads and only 50% of joint-democratic dyads. This study largely investigated unsupported assertions of fact and showed them to lack support: neither DOR nor Ray (2013) properly supported their claims that multiple imputation, the treatment of ongoing dispute years, an interaction, the adoption of an alternative measure for contractualist economy, or reverse causality actually restore the evidence for the democratic peace. In this way this study merely corroborated what was already the state of knowledge, and it would be a mistake to think there are continuing factual differences in this controversy. I cannot promise that the analyses herein are error free, and I fully expect defenders of the democratic peace to carefully scrutinize them for errors, but no claim of error should be perceived as resurrecting the correlation of democracy with peace unless it is also shown to change results. Nor has anyone disputed the overturning of the democratic peace as reported in two studies (Mousseau, 2009, 2012a). While DOR (205) assert that the analyses in Mousseau (2009) are based on a misinterpreted interaction term, there is no such interaction term in Mousseau (2009). The only evidence-based defense of the democratic peace that exists today comes from DOR’s 120 regressions, 101 of which are invalid. Of the 19 valid ones, only 15 are of fatal disputes that count, and every one of these 15 regressions is mired by one of two questionable practices: five include control for the DemocracyH term that is said to artificially inflate the democracy coefficient; 10 are irrelevant because they include the inconsequential interaction term additionally calculated at the misleading 75th percentile of contractualist economy. If there is a correlation of democracy with peace, why cannot this be shown in a clear-cut regression? Beyond the facts, scientific assessment calls for acknowledgment of the imbalance of theory in this controversy. Economic norms theory does not deny the correlation of democracy with peace, and thus all prior evidence for it; rather, it offers a specific and falsifiable explanation for the correlation that identifies it as spurious. Defenders of the democratic peace are not putting forth a competing explanation for the correlation; rather, they simply oppose the idea that democracy does not independently cause peace, with no reason given for this opposition. However, democracy is not a random variable, so there are no scientific grounds that prohibit us from seeking to explain it, and there are no scientific grounds that preclude that whatever explains democracy cannot also explain the peace. Causality, not statistics, lies at the core of this controversy, and causality cannot be directly seen: it can only be theorized and corroborated. Yet defenders of the democratic peace have not addressed any of the extensive corroborations of economic norms theory accrued in studies of civil conflict and insurgency (Mousseau, 2012b), terrorism (Meierrieks 2012; Boehmer and Daube, 2013; Krieger and Meierrieks, 2015), democratization (Aytacx et al., 2016), and human rights (Mousseau and Mousseau, 2008). The weight of evidence for economic norms theory overwhelms any theory of democracy causing peace (Ungerer, 2012), yet defenders of the proposition have sought only to report some statistically significant correlation of democracy with peace, as if correlation equals causation (Dafoe, 2011; Dafoe and Russett, 2013; DOR; Ray, 2013; Russett, 2010). Nor is there any scientific basis for concluding that this controversy is ultimately unresolvable because the factors are closely related, as is frequently asserted without support (e.g. DOR: 203). The relevant factors are not closely related: contractualist economy is only moderately correlated with trade interdependence (0.31), income (0.71/0.56), and democracy (0.47) (Mousseau, 2013: 191–193). That contractualist nations are almost always democratic does not mean that democratic nations are almost always contractualist, and the majority 57% of democracies had clientelist economies from 1950 to 2010. The notion that democracy, market development, and trade are synonymous is rooted in ignorance, and ignorance cannot justify discarding, after the fact, our carefully constructed measures and datasets.13 The implications of this study are far from trivial: the democratic peace, defined as democracy causing peace, lacks the evidentiary core on which it is based; the observation of democratic peace is best explained by contract norms. If our field is to abide by scientific rules of evidence, then our scholars must stop describing democracy as a ‘‘known’’ cause, or correlate, of peace, and we must stop tossing in a variable for democracy, willy-nilly, in quantitative analyses of international conflict. The variable to replace it is contractualist economy, which not only subsumes democracy but is now the most powerful non-trivial factor in the study of international conflict, whose impact is more than 10 times that which we once thought democracy had. No historical study is immune to criticism, but the progress of knowledge will not be furthered with another (third) round of ardently asserted claims of error that are not shown to change results. I understand the prior view of democratic peace is known and intuitive and the contractualist peace is less so, and unsupported assertions are enough for many to believe in already-known claims. However, the purpose of science is to promote rather than stifle innovation, and to differentiate good ideas from bad ones. Better yet are new ideas that can help make the world a better place, and economic norms theory is clear on that: if the wealthy market-oriented nations wish to advance democracy and peace around the world, the way to do that is to promote economic opportunity.

### 2NC---IL---Warming---Spillover

#### Circuit courts are split on PTD applicability to the climate---definite recognition of statute-independent common law is the one obstacle

Zachary L Berliner 18, J.D. and Environmental Law Certificate candidate, Elisabeth Haub School of Law at Pace University, 2018, “WHAT ABOUT UNCLE SAM? CARVING A NEW PLACE FOR THE PUBLIC TRUST DOCTRINE IN FEDERAL CLIMATE LITIGATION,” University of Pennsylvania Journal of Law and Social Change, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1226&context=jlasc

One effort to extend the PTD in this manner with respect to climate change failed in Alec L. 24 Alec L. was a 2012 decision in which the U.S. District Court for the District of Columbia rejected the plaintiffs’ argument that the PTD imposes a duty on the federal government to prevent the release of atmospheric greenhouse gases.25 The plaintiffs in Alec L., five young citizens and two advocacy organizations, sued the Administrator of the Environmental Protection Agency (“EPA”) and the heads of five other federal agencies.26 They alleged that each agency, representing the federal government and through permitting and approval actions, allowed the atmosphere to become polluted with high levels of human-caused carbon dioxide (“CO2”).27 As such, the defendants “wasted and failed to preserve and protect the atmosphere Public Trust asset” in violation of their “fiduciary duties under the Public Trust Doctrine as trustee of the natural resources of the United States.”28 The plaintiffs sought both declaratory and injunctive relief for their claim—specifically, a declaration of the federal government’s fiduciary role in preserving the atmosphere and an injunction of its actions which contravene that role.29

Since Alec L. was decided, there has been a successful attempt to not only rekindle the PTD argument but incorporate constitutional claims to compel the federal government to combat climate change. Such a victory (albeit a procedural one) occurred in Juliana, in which Judge Ann Aiken of the U.S. District Court for the District of Oregon denied a motion to dismiss the plaintiffs’ claims that the federal government, as represented by the agency defendants, willfully and knowingly acted or failed to act so as to accelerate climate change.30 The plaintiffs also allege that the government violated several of the plaintiffs’ constitutional rights as well as the PTD.31 The plaintiffs in this suit include individuals aged eight to nineteen, associations of activists, and Dr. James Hansen, the well-known climatologist, on behalf of “future generations.”32

ii. Supreme Court Statement in PPL Montana

Central to the holdings in Alec L. and Juliana on the PTD was a statement by the U.S. Supreme Court in PPL Montana, LLC v. Montana (“PPL Montana”) that “the public trust doctrine remains a matter of state law” whose “contours . . . do not depend upon the Constitution.”33 In PPL Montana, the State of Montana sought rent from the plaintiff power company for the use of riverbeds, arguing that it had acquired title to the rivers via the “equal footing doctrine” upon its statehood in 1889.34 The Supreme Court held that Montana state courts had applied an incorrect methodology in determining whether the rivers were “navigable,” as required under the equal footing doctrine.35

In addition to its navigability argument, Montana asserted that denying it title to the riverbeds would “undermine the public trust doctrine.”36 The Supreme Court rejected this, responding with the statement interpreted in Alec L. and Juliana: the PTD, unlike the equal footing doctrine, is a matter of Montana law unaffected by the U.S. Constitution.37 Rather, in the Court’s view, “[t]he States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”38

The Alec L. court found this language to be unambiguous and binding, concluding that it foreclosed the plaintiffs’ public trust claim.39 Moreover, the court stated that it is irrelevant that the statement was dictum, citing its prior holding that Supreme Court language—including dictum—”must be treated as authoritative.”40 The court even felt that the statement was persuasive, as it held in a previous case that “[i]n this country the public trust doctrine has developed almost exclusively as a matter of state law.”41

Conversely, in Juliana, Judge Aiken asserted that PPL Montana said nothing about the viability of federal public trust claims.42 Instead, in her view, PPL Montana was about the equal footing doctrine, not the PTD.43 The Supreme Court was only clarifying that “federal law, not state law, determined whether Montana has title to the riverbeds,” and that “if Montana had title, state law would define the scope of Montana’s public trust obligations.”44 This was logical to Judge Aiken, as the PPL Montana court was tasked with applying the PTD to a state rather than to the federal government.45 She saw no reason why the PTD, given its deep roots in our nation’s civil law system, would apply only to the states and not to the United States government.46

iii. Displacement by Federal Statute

Alec L. and Juliana also came to differing conclusions on the issue of whether the CAA displaces plaintiffs’ common law rights under the PTD given the Supreme Court’s decision in American Electric Power Co. v. Connecticut (“AEP”).47 In AEP, the plaintiffs alleged that the five defendant power companies’ CO2 emissions constituted a public nuisance under federal common law.48 The Supreme Court struck down the claim, holding that “the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of [CO2] emissions from fossil-fuel fired power plants.”49

From this, the Alec L. court concluded that the plaintiffs’ public trust claim was similarly displaced by the CAA.50 The court also noted that AEP does not only apply to common law nuisance claims but rather to any federal common law right associated with the CAA.51 Additionally, the court echoed the AEP court’s concerns that “the judgments the plaintiffs would commit to federal judges . . . cannot be reconciled with the decision-making scheme Congress enacted,”52 and that Congress designated EPA as the primary regulator of greenhouse gas emissions because it “is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”53 In essence, the court believed that it was beyond the scope of its power to direct a federal agency to regulate when Congress has already delegated such authority to an agency with greater expertise on the matter.54

In Juliana, Judge Aiken disagreed with the Alec L. court, reasoning that the Supreme Court did not consider a public trust claim in AEP. 55 Displacement analysis, in her view, does not apply to public trust claims because “they concern inherent attributes of sovereignty”—imposing obligations on the government that “cannot be legislated away” in statutes such as the CAA.56 [\*\*\*FOOTNOTE 56 BEGINS\*\*\*] 56 Id. Judge Aiken also concluded that the court’s fashioning of a proper remedy here would not implicate nonjusticiable political concerns better left to the political branches of government, citing her thorough discussion in an earlier part of the opinion. See id. at 1236–42. In her analysis, she applied the six factors laid out by the Supreme Court in Baker v. Carr, 369 U.S. 186, 210 (1962). She thereafter concluded that there are no political questions here because, “[a]t its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs’ constitutional rights,” which is “squarely within the purview of the judiciary.” Juliana, 217 F. Supp.3d at 1241 (citing INS v. Chadha, 462 U.S. 919, 941 (1983)). Moreover, there are no constitutional provisions or acts of Congress which reserve all decision-making authority relating to climate change to any one political branch. Id. at 1238. She also explained that the court can order the defendants to implement a plan that would redress the plaintiffs’ injuries without specifying exactly what methods that plan would contain. Id. at 1242 [\*\*\*FOOTNOTE ENDS\*\*\*]

### 2NC---IL---Warming---Common-Law Solves

#### Even if rulings themselves fail---the mere doctrinal possibility of climate litigation acts as a ‘prod’ that compels government regulation---that’s Nevitt---AND…

Benjamin Ewing & Douglas A. Kysar 11, Ewing is an Assistant Professor at Queen's Law; Kysar is Joseph M. Field '55 Professor of Law at Yale Law School and faculty co-director of the Law, Ethics and Animals Program, “Prods and Pleas: Limited Government in an Era of Unlimited Harm,” 121 Yale L.J. 350, November 2011, Lexis

At the outset, it must be acknowledged that the fit between climate change and tort law seems poor. Climate change is the ultimate tragedy of the commons. Not only fossil fuel companies and industrial manufacturers, but all human beings and enterprises contribute - however marginally - to the phenomenon of anthropogenic climate change. Isolating where responsibility for greenhouse gas emissions attaches in our energy and land use cycles is therefore an intellectual, moral, and empirical challenge of the first order. In essence, climate change takes Ronald Coase's famous reformulation of tort law - which disrupted classical tort thinking by substituting neutral concepts of reciprocal harm and resource conflict for the moralized terms of victim and polluter 63 - and extrapolates it to the entire globe. Moreover, many of the most devastating impacts of climate change will not happen for decades or centuries hence, even though actions taken today critically affect whether they will occur. If the paradigmatic tort is one in which A hits B - a clear, direct, and unlawful action by one actor against another that gives rise to an isolated, retrospective harm - then climate change lies conspicuously far outside the paradigm.

Climate change harms also seem ill fit for the tort system in light of its supposed goals of ex ante efficient deterrence and ex post corrective justice. From the prospective regulatory standpoint, it seems obvious that carbon taxes, emissions allowances, or traditional pollution control measures are more capable of providing clear rules to facilitate coordinated planning and of casting a wide enough net to actually limit and reverse the growth of greenhouse gas emissions. From the retrospective corrective justice standpoint, a second-order duty to repair one's victim might arise if one has contributed to her harm through the mechanism of climate change, and, in so doing, breached an underlying duty of care owed to her. However, the domain of behavior to which such an underlying duty might apply could be severely cabined by demands for clear and proximate causation, foreseeability of harm, and feasible [\*370] allocation of damages - all far from worked out as matters of morality, let alone law. 64

On the other hand, many of the reasons for skepticism that climate change tort defendants could be held liable - especially the difficulty of pinning causation on a single defendant or group of defendants - have been similarly applicable to other environmental and toxic tort suits. Albeit with hesitation and confusion, courts have devised a number of doctrinal devices to accommodate the difficulties of proof associated with those cases. For instance, courts developed market share liability in the diethylstilbestrol (DES) context as a way of apportioning responsibility for harm in the absence of other means to disaggregate causal influence. 65 Courts made loss of chance recovery available in the medical malpractice context for those whose dim chances of survival might otherwise have rendered them ineligible for protection from negligent behavior under a "more-likely-than-not" causation test. 66 Subtle toxic causation presumptions incorporated into the asbestos context have helped litigants where orthodox doctrines would have prevented recovery due to scientific uncertainty regarding the biological mechanism underlying asbestos-related diseases. 67 Though its track record in these cases has been less than ideal (with many, including courts themselves, preferring legislative or regulatory solutions), the tort system is no stranger to complex, sprawling litigation. Indeed, finding in such cases a broad set of precedents upon which to legitimate climate change torts, some commentators have appeared relatively bullish about the prospects of establishing a viable claim. 68

Whether optimistic or pessimistic about the likelihood that greenhouse gas emissions can successfully be challenged, writers in the climate change tort literature have almost invariably focused on what, if anything, tort law can do [\*371] to help save the global environment from potential catastrophe. 69 Less considered has been how climate change will or should impact the struggle over tort law itself - its appropriate institutional role and the values and meanings it ought to affirm. If most commentators have as yet shied away from such expansive analysis, it may be partly because of an unwritten assumption that although climate change litigation may serve near-term instrumental goals, courts and tort law have no long-term, principled role to play in the struggle to de-carbonize the economy. Thus, writers have tended to focus only on the auxiliary role climate change tort suits might play in regulation more broadly - including framing the climate change issue in terms of compelling victim narratives, stimulating and dignifying climate science against skeptics and propagandists, pushing past special interests and congressional inertia, potentially spurring new laws or regulations, and helping advocacy movements to organize and define themselves. 70

[\*372] Theory and experience do suggest that the margin of legal ambiguity entailed by tort adjudication can serve as a strong impetus for concrete, reformist agitation in the other branches of government. To give one prominent example, uncertainty over liability and the potential for varying environmental, health, and safety standards through tort law give potential defendants a strong incentive to join their plaintiff complainants in attempting to mobilize Congress to respond to the social harms at issue in litigation. 71 Likewise, even when the political branches are pursuing a national policy, they may leave in place the threat of common law tort suits precisely in order to bolster the chance of that policy succeeding. 72 Nevertheless, more analytical work is needed to defend the role of courts in this practice - this apparent means to an expedient political end for plaintiffs, their supporters, and the climate change policy world. As Timothy Lytton brings out in his study of gun industry and clergy sexual abuse suits, the brute consequential effect of litigation on the regulatory system is a contingent empirical question. 73 Even if litigation seems poised to stimulate more substantial and effective regulation, it [\*373] may instead create a backlash from reinvigorated special interests. The Protection of Lawful Commerce in Arms Act, which confers a wide grant of immunity from civil liability on manufacturers and retailers of firearms and ammunition, is one prominent example. 74

Commentators are correct that common law claims have long existed in a complementary relationship with statutory and administrative efforts to protect human health and the environment. 75 Yet, a principled justification of the courts' role in this dynamic must rest on a sturdier foundation than the mere possibility that it will promote what some observers take to be desirable substantive outcomes. The institutional role we are calling "prods and pleas" provides such a justification. Although prods and pleas are generalizable across the different branches of government, they are no more created equal than are checks and balances. Instead, they vary greatly in magnitude, message, and - perhaps most importantly - pedigree within the system and history of American governance. In our view, the common law of tort provides a distinctive and especially powerful instantiation of prods and pleas.

#### That political action’s sufficient AND empirically proven in other environmental contexts

Mark P. Nevitt & Robert V. Percival 18, Mark P. Nevitt is the George Sharswood Fellow at the University of Pennsylvania Law School and a former active duty Navy Judge Advocate General (JAG) officer who served in the rank of commander; Robert V. Percival is the Robert F. Stanton Professor of Law & Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law, “Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?,” Washington University Law Review, Vol. 96, No. 3, pp 441-494

CONCLUSION

Congress first enacted comprehensive federal regulatory programs to protect the environment in the early 1970s. Prior to the enactment of such programs, the common law of nuisance was the primary legal vehicle for redressing pollution problems. Early in the twentieth century, states invoked the federal common law of nuisance to seek intervention by the U.S. Supreme Court in disputes over transboundary air and water pollution. The Court, exercising its original jurisdiction over disputes between states, heard several interstate nuisance cases and used its equitable powers to stop environmentally destructive actions.

After more than a century of evolution, the federal common law of interstate nuisance has been largely eclipsed by the rise of the regulatory state. The Court has held that the CAA and CWA displace federal common law for pollution problems they comprehensively regulate. But for emerging problems not covered by existing regulatory programs, like invasive species, the federal common law may remain a viable option.

In AEP the Court held that federal common law nuisance actions to redress climate change had been displaced by the CAA in light of its decision in Massachusetts v. EPA that the Act delegated to EPA the responsibility to regulate greenhouse gas emissions. 381 But the Court reaffirmed the standing of states to sue, rejected the notion such lawsuits raise non-justiciable political questions, and left open the door to state common law nuisance actions to redress climate change.382 Principles of federalism and the extensive savings clauses in the federal environmental laws will make it difficult to preempt the state common law of nuisance. Thus, if a state can show that its residents are suffering significant injury that federal regulatory authorities have failed to prevent and for which an express decision to preempt state law has not been made, state common law actions founded on the law of the source state will remain available.

In AEP, the Court reaffirmed that environmental protection was a proper subject for the development of federal common law. 383 It also emphasized that expert administrative agencies generally are more capable than the judiciary at fashioning solutions for complex environmental problems. 384 Yet the judiciary has played an important role as a catalyst for action when activities causing significant harm otherwise have escaped regulation. Direct judicial intervention to stop interstate pollution is rare today, but when regulation fails, common law remedies can serve as an important backstop. The Trump Administration’s aggressive efforts to dismantle regulation of GHG emissions and to deny the reality of climate change could revive federal common law,385 [FOOTNOTE 385 BEGINS] 385. Fear of reviving federal common law nuisance suits reportedly was a factor in industry lawyers praising the Trump Administration for proposing new, albeit much weaker, regulations of GHG emissions to replace the Obama Administration’s Clean Power Plan. Ellen M. Gilmer, Proposed Climate Rule May Help Hamstring Nuisance Claims, E&E NEWS, (Aug. 24, 2018), https://www.eene ws.net/stories/1060095165/print [https://perma.cc/XZE6-HBP6]. [FOOTNOTE 385 ENDS] particularly if EPA reverses its endangerment finding or Congress overrules Massachusetts v. EPA.

Judicial intervention to stop interstate pollution remains rare, but the common law of interstate nuisance still retains vitality as a backstop when regulation fails to respond to a serious problem.386 And this is particularly true when states sue. Moreover, in light of the judiciary’s historic role in responding when the other branches of government fail to address significant environmental harm, the common law may return as a viable catalyst for change if official climate denial persists.387 [FOOTNOTE 387 BEGINS] 387. Indeed, despite the environmental litigants’ defeat in the Fourth Circuit in North Carolina. ex rel. Cooper v. Tennessee Valley Authority, the threat of future litigation brought the parties to the negotiating table, resulting in significant decreases in air pollution. See supra Part III. [FOOTNOTE 387 ENDS]

The Court in AEP was surely correct that administrative agencies like EPA possess greater expertise than the judiciary in fashioning responses to climate change. This is why Congress has assigned EPA the primary responsibility for protecting the public against pollutants that endanger public health or welfare. But displacement of federal common law is not a license to deny or ignore a global environmental crisis. If EPA becomes the captive of official climate change denial, common law litigation may return to its historic role as an important catalyst for action.

### 2NC---IL---AT: US Not Key

#### The U.S. is key---tech scale up diffuses globally, action is modeled, and leverage can create future agreements

Dr. Noah Smith 20, Assistant Professor of Finance at Stony Brook University, PhD in Economics from the University of Michigan, Contributor at Quartz, “American Leadership Needed To Fight Climate Change”, Times Leader, 1/15/2020, https://www.timesleader.com/opinion/op-ed/769461/noah-smith-american-leadership-needed-to-fight-climate-change-4

As it becomes more apparent that climate change is a true worldwide emergency, there’s a mounting need for a big policy push to curb greenhouse emissions. But that leaves the question of which policy steps would be most effective.

Despite having high per-capita emissions, the U.S. is actually responsible for only about a seventh of the global total carbon output. U.S. emissions from power-generation are falling as the country transitions away from coal, even as China adds more coal-fired plants. Meanwhile, poor countries are eager to begin or accelerate their own industrialization. For the U.S. to help fix this global problem, it will need to employ solutions that have a worldwide impact — researching and disseminating new technologies, subsidizing companies to scale up these technologies and make them cost-effective, paying other countries to use renewable energy and taxing the products of those nations that increase their use of dirty fuels.

But the U.S. needs to clean its own house. If the U.S. doesn’t curb its own emissions substantially, it will look like a hypocrite for trying to get the rest of the world to do so. That would make it much harder to conclude future global climate agreements and will make competitors reluctant to switch from fossil fuels for fear of forfeiting competitive advantage.

## Adv---Dynamism

### 2NC---TURN

#### Even if they are right that integration is counterproductive - divestiture - which is what separation requires - is still a catastrophically misguided remedy

Hovenkamp ’21 [Herbert; June; Law Professor at the University of Pennsylvania; Yale Law Journal, “Antitrust and Platform Monopoly,” vol. 130, no. 8]

For most antitrust problems outside the context of acquisitions, structural breakup is not a promising remedy. The history of deconcentration measures in American monopolization cases is not pretty.249 Requiring integrated firms to spin off specific plants or products will make them less attractive to consumers but will not inherently serve to dissipate market power in any particular product or service.

Entities and assets acquired by merger, however, present different issues. In some cases, acquired assets are eventually so completely integrated into the acquiring firm that the spinoff problem is not materially different from that of internally developed assets. In others, the degree of integration is less or acquisition lines remain distinct, and the undoing of mergers becomes a more promising remedy. For example, in its Facebook antitrust complaint, the FTC requests an order for Facebook to divest Instagram and WhatsApp, two companies that Facebook acquired, respectively, in 2012 and 2014. 250 Both Insta- gram and WhatsApp continue as separate platforms with distinct member- ship.251 Although the extent of integration between them and Facebook is significant, some of that integration occurred as recently as 2020. 252 Writers have suggested that even this integration was primarily gamesmanship to make an antitrust breakup more difficult.253 A more challenging problem is Android, which Google acquired in 2005 when it was still a tiny, financially troubled firm making software for digital cameras and mobile phones.254 Most of its development into a mature smartphone operating system occurred after this acquisition.255

One successful breakup of a unitary firm was that of AT&T, implemented by a 1982 antitrust consent decree.256 The AT&T network had been presumed to be a natural monopoly, but it lost that status as technological changes facilitated the growth of wireless communication. The breakup left the incumbent local exchange carriers intact for local service because they still depended on wired connections to each customer. However, long-distance service and the production of instruments were divested and turned over to competition.257 The AT&T breakup carries some important lessons for anyone considering structural relief against a monopoly: identify those markets and assets where competition can be made to work well, and devise the remedy accordingly.

The structural breakup problem is more severe for digital platforms. First, breakups can decrease the scope of both direct and indirect network effects, resulting in loss of value. Second, setting aside externally acquired assets, the platforms are typically highly integrated. To be sure, a multidivisional firm such as Alphabet probably can be broken into separate parts that follow its corporate lines—perhaps one firm for the Android OS; another for application services such as Gmail and Google Search; and others for YouTube, Google Nest home products, and Waymo autonomous-driving technology.

But breaking apart noncompeting units does not necessarily increase the amount of competition. If a manufacturer makes 80% of the world’s toasters and 75% of the world’s blenders, compelling divestiture of one will yield one firm that makes 80% of the world’s toasters and a second firm that makes 75% of the world’s blenders. Because the two divisions are not competitors to begin with, we have done nothing to increase the amount of competition.

To do that, we need to break *into* the production of each product. We might force divestiture of half of the firm’s toaster business and half of its blender business, spinning them off to other firms. This, however, can be a much more difficult thing to accomplish. The more integrated the primary company, the greater the difficulties. For example, if the firm makes its toasters in one plant with an integrated production line and blenders in a different plant, a divesture that actually increases competition will likely require dismantling or restructuring the plants themselves.

Breaking up any platform subject to significant economies of scale threatens to be socially costly. It would force inefficiencies on all postbreakup constituents as well as cause consumer harm. For example, Amazon has roughly 67% of the market for ebooks.258 We might divest Amazon’s ebook business and give it to a different firm. Currently, a user can call up a book title on Amazon and select from available formats, whether hardback, paperback, Kindle (ebook), or audio. Forcing a divestiture of Kindle would require a customer who wanted the ebook version to go to a different firm’s website. Ebooks are sold by other resellers, including many of the publishers themselves. The principal impact of such a di- vestiture would be to make it less convenient for readers to select a book format. That is not likely to be a consumer-welfare improvement, and it will do little to promote competition within the ebook industry.

### 2NC---AT: Rulemaking

#### FTC rulemaking would kill the economy.

Abbott ’21 [Alden; August 9; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Truth on the Market, “FTC Antitrust Enforcement and the Rule of Law,” https://truthonthemarket.com/2021/08/09/ftc-antitrust-enforcement-and-the-rule-of-law/]

Proposed FTC Competition Rulemakings

The new FTC leadership is strongly considering competition rulemakings. As I explained in a recent Truth on the Market post, such rulemakings would fail a cost-benefit test. They raise serious legal risks for the commission and could impose wasted resource costs on the FTC and on private parties. More significantly, they would raise two very serious economic policy concerns:

First, competition rules would generate higher error costs than adjudications. Adjudications cabin error costs by allowing for case-specific analysis of likely competitive harms and procompetitive benefits. In contrast, competition rules inherently would be overbroad and would suffer from a very high rate of false positives. By characterizing certain practices as inherently anticompetitive without allowing for consideration of case-specific facts bearing on actual competitive effects, findings of rule violations inevitably would condemn some (perhaps many) efficient arrangements.

Second, competition rules would undermine the rule of law and thereby reduce economic welfare. FTC-only competition rules could lead to disparate legal treatment of a firm’s business practices, depending upon whether the FTC or the U.S. Justice Department was the investigating agency. Also, economic efficiency gains could be lost due to the chilling of aggressive efficiency-seeking business arrangements in those sectors subject to rules. [Emphasis added.]

In short, common law antitrust adjudication, focused on the consumer welfare standard, has done a good job of promoting a vibrant competitive economy in an efficient fashion. FTC competition rulemaking would not.

### 2NC---AT: VC Low

#### VC investment in tech is rising, NOT declining - and startups are less important for innovation in tech

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)

Large Internet platforms such as Amazon, Apple, Facebook, and Google have attracted increased regulatory attention over the past several years. Most recently, the Democratic majority in the Subcommittee on Antitrust, Regulatory, and Administrative Law of the U.S. House of Representatives Committee on the Judiciary culminated a 16-month investigation of competition in digital markets by issuing a report calling for significantly greater regulation of these companies. One argument made against large technology companies is that they 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 these areas (“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 firm to benefit from economies of scale or network effects, and enable the smaller firm 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 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, guiding entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate usually 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. Although the areas of investment have shifted in response to market developments, this reflects the natural evolution of Internet platforms, rather than a pernicious attempt to stifle competition or innovation. In either case, regulators already have sufficient powers to protect competition. The current focus on consumer welfare adequately incorporates concerns about innovation. While antitrust authorities going forward probably should broaden their review of acquisitions by dominant companies, there is no need to significantly change antitrust statutes or embrace structural remedies such as structural separation or breakups, as these would likely slow innovation and harm consumers. WORRIES ABOUT KILLER ACQUISITIONS Large technology-based companies have long used acquisitions as a way to grow and complement their innovation. For example, Between 1993 and 2000, Cisco Systems spent roughly $9 billion buying more than 50 companies. The technology it acquired allowed it to use some of its remaining resources to focus on its core competencies and gain needed capabilities to expand in global markets.1 Since 1998, the four major tech companies (Amazon, Apple, Facebook, and Google) have purchased over 500 companies.2 In February 2020, the Federal Trade Commission (FTC) issued Special Orders to the five largest tech firms (Amazon, Apple, Facebook, Google, and Microsoft) requiring each to provide the commission with information about past acquisitions that were not previously reported to the government. The commission ’s action reflects a broader concern about the effect of acquisitions on competition and innovation within large tech companies. The majority House Subcommittee on Antitrust, Commercial, and Administrative Law report states: [F]irms investigated by the Subcommittee have acquired hundreds of companies just in the last ten years. In some cases, a dominant firm evidently acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand the firm’s dominance. In other cases, a dominant firm acquired smaller companies to shut them down or discontinue underlying products entirely—transactions aptly described as “killer acquisitions.”3 WORRIES ABOUT KILL ZONES Others worry that large technology companies deter investment because no one wants to challenge their market. At a recent antitrust workshop organized by the Department of Justice, investor Paul Arnold said: Everybody’s dissatisfied with LinkedIn. Every founder thinks there’s a better thing to be done. And they’re probably right. It’s not that good. But they have a very powerful network effect. It’ s just incredibly hard to overcome that network. And I’ve never seen something compelling. And so, my choice is investing in a company that’s going to try to do that, or has a very clear path for selling something in insurance, easy choice.4 In 2018, The Economist wrote, “Anything having to do with the consumer internet is perceived as dangerous, because of the dominance of Amazon, Facebook and Google…. Venture capitalists are wary of backing startups in online search, social media, mobile and e-commerce. It has become harder for startups to secure a first financing round.”5 The article predicts kill zones are likely to stay, partly because “the giants have tons of data to identify emerging rivals faster than ever before.”6 The House Subcommittee on Antitrust, Commercial, and Administrative Law report states: Some venture capitalists, for example, report that there is an innovation “kill zone” that insulates dominant platforms from competitive pressure simply because investors do not view new entrants as worthwhile investments. Other investors have said that they avoid funding entrepreneurs and other companies that compete directly or indirectly with dominant firms in the digital economy.7 ACADEMIC PAPERS IDENTIFYING KILL ZONES AND KILLER ACQUISITIONS A number of academic papers have studied both kill zones and killer acquisitions in the tech sector. Economists Sia Kamepalli, Raghuram Rajan, and Luigi Zingales developed a model to measure the prospect that the acquisition of a potential competitor could deter future innovation in a market.8 In their model, the growth of a platform relies on its adoption by “techies.” These early adopters of technology can accurately judge whether a new platform is better than the incumbent. They are willing to incur the switching costs in order to master a new platform provided they 1) judge it to be significantly better than the alternatives; or 2) believe it will eventually become the new standard. Their adoption gives the new technology critical market share in the early stages until others, influenced by early adopters, also join. They postulate that if new companies are frequently acquired and their technology is sidelined, techies will be less inclined to adopt new technology. But if mergers are discouraged, techies will have more confidence that the new technology will eventually replace the existing standard, thereby justifying their investment in adopting it. In this way, acquisitions of new entrants by incumbents can reduce new entry and investment by reducing the new technology’s ability to attract techies.9 The authors acknowledged that prohibitions on mergers can also dampen investment by making it harder for entrants to obtain early-stage funding: “[T]he social optimum will not be an outright prohibition or complete laissez faire, but some middle-of-the-road policy, which will trade off the ex-post welfare losses produced by merger restrictions against the ex-ante gains in investments in innovation.”10 In order to discover whether actual acquisitions deter innovation, the paper looks at acquisitions of software companies for over $500 million. Of the hundreds of deals large Internet companies have done over the last decade, only nine acquisitions met this criteria: seven by Google and two by Facebook. The authors also looked at data from Pitchbook to measure the amount of investment in start-up companies operating in the same “space” as the companies acquired, as well as the total number of venture capital deals funded. From this sample, they concluded that sectors targeted by the two companies exhibit lower investment by venture capitalists. This suggests that Facebook and Google may crowd out investments even before they acquire a company.11 However, Mark Jamison of the American Enterprise Institute has argued that the acquisitions Kamepalli et al. used don’t fit the assumptions of their model, making any conclusions dubious at best.12 The Kamepalli paper assumes that each transaction meets five key assumptions, including that the entrant produces the same product as the acquirer, only better; that there is no multi-homing; and that the acquirer never innovates. Jamison alleged that of the nine transactions examined by Kamepalli et al., five fail to meet any of the assumptions, and four meet just one. Given this, it is hard to have much faith in the conclusions.13 Ian Hathaway took a similar approach as Kamepalli et al. Using data from Pitchbook, he tracked the change in annual venture capital first financings starting in 2009.14 Looking at Amazon, Google, and Facebook, the data let him compare historical financing in the specific market each company is in (e.g., for Google, Internet software), the next broadest category excluding the specific market (for Google and Facebook, software, excluding Internet software), and also for the next-highest category (for both companies, information technology (IT) excluding software). The results allowed him to compare outside investment in the markets primarily occupied by the three companies with investment in markets once and twice removed from them. In each case Hathaway found that investments in the core market increased rapidly up to a point, but that, after a certain date, the rate of increase fell relative to adjacent markets, giving the appearance of killer zones. However, Hathaway also found that investment in immediately adjacent markets continues to grow strongly for several years—in fact, much more strongly than venture capital as a whole, and that despite tailing off, some first fundings continue to occur in the core market. For this reason, Hathaway cautioned: A number of factors outside of market power could explain the decline of new startup activity in [core] industries. Even if market power (or the leveraging of that power into adjacent markets) is to blame, that doesn’t automatically spell trouble for innovation—and in markets with strong network effects, strong concentration might be the most likely or even preferred outcome.15 Other studies have looked at the effect permissive acquisition policy can have on the technology developed by an entrant in an established market. They find that, at least in certain circumstances, merger policy can help a dominant firm create a killer zone within which there is less innovation by new companies. A paper by Kevin A. Bryan and Erik Hovenkamp concludes that if start-up acquisitions are unlimited, a leading incumbent will sometimes acquire new technology partly to keep other companies from catching up. Start-ups will shift innovation to inventions that improve the leader’s technology rather than those that help the broader market. Should the market leader acquire a monopoly, its willingness to purchase new technologies will fall, thereby reducing private returns on future innovations.16 A model developed by economist Michael Katz of the University of California, Berkeley, cautions that “the competitive effects of mergers can be complex and highly fact specific.”17 His model predicts that the effect of permissive merger policy on the incentive to innovate depends on how superior an entrant’s technology is compared with the incumbent’s. In certain cases, incumbents will respond by developing rival technology solely to place pressure on the incumbent to sell. However, models such as this, which are divorced from actual data, show what could conceivably happen under certain assumptions—but provide little guidance on what will actually happen. A study by Etla Economic Research uses Crunchbase data on venture capital deals to measure the actual impact of acquisitions by comparing activity in product markets that experienced acquisitions with markets that have not.18 The study compares the timing of acquisitions in a particular market with the pattern of market entry and venture capital financing both before and after the event. The authors concluded that buyouts by the large technology companies generally led to substantially lower market-entry rates and less venture capital funding in the relevant market. They reported that this effect grew during the 2010s when the large companies gained access to increasing amounts of user data showing what websites and apps people were using, allowing them to spot new challengers sooner. Acquisitions of platform companies have also decreased entry into markets unrelated to those directly affected by the acquisition. Finally, a paper by Mark Lemley and Andrew McCreary argues that the heavy dependence on acquisitions as an exit strategy for venture capitalists is problematic.19 The authors alleged that acquisitions lead to concentration in the tech industry by reinforcing the power of large firms, and preclude the development of the type of disruptive technologies that have traditionally displaced incumbents. But, although they suggested a number of possible solutions, it is not clear any of them would result in better outcomes on average. ARGUMENTS AND STUDIES AGAINST THE KILL ZONE AND KILLER ACQUISITIONS THEORIES Despite the warnings about killer acquisitions and kill zones, many have written and argued that the negative impacts are overstated, and future acquisitions should not be curtailed. Indeed, there are a number of reasons to believe that these concerns are significantly overstated. The Tech Industry Is Different As in much of the anti-monopoly movement’s criticism of technology industries, the critique of killer acquisitions does not reflect the unique nature of technology industries, wherein continued innovation is key and product platforms are complex and require many different components, often ones that companies simply do not have capabilities in. As Edward Roberts and Wenyun Kathy Liu wrote in 2001: The most dramatic change in global technological innovation—the movement toward externally oriented collaborative strategies that complement internal research-and-development investments—began more than a decade ago. Today companies use alliances, joint ventures, licensing, equity investments, mergers and acquisitions to accomplish their technological and market goals over a technology’s life cycle.20 Unlike most other industries, the large Internet companies have plenty of cash to invest in new research. Their markets also experience rapid technological innovation that threatens to displace them if they do not continue to offer a better service than their rivals. The high capacity for internal investment reduces the need for venture capital. But the dynamic nature of the markets ensures continuous innovation, even without entrants. A market leader that merely buys up companies to protect itself from having to innovate will soon be eclipsed by the next new thing. This is part of the reason these companies spend significantly more on research as a portion of their revenue than virtually any other public companies in the world.21 This is why, despite expressing many concerns about the competitive threat posed by large Internet firms, a recent report for the European Commission urges caution in toughening merger policy for digital companies: In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them.22 Likewise, economist Luis Cabral argued that several features of digital platforms make acquisitions a more attractive form of technology transfer.23 First, the evolution of business models is much harder to predict. Partly for this reason, preemptive actions are difficult to judge given the poor definition of markets and the uncertainty in identifying future rivals. Second, intellectual property is more difficult to protect than in markets such as pharmaceuticals. As a result, companies cannot be sure of what they are licensing. Nor can they be confident that a rival will not simply copy their technology for free. Cabral noted that, out of hundreds of mergers completed by these companies over the last decade, only a handful typically attract any criticism. As an anecdote, he mentioned Alta Vista’s refusal of an offer to purchase Google for $1 million. He pointed out that Google’s substitutability and superiority was not apparent at the time. In fact, two years later, Alta Vista still had more than double Google’s market share. Also, while the tech industry does use acquisitions as a way to gain needed technology and talent, it does not do so as a substitute for investing in its own innovation. According to the 2019 EU Industrial R&D Scorecard, of the top companies globally with the largest increase in research and development (R&D) expenditures, four were large U.S. tech companies (Apple, Facebook, Google, and Microsoft). And of the top 5,000 companies in the world ranked by R&D spending in 2019, Alphabet (Google’s parent) ranked number 1, Microsoft 3, Apple 6, and Facebook 11. And according to the EU, Amazon would have ranked first overall if it had broken out its R&D and content development expenditures. Even with the ability to acquire other firms, these firms seem to have plenty of incentive to invest in R&D. Moreover, it is precisely their size and market power that gives them the ability to invest so heavily in R&D.24 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 in an industry because it deters innovation.28 They built a model in which prohibiting acquisitions has a positive effect on consumer surplus only if the bargaining power of the entrant is small and competition in the industry is not too intense, because both raise the incentives for an incumbent to do its own innovation rather than purchasing that of others. They cautioned: While prohibiting acquisitions always has a strictly negative innovation effect in the case without commercialization (i.e. for killer acquisitions), it is not necessarily true for acquisitions with commercialization. Thus, even though killer acquisitions may appear to be particularly problematic, the case for prohibiting them is not necessarily stronger than for acquisitions with commercialization if one takes ex-ante innovation incentives into account.29 Moreover, Will Rinehart of the Center for Growth and Opportunity wrote that the large majority of acquisitions are motivated by the desire to purchase either the technology or the talent of the specific firm, rather than to stifle a potential rival.30 Sometimes termed “acqui-hires,” these acquisitions refer to when a company is acquired largely as a means to hire its workforce, and the newly hired team is often more productive after acquisition, in part because of economies of scope and increased resources.31 These acquisitions also often benefit both parties by integrating new technology into a broader network and helping the new firm scale up. They also benefit consumers by disseminating innovations more broadly. Rinehart related how Facebook’s purchase of Instagram was frequently mocked at the time. Since the purchase, Facebook has helped Instagram become a widely used platform. Likewise, when Google purchased the start-up Keyhole, an innovative digital mapping company, (at the request of Keyhole founders), Google invested billions to improve and expand the mapping coverage. Bill Kilday, one of the founders of Keyhole, wrote that Google “gave them zero direction [and] unlimited resources.”32 In Keyhole’s early days, Kilday talked with someone who had an idea to do street-level mapping, complete with pictures. He estimated that because of the vast scale of it, coupled with an uncertain business model, it was essentially science fiction, not likely to be seen in his lifetime. Google, with its Street View project, did it in less than five years, providing it to consumers for free. Moreover, by acquiring Keyhole to help it create Google maps, Google disrupted an incumbent duopoly (MapQuest and TeleAtlas) that was charging for their products. Moreover, the assumption there are many killer acquisitions does not seem to be borne out. One reason is they are seldom profitable. A mathematical model developed by Pehr-Johan Norbäck, Charlotta Olofsson, and Lars Persson predicts that companies will only purchase a new technology in order to kill it if the quality of the invention is small, otherwise the profit from introducing the technology is higher than the value of deterring its use.33 This incentive to acquire also falls when intellectual property rights are strong, thereby increasing the entrant’s commercial value. Likewise, a paper by Axel Gautier and Joe Lamesch that surveyed acquisitions by Google, Amazon, Facebook, Microsoft, and Apple finds that out of 175 acquisitions in the 2015–2017 period the paper surveys, only one qualified for being a potential “killer” acquisition: Facebook’s acquisition of a photo-sharing app called Masquerade, which had raised just $1 million in funding before being acquired.34 Acquisitions Often Fail and Do Not Provide a Competitive Advantage The antimonopoly critics of tech firms assume the firms are all powerful and prescient, and all their acquisitions achieve the companies’ goals. It is easy for them to remember successful acquisitions, but failures tend to be forgotten. Moreover, even successful mergers are unable to protect the acquirer from technological and market changes that erode its competitive advantage. We have seen a number of examples of this. In the late-1990s and early 2000s, Lucent and Nortel were the powerful tech giants of their time. In the quest to get even larger, they invested tens of billions of dollars in acquisitions. In just five years, Lucent acquired nearly 40 companies, including spending over $20 billion for Ascend Communications.35 Nortel spent $9.1 billion to acquire Bay Networks in 1998.36 Almost all these acquisitions were subsequently written off or divested at a significant loss. Sun Microsystems acquired numerous companies during its heyday, including StarDivision, [StorageTek](https://www.computerhope.com/comp/stortek.htm), Procom Technology, and at least 88 others.37 In 1997, it bought tech start-up Diba, which created technology for devices that scan television and the Internet. As one article states, “This is just one more of Sun's strategic ventures to stay ahead of competition.”38 At the time, Sun was “big tech” and “ideally positioned with its leadership in network computing and [the Internet](https://www.encyclopedia.com/science-and-technology/computers-and-electrical-engineering/computers-and-computing/internet).”39 But it was for naught because eventually Sun, near failure, was purchased by Oracle, in what is generally seen as a poor decision by Oracle. Likewise, once-dominant Internet titan Yahoo! purchased over 114 technology companies, many of them start-ups.40 When it was just five years old, it was worth more than GM, Ford, and Chrysler combined. Indeed, some antimonopolists of the day believed that the Department of Justice would soon bring an antitrust suit against Yahoo! for being a dominant monopoly.41 But the acquisitions did not enable it to remain ahead of Google in search. A team led by Mats Holmström pointed out that many acquisitions, which by definition are expected to benefit the acquirer, fail miserably. A long academic literature documents the fact that, in different industries over different time periods, only a fraction of mergers meet their financial goals.42 That is why the team expressed skepticism that either WhatsApp or Instagram could have become strong competitors to Facebook. Acquisitions Provide a Needed Exit Route The knowledge of possibly being acquired can also spur entrepreneurial activity and investment. As the report for the European Commission notes: Simultaneously, the chance for start-ups to be acquired by larger companies is an important element of venture capital markets: it is among the main exit routes for investors and it provides an incentive for the private financing of high-risk innovation.43 This argument was echoed by James Pethokoukis of the American Enterprise Institute: Not every founder starts a company intending for it become Amazon. Often future acquisition is the goal. Then the entrepreneur can go on to start another firm or become an investor in other aspirational startups working on risky new ideas. Same goes for the investors in the acquired firm. What’s more, these purchases are often “acquisition-by-hire” situations where the prize is talent rather than the Next Big Thing. And when an upstart firm has a valuable idea, acquisition can be the fastest way to get it to users.44 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.

#### Their startup formation statistics are misleading - tech startups are actually booming

Atkinson ’20 [Robert D and Caleb Foote; August 3; Ph.D. at UNC-Chapel Hill, the founder and president of ITIF; research assistant at the ITIF; Information Technology & Innovation Foundation, “Monopoly Myths: Is Concentration Leading to Fewer Start-Ups?” https://itif.org/publications/2020/08/03/monopoly-myths-concentration-leading-fewer-start-ups]

This difference in the kind of new firm start-ups is why dire claims that the sky is falling on new business formation can exist parallel to claims that we are living in a time of robust innovation and entrepreneurship, with Silicon Valley and other tech hubs throughout the nation enjoying frothy and dynamic innovation. As Silicon Valley venture capitalist Marc Andreessen tweeted, “There’s too much entrepreneurship: Disruption running wild!” He added, “There’s too little entrepreneurship: Economy stalling out!”42 A big reason for this contradiction is that the above studies reporting gloom don’t differentiate between lifestyle businesses that stay small (mostly in the retail sector) and growth businesses that don’t.

What really matters is how high-growth, innovation-based start-ups are doing (think: biotech or robotics start-ups, not owner-operated pizza parlors). And here, things are healthy. When MIT professors Jorge Guzman and Scott Stern looked at trends in high-growth entrepreneurship for 15 large states from 1988 to 2014, they found that even after controlling for the size of the U.S. economy, the second-highest rate of high-growth entrepreneurship occurred in 2014.43 They also found that even after controlling for the size of the U.S. economy, the second highest rate of high-growth entrepreneurship occurred in 2014.44 This research indicates that the entrepreneurial potential (successful start-ups as a share of gross domestic product (GDP)) by founding year hit its low point in 1990, peaked in 2000 at almost twice as high, fell after the dot-com bust, then rose to 2007, fell again with the global recession of 2008–2009, but then bounced back to almost record highs by 2014. As Fazio and colleagues have noted, “Quantity-based measures document a troubling, three-decade-long decline in the U.S. rate of entrepreneurship…. Conversely, outcome-based measures indicate that the rate of entrepreneurship is rising. Early-stage angel and venture capital financing of new ventures has been on a significant upswing over the past several years.”45

And when the Information Technology and Innovation Foundation (ITIF) examined data on more than 5 million technology-based start-ups in the United States, it found that the number had grown 47 percent over the last decade.46 For example, from 2007 to 2015, software-firm start-ups increased 20 percent. And there were more software firms in 2016 than in 2007. Their five-year survival rate in 2011 was 17 percentage points higher than in 1999.

### 2NC---AT: Kill Zones

#### Kill zones are good - productively steer investment

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)

Large Internet platforms such as Amazon, Apple, Facebook, and Google have attracted increased regulatory attention over the past several years. Most recently, the Democratic majority in the Subcommittee on Antitrust, Regulatory, and Administrative Law of the U.S. House of Representatives Committee on the Judiciary culminated a 16-month investigation of competition in digital markets by issuing a report calling for significantly greater regulation of these companies. One argument made against large technology companies is that they 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 these areas (“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 firm to benefit from economies of scale or network effects, and enable the smaller firm 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 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, guiding entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate usually 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. Although the areas of investment have shifted in response to market developments, this reflects the natural evolution of Internet platforms, rather than a pernicious attempt to stifle competition or innovation. In either case, regulators already have sufficient powers to protect competition. The current focus on consumer welfare adequately incorporates concerns about innovation. While antitrust authorities going forward probably should broaden their review of acquisitions by dominant companies, there is no need to significantly change antitrust statutes or embrace structural remedies such as structural separation or breakups, as these would likely slow innovation and harm consumers. WORRIES ABOUT KILLER ACQUISITIONS Large technology-based companies have long used acquisitions as a way to grow and complement their innovation. For example, Between 1993 and 2000, Cisco Systems spent roughly $9 billion buying more than 50 companies. The technology it acquired allowed it to use some of its remaining resources to focus on its core competencies and gain needed capabilities to expand in global markets.1 Since 1998, the four major tech companies (Amazon, Apple, Facebook, and Google) have purchased over 500 companies.2 In February 2020, the Federal Trade Commission (FTC) issued Special Orders to the five largest tech firms (Amazon, Apple, Facebook, Google, and Microsoft) requiring each to provide the commission with information about past acquisitions that were not previously reported to the government. The commission ’s action reflects a broader concern about the effect of acquisitions on competition and innovation within large tech companies. The majority House Subcommittee on Antitrust, Commercial, and Administrative Law report states: [F]irms investigated by the Subcommittee have acquired hundreds of companies just in the last ten years. In some cases, a dominant firm evidently acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand the firm’s dominance. In other cases, a dominant firm acquired smaller companies to shut them down or discontinue underlying products entirely—transactions aptly described as “killer acquisitions.”3 WORRIES ABOUT KILL ZONES Others worry that large technology companies deter investment because no one wants to challenge their market. At a recent antitrust workshop organized by the Department of Justice, investor Paul Arnold said: Everybody’s dissatisfied with LinkedIn. Every founder thinks there’s a better thing to be done. And they’re probably right. It’s not that good. But they have a very powerful network effect. It’ s just incredibly hard to overcome that network. And I’ve never seen something compelling. And so, my choice is investing in a company that’s going to try to do that, or has a very clear path for selling something in insurance, easy choice.4 In 2018, The Economist wrote, “Anything having to do with the consumer internet is perceived as dangerous, because of the dominance of Amazon, Facebook and Google…. Venture capitalists are wary of backing startups in online search, social media, mobile and e-commerce. It has become harder for startups to secure a first financing round.”5 The article predicts kill zones are likely to stay, partly because “the giants have tons of data to identify emerging rivals faster than ever before.”6 The House Subcommittee on Antitrust, Commercial, and Administrative Law report states: Some venture capitalists, for example, report that there is an innovation “kill zone” that insulates dominant platforms from competitive pressure simply because investors do not view new entrants as worthwhile investments. Other investors have said that they avoid funding entrepreneurs and other companies that compete directly or indirectly with dominant firms in the digital economy.7 ACADEMIC PAPERS IDENTIFYING KILL ZONES AND KILLER ACQUISITIONS A number of academic papers have studied both kill zones and killer acquisitions in the tech sector. Economists Sia Kamepalli, Raghuram Rajan, and Luigi Zingales developed a model to measure the prospect that the acquisition of a potential competitor could deter future innovation in a market.8 In their model, the growth of a platform relies on its adoption by “techies.” These early adopters of technology can accurately judge whether a new platform is better than the incumbent. They are willing to incur the switching costs in order to master a new platform provided they 1) judge it to be significantly better than the alternatives; or 2) believe it will eventually become the new standard. Their adoption gives the new technology critical market share in the early stages until others, influenced by early adopters, also join. They postulate that if new companies are frequently acquired and their technology is sidelined, techies will be less inclined to adopt new technology. But if mergers are discouraged, techies will have more confidence that the new technology will eventually replace the existing standard, thereby justifying their investment in adopting it. In this way, acquisitions of new entrants by incumbents can reduce new entry and investment by reducing the new technology’s ability to attract techies.9 The authors acknowledged that prohibitions on mergers can also dampen investment by making it harder for entrants to obtain early-stage funding: “[T]he social optimum will not be an outright prohibition or complete laissez faire, but some middle-of-the-road policy, which will trade off the ex-post welfare losses produced by merger restrictions against the ex-ante gains in investments in innovation.”10 In order to discover whether actual acquisitions deter innovation, the paper looks at acquisitions of software companies for over $500 million. Of the hundreds of deals large Internet companies have done over the last decade, only nine acquisitions met this criteria: seven by Google and two by Facebook. The authors also looked at data from Pitchbook to measure the amount of investment in start-up companies operating in the same “space” as the companies acquired, as well as the total number of venture capital deals funded. From this sample, they concluded that sectors targeted by the two companies exhibit lower investment by venture capitalists. This suggests that Facebook and Google may crowd out investments even before they acquire a company.11 However, Mark Jamison of the American Enterprise Institute has argued that the acquisitions Kamepalli et al. used don’t fit the assumptions of their model, making any conclusions dubious at best.12 The Kamepalli paper assumes that each transaction meets five key assumptions, including that the entrant produces the same product as the acquirer, only better; that there is no multi-homing; and that the acquirer never innovates. Jamison alleged that of the nine transactions examined by Kamepalli et al., five fail to meet any of the assumptions, and four meet just one. Given this, it is hard to have much faith in the conclusions.13 Ian Hathaway took a similar approach as Kamepalli et al. Using data from Pitchbook, he tracked the change in annual venture capital first financings starting in 2009.14 Looking at Amazon, Google, and Facebook, the data let him compare historical financing in the specific market each company is in (e.g., for Google, Internet software), the next broadest category excluding the specific market (for Google and Facebook, software, excluding Internet software), and also for the next-highest category (for both companies, information technology (IT) excluding software). The results allowed him to compare outside investment in the markets primarily occupied by the three companies with investment in markets once and twice removed from them. In each case Hathaway found that investments in the core market increased rapidly up to a point, but that, after a certain date, the rate of increase fell relative to adjacent markets, giving the appearance of killer zones. However, Hathaway also found that investment in immediately adjacent markets continues to grow strongly for several years—in fact, much more strongly than venture capital as a whole, and that despite tailing off, some first fundings continue to occur in the core market. For this reason, Hathaway cautioned: A number of factors outside of market power could explain the decline of new startup activity in [core] industries. Even if market power (or the leveraging of that power into adjacent markets) is to blame, that doesn’t automatically spell trouble for innovation—and in markets with strong network effects, strong concentration might be the most likely or even preferred outcome.15 Other studies have looked at the effect permissive acquisition policy can have on the technology developed by an entrant in an established market. They find that, at least in certain circumstances, merger policy can help a dominant firm create a killer zone within which there is less innovation by new companies. A paper by Kevin A. Bryan and Erik Hovenkamp concludes that if start-up acquisitions are unlimited, a leading incumbent will sometimes acquire new technology partly to keep other companies from catching up. Start-ups will shift innovation to inventions that improve the leader’s technology rather than those that help the broader market. Should the market leader acquire a monopoly, its willingness to purchase new technologies will fall, thereby reducing private returns on future innovations.16 A model developed by economist Michael Katz of the University of California, Berkeley, cautions that “the competitive effects of mergers can be complex and highly fact specific.”17 His model predicts that the effect of permissive merger policy on the incentive to innovate depends on how superior an entrant’s technology is compared with the incumbent’s. In certain cases, incumbents will respond by developing rival technology solely to place pressure on the incumbent to sell. However, models such as this, which are divorced from actual data, show what could conceivably happen under certain assumptions—but provide little guidance on what will actually happen. A study by Etla Economic Research uses Crunchbase data on venture capital deals to measure the actual impact of acquisitions by comparing activity in product markets that experienced acquisitions with markets that have not.18 The study compares the timing of acquisitions in a particular market with the pattern of market entry and venture capital financing both before and after the event. The authors concluded that buyouts by the large technology companies generally led to substantially lower market-entry rates and less venture capital funding in the relevant market. They reported that this effect grew during the 2010s when the large companies gained access to increasing amounts of user data showing what websites and apps people were using, allowing them to spot new challengers sooner. Acquisitions of platform companies have also decreased entry into markets unrelated to those directly affected by the acquisition. Finally, a paper by Mark Lemley and Andrew McCreary argues that the heavy dependence on acquisitions as an exit strategy for venture capitalists is problematic.19 The authors alleged that acquisitions lead to concentration in the tech industry by reinforcing the power of large firms, and preclude the development of the type of disruptive technologies that have traditionally displaced incumbents. But, although they suggested a number of possible solutions, it is not clear any of them would result in better outcomes on average. ARGUMENTS AND STUDIES AGAINST THE KILL ZONE AND KILLER ACQUISITIONS THEORIES Despite the warnings about killer acquisitions and kill zones, many have written and argued that the negative impacts are overstated, and future acquisitions should not be curtailed. Indeed, there are a number of reasons to believe that these concerns are significantly overstated. The Tech Industry Is Different As in much of the anti-monopoly movement’s criticism of technology industries, the critique of killer acquisitions does not reflect the unique nature of technology industries, wherein continued innovation is key and product platforms are complex and require many different components, often ones that companies simply do not have capabilities in. As Edward Roberts and Wenyun Kathy Liu wrote in 2001: The most dramatic change in global technological innovation—the movement toward externally oriented collaborative strategies that complement internal research-and-development investments—began more than a decade ago. Today companies use alliances, joint ventures, licensing, equity investments, mergers and acquisitions to accomplish their technological and market goals over a technology’s life cycle.20 Unlike most other industries, the large Internet companies have plenty of cash to invest in new research. Their markets also experience rapid technological innovation that threatens to displace them if they do not continue to offer a better service than their rivals. The high capacity for internal investment reduces the need for venture capital. But the dynamic nature of the markets ensures continuous innovation, even without entrants. A market leader that merely buys up companies to protect itself from having to innovate will soon be eclipsed by the next new thing. This is part of the reason these companies spend significantly more on research as a portion of their revenue than virtually any other public companies in the world.21 This is why, despite expressing many concerns about the competitive threat posed by large Internet firms, a recent report for the European Commission urges caution in toughening merger policy for digital companies: In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them.22 Likewise, economist Luis Cabral argued that several features of digital platforms make acquisitions a more attractive form of technology transfer.23 First, the evolution of business models is much harder to predict. Partly for this reason, preemptive actions are difficult to judge given the poor definition of markets and the uncertainty in identifying future rivals. Second, intellectual property is more difficult to protect than in markets such as pharmaceuticals. As a result, companies cannot be sure of what they are licensing. Nor can they be confident that a rival will not simply copy their technology for free. Cabral noted that, out of hundreds of mergers completed by these companies over the last decade, only a handful typically attract any criticism. As an anecdote, he mentioned Alta Vista’s refusal of an offer to purchase Google for $1 million. He pointed out that Google’s substitutability and superiority was not apparent at the time. In fact, two years later, Alta Vista still had more than double Google’s market share. Also, while the tech industry does use acquisitions as a way to gain needed technology and talent, it does not do so as a substitute for investing in its own innovation. According to the 2019 EU Industrial R&D Scorecard, of the top companies globally with the largest increase in research and development (R&D) expenditures, four were large U.S. tech companies (Apple, Facebook, Google, and Microsoft). And of the top 5,000 companies in the world ranked by R&D spending in 2019, Alphabet (Google’s parent) ranked number 1, Microsoft 3, Apple 6, and Facebook 11. And according to the EU, Amazon would have ranked first overall if it had broken out its R&D and content development expenditures. Even with the ability to acquire other firms, these firms seem to have plenty of incentive to invest in R&D. Moreover, it is precisely their size and market power that gives them the ability to invest so heavily in R&D.24 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 in an industry because it deters innovation.28 They built a model in which prohibiting acquisitions has a positive effect on consumer surplus only if the bargaining power of the entrant is small and competition in the industry is not too intense, because both raise the incentives for an incumbent to do its own innovation rather than purchasing that of others. They cautioned: While prohibiting acquisitions always has a strictly negative innovation effect in the case without commercialization (i.e. for killer acquisitions), it is not necessarily true for acquisitions with commercialization. Thus, even though killer acquisitions may appear to be particularly problematic, the case for prohibiting them is not necessarily stronger than for acquisitions with commercialization if one takes ex-ante innovation incentives into account.29 Moreover, Will Rinehart of the Center for Growth and Opportunity wrote that the large majority of acquisitions are motivated by the desire to purchase either the technology or the talent of the specific firm, rather than to stifle a potential rival.30 Sometimes termed “acqui-hires,” these acquisitions refer to when a company is acquired largely as a means to hire its workforce, and the newly hired team is often more productive after acquisition, in part because of economies of scope and increased resources.31 These acquisitions also often benefit both parties by integrating new technology into a broader network and helping the new firm scale up. They also benefit consumers by disseminating innovations more broadly. Rinehart related how Facebook’s purchase of Instagram was frequently mocked at the time. Since the purchase, Facebook has helped Instagram become a widely used platform. Likewise, when Google purchased the start-up Keyhole, an innovative digital mapping company, (at the request of Keyhole founders), Google invested billions to improve and expand the mapping coverage. Bill Kilday, one of the founders of Keyhole, wrote that Google “gave them zero direction [and] unlimited resources.”32 In Keyhole’s early days, Kilday talked with someone who had an idea to do street-level mapping, complete with pictures. He estimated that because of the vast scale of it, coupled with an uncertain business model, it was essentially science fiction, not likely to be seen in his lifetime. Google, with its Street View project, did it in less than five years, providing it to consumers for free. Moreover, by acquiring Keyhole to help it create Google maps, Google disrupted an incumbent duopoly (MapQuest and TeleAtlas) that was charging for their products. Moreover, the assumption there are many killer acquisitions does not seem to be borne out. One reason is they are seldom profitable. A mathematical model developed by Pehr-Johan Norbäck, Charlotta Olofsson, and Lars Persson predicts that companies will only purchase a new technology in order to kill it if the quality of the invention is small, otherwise the profit from introducing the technology is higher than the value of deterring its use.33 This incentive to acquire also falls when intellectual property rights are strong, thereby increasing the entrant’s commercial value. Likewise, a paper by Axel Gautier and Joe Lamesch that surveyed acquisitions by Google, Amazon, Facebook, Microsoft, and Apple finds that out of 175 acquisitions in the 2015–2017 period the paper surveys, only one qualified for being a potential “killer” acquisition: Facebook’s acquisition of a photo-sharing app called Masquerade, which had raised just $1 million in funding before being acquired.34 Acquisitions Often Fail and Do Not Provide a Competitive Advantage The antimonopoly critics of tech firms assume the firms are all powerful and prescient, and all their acquisitions achieve the companies’ goals. It is easy for them to remember successful acquisitions, but failures tend to be forgotten. Moreover, even successful mergers are unable to protect the acquirer from technological and market changes that erode its competitive advantage. We have seen a number of examples of this. In the late-1990s and early 2000s, Lucent and Nortel were the powerful tech giants of their time. In the quest to get even larger, they invested tens of billions of dollars in acquisitions. In just five years, Lucent acquired nearly 40 companies, including spending over $20 billion for Ascend Communications.35 Nortel spent $9.1 billion to acquire Bay Networks in 1998.36 Almost all these acquisitions were subsequently written off or divested at a significant loss. Sun Microsystems acquired numerous companies during its heyday, including StarDivision, [StorageTek](https://www.computerhope.com/comp/stortek.htm), Procom Technology, and at least 88 others.37 In 1997, it bought tech start-up Diba, which created technology for devices that scan television and the Internet. As one article states, “This is just one more of Sun's strategic ventures to stay ahead of competition.”38 At the time, Sun was “big tech” and “ideally positioned with its leadership in network computing and [the Internet](https://www.encyclopedia.com/science-and-technology/computers-and-electrical-engineering/computers-and-computing/internet).”39 But it was for naught because eventually Sun, near failure, was purchased by Oracle, in what is generally seen as a poor decision by Oracle. Likewise, once-dominant Internet titan Yahoo! purchased over 114 technology companies, many of them start-ups.40 When it was just five years old, it was worth more than GM, Ford, and Chrysler combined. Indeed, some antimonopolists of the day believed that the Department of Justice would soon bring an antitrust suit against Yahoo! for being a dominant monopoly.41 But the acquisitions did not enable it to remain ahead of Google in search. A team led by Mats Holmström pointed out that many acquisitions, which by definition are expected to benefit the acquirer, fail miserably. A long academic literature documents the fact that, in different industries over different time periods, only a fraction of mergers meet their financial goals.42 That is why the team expressed skepticism that either WhatsApp or Instagram could have become strong competitors to Facebook. Acquisitions Provide a Needed Exit Route The knowledge of possibly being acquired can also spur entrepreneurial activity and investment. As the report for the European Commission notes: Simultaneously, the chance for start-ups to be acquired by larger companies is an important element of venture capital markets: it is among the main exit routes for investors and it provides an incentive for the private financing of high-risk innovation.43 This argument was echoed by James Pethokoukis of the American Enterprise Institute: Not every founder starts a company intending for it become Amazon. Often future acquisition is the goal. Then the entrepreneur can go on to start another firm or become an investor in other aspirational startups working on risky new ideas. Same goes for the investors in the acquired firm. What’s more, these purchases are often “acquisition-by-hire” situations where the prize is talent rather than the Next Big Thing. And when an upstart firm has a valuable idea, acquisition can be the fastest way to get it to users.44 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---AT: Small Firms Key

#### The most recent and comprehensive data proves vertical integration is good.

Ganapati ’21 [Sharat; 2021; Assistant Professor of International Economics at Georgetown University; American Economic Journal of Microeconomics, “Growing Oligopolies, Prices, Output, and Productivity,” vol. 13, no. 3]

American industries have grown more concentrated over the last 40 years. In the absence of productivity innovation, this should lead to price hikes and output reductions, decreasing consumer welfare. With US census data from 1972 to 2012, I use price data to disentangle revenue from output. Industry-level estimates show that concentration increases are positively correlated to productivity and real output growth, uncorrelated with price changes and overall payroll, and negatively correlated with labor’s revenue share. I rationalize these results in a simple model of competition. Productive industries (with growing oligopolists) expand real output and hold down prices, raising consumer welfare, while maintaining or reducing their workforces, lowering labor’s share of output. (JEL D43, L13, D24, D33, D21, D42)

Does America have a monopoly problem? Market concentration within narrowly defined industries has risen over the last 40 years. Various papers have systematically and comprehensively laid out the implications of concentration on profits, productive factors, and markups.1 However, research has not systematically measured consumer welfare and prices, a first-order concern for antitrust authorities (Shapiro 2010, FTC Hearings 2018). 2 In the simplest economics examples (Tirole 1988), monopolies charge higher prices and restrict output, maximizing profits and reducing consumer welfare. However, monopolies could be caused by innovation from “superstar” firms or scale economies, leading to falling prices or increased output (Autor et al. 2017, Van Reenen 2018, Armstrong and Porter 2007, Tirole 1988, Kehrig and Vincent 2021).

Monopolists and oligopolists have incentives to both increase prices and/or decrease output.3 My main research question is simple: is there an empirical relationship between changes in oligopolies and consumer-relevant market outcomes on an economy-wide basis? I test the relationship of prices, quantities, and market concentration across the vast majority of the US economy using 40 years of census data. I then link these changes on the consumer side to productivity innovations and labor shares.

I directly quantify how changes in industry concentration in the medium- to long-run are correlated to changes in prices and real output by combining price data with revenue data.4 A 10 percent increase in the national market share of the 4 largest firms is correlated with a 1 percent increase in real output. Finding that higher output, but not price, is linked with higher concentration rates, I turn to the role of productivity. Industries with the most real productivity growth are those with the largest increases in industry concentration. A 10 percent increase in the market share of the largest 4 firms is linked to a 2 percent increase in labor productivity. With both industry concentration and productivity, output growth is not accompanied by payroll growth. Growing monopolists and oligopolists are able to produce more output with fewer, but higher-paid, workers. A 10 percent increase in the market share of the largest 4 firms is correlated with a 1 percent decrease in the labor’s share of revenue.5

# 1NR

## Adv---Dynamism

### 2NC---AT: Econ

#### Growth will rebound due to self-sustaining corporate performance.

Van der Welle ’21 [Peter; July 7; Strategist within the Global Macro team, M.A. in Economics from Tilburg University; Robeco, “How capex holds the key to a self-sustaining economic recovery,” <https://www.robeco.com/latam/en/insights/2021/07/how-capex-holds-the-key-to-a-self-sustaining-economic-recovery.html>]

Title:

How capex holds the key to a self-sustaining economic recovery.

Capital expenditure to fix supply shortages and meet burgeoning demand is seen figuring strongly in the post-Covid recovery.

[Author and summary omitted].

Companies are expected to invest heavily in new equipment and capacity as they seek to meet the pent-up demand released from economic reopening.

“The world is emerging from the pandemic, and much of the focus has been on the release of huge pent-up demand for goods and services that have been inaccessible for much of the past year,” says Peter Van der Welle, strategist with Robeco’s multi-asset team.

“But there is a bigger issue regarding the ability of companies to supply these goods and services, due to the supply side constraints that have emerged through economic reopening. We believe this is powering a resurgence in capital expenditure by companies, and those which are investing in new equipment to meet greater demand will be the more sought after stocks.”

Capex intentions

Van der Welle says this trend can already be seen in the US Federal Reserve’s Capex Intentions Index, which shows that steep year-on-year increases in capital expenditures are planned.

“So, that's promising for a near-term rebound in the capex cycle,” he says. “The market has already picked up on that theme because you can see a clear outperformance of capex-intensive stocks compared to the broader market year to date.”

Fiscal dominance

Van der Welle says five elements support the multi-asset team’s view that capex will rise from here onwards. “The first is the overarching macroeconomic picture in that we are increasingly moving towards an environment of fiscal dominance and away from one that has been monetary-led via quantitative easing,” he says.

“Central banks have pursued very easy monetary policies, but they have hit the nominal lower bounds with regard to policy rates.”

“This is a hard constraint because real rates are difficult for central banks to push even lower than they are nowadays, given the strong consensus among both central bankers and market participants that inflation is transitory.”

Big spending plans

For stimulus, fiscal policy is better suited to address the negative supply shock that Covid-19 has posed. Fiscal dominance can be seen in the huge infrastructure spending planned in the US, with the USD 1.9 trillion American Rescue Plan already in motion, and the USD 2 trillion American Jobs Plan going through Congress. In Europe, the disbursement of the EUR 750 billion EU Recovery Fund is due to start later in July.

“An era of fiscal dominance is able to say goodbye to the secular stagnation thesis, which holds that the economy is suffering from under-investment,” says Van der Welle. “Under-investment due to insufficient demand, which was the biggest problem after the global financial crisis, has become less likely.”

“We saw very subdued consumption growth both in the US and elsewhere between 2009 and 2019. That story is reversing in the US. Households’ income has been supported by fiscal policy during the Covid-19 recession, while burgeoning consumer demand in the reopening phase could prove to be more sticky as employment prospects continue to improve in the medium term.”

Tobin’s Q looks good

A third reason to expect higher capex is driven by ‘Tobin’s Q’ – the market value of a company divided by its assets' replacement cost. If this ratio is above one, then corporates have an incentive to invest directly in the underlying assets rather than buying another company at market value to acquire the same assets.

The Tobin’s Q ratio is currently at 1.7 for the US. “So it's very expensive to do M&A, and it is wiser for corporates to invest in the underlying capital goods themselves,” Van der Welle says.

“We should therefore expect a gradual move away from M&A activity towards companies making direct investments in capital goods.”

Supply-side constraints

The fourth element is the severe supply-side constraints seen in the global economy, as capacity shut down during the pandemic.

“This is reflected in the ISM Prices Paid Index, which reached an all-time high in June in reflection of rampant shortages of raw materials and labor,” says Van der Welle.

“Clearly the issue today following the pandemic is not demand related, but supply related. This will also trigger more awareness to push the productivity frontier and incentivize capital expenditure.”

Less reliance on labor

The fifth element is the partial substitution from labor to capital in the US against the backdrop of lingering labor shortages.

“A decline in the labor force participation rate shows that people are not quickly returning to the labor force, as they have been disincentivized by the subsidies and pay checks they have gained from the stimulus plans, and/or structural changes in their work/life balance due to the pandemic,” says Van der Welle.

“When the cost of labor becomes more expensive, substituting labor with capital becomes more attractive for employers. Typically, the inflection point for capex intentions becoming positive is when unit labor costs rise by more than 2% year on year, which is the case today.”

Capex will lengthen the earnings cycle

Regarding earnings, there is a significant relationship between capex intentions and productivity, though the lag from intending to invest to actually getting a realized productivity gain is quite long – up to several years.

Higher capex that eventually brings higher productivity growth will sustain the earnings cycle, Van der Welle says. Higher productivity gives corporates more pricing power because they suppress unit labor costs, and that means profit margins can stay elevated for longer.

### 2NC---AT: Digital Authoritarianism

#### Tech transfer isn’t key to China rise

Yu Zhou, 1-28-2019 BS, MS, Geography and Urban and Regional Planning, Peking University, P.R. China. PhD, Geography, University of Minnesota, 1995, In 2008, she was selected as one of the twenty Public Intellectual Fellows by the National Committee on US-China Relations, “U.S. trade negotiators want to end China’s forced tech transfers. That could backfire", Washington Post, https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/28/u-s-trade-negotiators-want-to-end-chinas-forced-tech-transfers-that-could-backfire/

3. The real forces behind China’s technological innovation Our book’s survey of China’s key high-tech sectors shows past official programs have not been as successful as outsiders often believe. China’s technological advances have been powered not just by top-down mandates or official programs, but also by bottom-up forces. The best bottom-up case is cellphone manufacturing — where China’s domestic firms are building affordable and innovative phones. While the phones utilize core parts or platform from Qualcomm and Google, they are Chinese designed and incorporate market-leading features. In this industry, an innovation ecosystem created by the comprehensive global supply chain for hardware, a rapidly expanding universe of phone apps by companies such as Tencent, and the vast and dynamic domestic market provides a powerful synergy to nurture and implement new ideas and features in China’s market — creating diverging paths from foreign phone manufacturers. Critics of Made in China 2025 see Chinese state support as the determining factor for Chinese technological progress. The cellphone industry shows the power of market forces. China’s state policy on forced technology transfers, ironically, produced dependency and lags in technology development for Chinese joint-venture partners, which is why China has now signaled a move to pursue a more autonomous technological path. The growing call in the United States to reduce or even block China’s access to U.S. technology, however, would likely backfire. Doing so is likely to encourage China to double down on this decision — choosing a technological path that is incompatible with products of U.S. tech companies. And that may mean fewer market prospects for U.S. companies in the long run.

## Adv---Systemic Risk

### 2NC---AT: Systemic Risk

#### Probability of catastrophe is low. ‘Interconnectedness’ is a neg argument.

Moosa ’10 [Imad; October 4; Finance Professor at RMIT in Melbourne, Australia; Journal of Banking Regulation, “The myth of too big to fail,” vol. 11]

ALLOWING MISMANAGED FINANCIAL INSTITUTIONS TO FAIL

Finally, if they have to fail, let it be. In every case of government bailout, a typical argument is put forward that allowing a big institution to fail brings about havoc on the financial sector and the economy as a whole. A doomsday scenario would be used by the management of a failed institution and regulators alike to ‘bail out or else’. Some would argue that finance is deeply interconnected, so that even a moderately large player can take down the system if it implodes. Those who argue along these lines would say that it was the failure of Lehman Brothers (not Citi or Bank of America) that ‘brought the world to the brink’. This claim is far-fetched because the world came to the brink as a result of the collective malpractice of financiers. Saving Lehman in any shape or form could not have changed the course of the global financial crisis.

Take, for example, AIG whose management claimed that any failure by the government to bail it (or them) out would have ‘catastrophic’ consequences. I do not believe that it would have been catastrophic (a really big word) to let AIG's partners in derivative transactions (which are mainly buyers of the credit default swaps offered by AIG) to take substantial losses – this is business, is it not? They took a gamble, and it did not work. The alternative to bailout would have been to put AIG into Chapter 11, in which case the creditors (including derivative counterparties) would obtain the company's assets. They would end up with a certain recovery ratio on their claims (say 20 per cent), bearing the losses themselves. They can afford it, and if they cannot then bad luck. Governments do not compensate people for losses incurred in the stock market, so why compensate rich companies (and the rich people who mismanage them) for their gambles? This is like opening loss compensation offices in the casinos of Las Vegas.

Consider now the case of LTCM, which is analysed brilliantly by Dowd.4 He wonders what might have happened if LTCM had failed, and whether or not the Federal Reserve's fears were plausible. The underlying arguments for bailouts were that (i) financial markets were in a particularly fragile state in September 1998; (ii) LTCM was a big player that was heavily involved in derivatives trading; and (iii) it had significant exposures to many different counterparties, and many of its positions were difficult and costly to unwind. These were the justifications for why the Fed was nervous about the prospect of LTCM's failing. Dowd, however, argues that financial markets could have absorbed the shock of LTCM's failing without going into the financial meltdown that Federal Reserve officials feared. He supports his argument as follows:

* Although many firms would have taken large hits, the amount of capital in the markets is in the trillions of dollars. It is therefore difficult to see how the markets as a whole could not have absorbed the shock, given their huge size relative to LTCM.
* When firms are forced to liquidate positions in response to a major shock, there are usually other firms willing to buy at the right price. Sellers may have to take a loss to liquidate, but buyers can usually be found (ask Warren Buffet who was willing to buy LTCM at a fair price). Competition for good buys usually puts a floor under sellers’ losses.
* Market experience suggests that the failure of even a big derivatives player usually has an impact only on the markets in which that player is very active. Worldwide market liquidity has never been threatened by any such failure.
* Even in those rather extreme and unusual markets where liquidity might be paralysed in the immediate aftermath of a major shock, participants have every reason to resume trading as soon as possible. There is no reason to suppose that the market response would have been much different if LTCM had failed.
* There have been major developments in derivatives risk management over the last few years, which means that most firms’ ‘true’ exposures are now only a small fraction of what they might otherwise appear to be.

In short, history does not provide even circumstantial evidence indicating that the failure of one institution can cause the failure of the whole system. Such a proposition cannot be substantiated by intuition or theoretical reasoning, neither can it be supported by empirical evidence. Good economics tells us that if a firm must fail, we should let it fail.

## T

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

#### They don’t meet---platforms that don’t separate platform from product can be prosecuted under existing antitrust law---no implied immunity for tech companies---proven by cases being brought against Google, Amazon, etc.---the plan just increases enforcement against activities already under the scope of antitrust law

McGill ‘8-30 [Margaret; August 30; technology reporter; Axios, “Fall antitrust forecast: Biden raises hammer on Big Tech,” <https://www.axios.com/antitrust-big-tech-apple-google-amazon-facebook-2e619cf6-2fd9-48be-bc72-0e36cb7fdcfb.html>]

[Title included].

Fall antitrust forecast: Biden raises hammer on Big Tech

[Author and image omitted].

The antitrust scrutiny of tech giants that began during the Trump era will only intensify this fall as Big Tech critics Lina Khan, Tim Wu and Jonathan Kanter take the lead on competition policy and enforcement in the Biden administration.

Why it matters: Facebook, Google, Amazon and Apple face threats from federal regulators, Congress, state attorneys general and European Union authorities.

The big picture: That's four companies each being challenged from four directions: No wonder the antitrust arena can feel like three-dimensional chess.

As the fall season looms, here's what the game board looks like:

Facebook

The Federal Trade Commission, now led by Khan, renewed its legal effort challenging Facebook's acquisitions of Instagram and WhatsApp in August. The FTC accuses Facebook of buying rivals or using anticompetitive tactics to stymie them in order to squelch competition.

* What to watch: Facebook has until Oct. 4 to respond.

The European Commission launched [an antitrust investigation](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848) of Facebook Marketplace in June over concerns that Facebook's collection of data from advertisers gives it an unfair advantage.

* What to watch: The United Kingdom announced a similar investigation in June that also focuses on Facebook's online dating service.

In Congress, the House Judiciary Committee narrowly approved a slate of tech antitrust bills, including one that would force more interoperability and another that would bar big companies from snapping up rivals through acquisitions.

#### There is no immunity protecting digital platforms - implied immunity is *disfavored* and requires *“plain repugnancy”* which does not exist in tech -- force them to produce a shred of evidence --- the strong presumption is *against* immunity

Flumenbaum and Karp 3 (Martin and Brad, <https://www.paulweiss.com/media/1931366/second_circuit_review_implied_immunity_from_the_antitrust_laws_3.pdf>, EM)

Recognizing that “repeal by implication is not favored,” the Second Circuit began its analysis by stating that “[i]mplied immunity will exist only where there is a plain repugnancy between the antitrust and regulatory provisions.” Friedman, 2002 WL 31844676, at \*2 (internal quotations omitted). In an important qualification, however, the Court emphasized that “the ‘plain repugnancy,’ or conflict, between antitrust and securities laws extends to potential as well as real conflicts.” Id (emphasis added). Though not essential for the Friedman decision, this qualification would Implied immunity analysis — i.e., the determination whether a putative conflict rises to the level of “plain repugnancy” — requires “a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law.” Id. at \*3. Given the allegations of the complaint, of particular relevance in Friedman was the nature and extent of regulatory action in connection with “flipping” restrictions and other IPO-related price-stabilization measures. As an initial matter, the Court found it significant that “Congress was aware of stabilization practices when it passed the Exchange Act,” but nonetheless “declined to prohibit pegging, fixing or stabilizing practices outright and instead gave the SEC authority to regulate them.” Id. at \*4-5. The Court then surveyed how the SEC had exercised that authority in the intervening years. The Court found that time and again — in 1940, 1955, 1963 and, most recently, in 1994 — the SEC “revisited the stabilization issue and modified existing regulations, but did not prohibit the practice.” Id. at \*5. The SEC took no action despite being fully aware that “stabilization in the aftermarket to combat flipping was ‘not uncommon and may act to support the price of the offered security in the aftermarket.’ ” Id. (quoting SEC Release Nos. 33-7282, 34-37094, at 1740). In light of this history, the Second Circuit concluded that the SEC’s decision to permit price stabilization measures was “both deliberate and significant.” Id. This conclusion was important to the Court’s holding, for “plain repugnancy” between the antitrust laws and SEC regulation, such as would give rise to implied immunity, “may, but need not, involve affirmative SEC action.” Id. at \*4. “Conflict,” the Court noted, “also can exist where the SEC has jurisdiction over the challenged activity and has deliberately chosen not to regulate it.” Id. Section 9(a)(6) of the Exchange Act permits price-stabilization measures except insofar as such practices are specifically prohibited by the SEC. Inasmuch as the SEC has chosen not to prohibit restrictions on flipping, those restrictions are permissible under the Exchange Act. The antitrust laws, by contrast, arguably prohibit such practices, as was alleged in the Friedman complaint. The Second Circuit concluded, therefore, that, with respect to restrictions on flipping, there is a clear conflict between the antitrust laws and the regulatory structure erected by the Exchange Act. Accordingly, the Second Circuit affirmed the district court’s ruling that the defendants’ alleged activity was immune from antitrust liability

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

#### Federal courts have decided 4,278 rule of reason cases.

--WestLaw search for “adv: antitrust & (Rule +2 Reason)”

--this is the search used by Carrier 9 to capture all rule of reason cases, but without the date limiter because Carrier was updating an older article with post-1999 data

--FYI

Michael A. Carrier 9, Professor, Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

I. METHODOLOGY

This survey is based on a Westlaw search of all federal cases decided between February 2, 1999, and May 5, 2009. I located the cases by searching broadly for all rule of reason cases: “DA(aft 2/2/1999) & antitrust & (Rule +2 Reason).”

Such a search is designed to pick up every instance in which a court applied rule of reason analysis. I assumed that any court conducting such analysis would at least mention the phrase “rule of reason.” This would appear to be a reasonable assumption given the importance of labels in antitrust. A court applying rule of reason analysis—as opposed to, say, per-se or quick-look analysis—should naturally refer to the concept. And I include “antitrust” as one of my search terms to restrict the universe of cases to antitrust cases, a helpful limitation given the prevalence of the phrase “rule of reason” in other settings such as environmental, patent, and criminal law.9

#### Defendants won 95% of those.

Sandeep Vaheesan 17, Regulations Counsel, Consumer Financial Protections Bureau, “Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission,” University of Pennsylvania Journal of Business Law, Vol. 19, Iss. 3, pp 645-699

In adopting the rule of reason, the FTC practically guaranteed that it would be able to bring few, if any, Section 5 cases. The statistics demonstrate, in practice, that the rule of reason means that the plaintiff almost always loses. A leading study found that, between 2000 and 2009, defendants received a favorable court ruling in more than ninety-five percent of antitrust cases implicating the rule of reason.146

#### Nearly all of those are dismissed based on a substantive finding of ‘no anticompetitive effect’---reversing any one of those would be T! Insert this chart

Michael A. Carrier 9, Professor, Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

Table

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### 2NC---AT: Aff Ground

#### Here’s a comprehensive list---we’re inserting it

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

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### 2NC---AT: Intent to Exclude & Arbitrariness

#### Prefer our ev---it’s from the ABA Antitrust Section’s Committee on Exemptions and Immunities, which literally wrote an authoritative text called “Handbook on the Scope of Antitrust!”

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

I. Current State of Exemptions and Immunities Committee

Even though we are a relatively small Committee, we address important policy issues that might not otherwise be addressed by the Antitrust Section. While we often work on issues alongside the Legislation Committee, our scope reaches judicial, as well as statutory exemptions. Our Committee is the one place within the Section that focuses on the concerns that may lead Congress or the courts to carve out certain conduct from traditional antitrust proscriptions.

In the 2017-2018 program year, we drafted and submitted four in-depth Section Comments at the request of the Council; produced six committee programs; published three newsletters; completed one ABA Handbook and are well underway on a second one; cosponsored two Spring Meeting Programs; co-sponsored one podcast; and participated in a Women in Leadership videoconference.

In the 2018-19 program year, we will chair an approved Spring Meeting Program; are cosponsoring a second approved Program; and we have been asked to revisit one of the Comments that we produced in the previous year. We are also working on committee programs, podcasts, and publications.

Perhaps most importantly, we are proud of our diversity achievements. In 2017-18, one of the E&I Co-Chairs was a woman for the first time, and our Young Lawyer Representative was LGBTQ for the first time. This year, we continue with a woman Co-Chair, a woman YLR, and we have added the first Vice Chair from the state of South Carolina on any Section Committee.

A. Scope of Charter: What is Role of Committee?

The Exemptions and Immunities Committee is chartered to address judicially created immunities from the antitrust laws, such as the Noerr-Pennington doctrine, state action, implied immunities, and filed rate doctrines, as well as statutory exemptions, including, among others, the McCarran-Ferguson and Capper-Volstead Acts. The Committee also addresses international issues, such as the Foreign Trade Antitrust Improvements Act (“FTAIA”), and other doctrines, such as antitrust preemption and primary jurisdiction, that affect the application and extent of the antitrust laws. The Committee strives to be the first and best resource for information on the fundamental question of defining the scope of the antitrust laws.

However, another key function of this Committee is an administrative role, rather than as a programming committee. This Committee serves as the de facto institutional memory before legislators and agencies for the Section's position on exemptions and immunities. The Section needs to have one place to look for what it has said in the past on exemption proposals, as well as commentary on DOJ or FTC attempts to narrow or expand exemptions. We believe this Committee has already served in that role and should serve in that role in the future. We want to improve on this function for the Section. We should have a Vice Chair designated as the point person to track prior comments and catalog the specific issues that have been raised. At the same time, we could develop a more standardized response. A related project would be a retrospective study of exemptions and their impact. We would join with International Task Force in its study of the impact of exemptions in other countries.

In short, the Committee should standardize the analysis of exemption proposals and reach out on the international front to catalog the differences in exemptions in different areas of the world.

B. Description of Reflective Evaluation of Membership Levels, Diversity, and Growth

The Committee currently has nearly 300 members, a 20% increase in membership in the last two years. Our members include government antitrust officials, private practitioners, corporate counsel and academics, and some practitioners based outside the United States. This variety of members ensures diverse views on the scope, applicability and appropriateness of antitrust exemptions and immunities.

Although other committees are larger, our Committee tends to include lawyers who specialize in specific antitrust issues. As most members of the Committee are members of other Section committees, the Committee may not be the primary committee that draws members into the Section. We believe that tracking the key issues surrounding the scope of the antitrust laws draws members of broader committees to also join E&I, and thus must continue to be a high priority for the Section.

#### They’re premier in the field

Jonathan B. Baker 19, Research Professor of Law, American University Washington College of Law, “Market Power in an Era of Antitrust,” The Antitrust Paradigm: Restoring a Competitive Economy, 2019, pp. 11–31

Antitrust norms, especially the objection to collusive conduct, are consistently endorsed and upheld by enforcers and courts, regardless of political affiliation.12 These norms have spread throughout the world, particularly since the 1990s, with the aid of a growing global antitrust community. Annual attendance at the spring meeting of the American Bar Association’s Section of Antitrust Law— the premier gathering in the field— now exceeds 3,000, a threefold increase over the low ebb in the late 1980s. Several new academic journals dedicated to antitrust law, economics, and policy were launched in the last decade.

# 2NR

## CP---Common Law

### 2NR---AT: Rulemaking Deficit

#### Court decisions with FTC-set standards is best---overcomes judicial reluctance and traditional drawbacks

1AC Chopra & Khan ’20 [Rohit; Commissioner @ Federal Trade Commission; and Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Case for “Unfair Methods of Competition” Rulemaking,” *The University of Chicago Law Review* *87*(2), p. 357-380; AS]

And third, rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy.49 APA procedures require that an agency provide the public with meaningful opportunity to comment on the rule’s content through the submission of written “data, views, or arguments.”50 The agency must then consider and address all submitted comments before issuing the final rule. If an agency adopts a rule without observing these procedures, a court may strike down the rule.51

This process is far more participatory than adjudication. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the Commission can put forth rules after considering a comprehensive set of information and analysis.52 Notably, this would also allow the FTC to draw on its own informational advantage—namely, its ability to collect and aggregate information and to study market trends and industry practices over the long term and outside the context of litigation.53 Drawing on this expertise to develop rules will help antitrust enforcement and policymaking better reflect empirical realities and better keep pace with evolving business practices.

**[Their cards end here]**

Given that the FTC has largely neglected this tool, some may question the Commission’s authority to issue competition rules and the legal status these rules would have.54 Indeed, a common misconception is that this authority is extremely limited because FTC rulemaking is subject to the extensive hurdles posed by the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act55 (“Magnuson-Moss”). In reality, Magnuson-Moss governs only rulemakings interpreting “unfair or deceptive acts or practices.”56 For rules interpreting “unfair methods of competition,” the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed this authority, and the Appendix lays out further background on and discussion of it.57

Others acknowledge the authority exists but assert that antitrust law is ill suited for rulemaking because antitrust is a common law enterprise. It is true that, as a descriptive matter, antitrust enforcement has proceeded almost exclusively through adjudication.58 But the idea that this approach is normatively desirable is neither clear nor persuasive. Indeed, relying solely on adjudication has certainly not delivered a system with sufficient clarity, efficiency, or transparency.59

Others question how § 5 rulemaking would intersect with existing Sherman Act jurisprudence, and whether it would conflict with or undermine the Justice Department’s authority. Former Acting Chair Maureen Ohlhausen, for example, has expressed concern that using § 5 to “supplant” the Sherman and Clayton Acts could weaken the Justice Department’s hand in some cases or create a situation where firms engaged in the same conduct would face different liability standards based on which agency conducted the investigation.60

Notably, these concerns are responding to the prospect of advancing—through adjudication—interpretations of § 5 that go beyond the bounds of the Sherman and Clayton Acts. It is less clear that these concerns are as salient in the context of § 5 rulemaking that interprets “unfair methods of competition” that fall under the other antitrust laws.61 Moreover, it is worth noting that the FTC Act already contemplates a role for the Attorney General in bringing certain claims when authorized to do so by the FTC.62 We see no reason why the Attorney General could not plead counts involving violations of rules proscribing “unfair methods of competition” in complaints that follow investigations by the Antitrust Division for entities that are covered by the Act.

Here, it is also worth underscoring that claims under the Sherman Act are enforceable by private plaintiffs and subject to treble damages.63 While private enforcement with treble damages is an important element of the antitrust enforcement regime, generalist judges may be reluctant to condemn certain anticompetitive conduct and impose remedies with very large financial awards in close cases. If the Commission promulgates rules under § 5 with respect to anticompetitive conduct, private plaintiffs would generally be unable to rely on these rules for the purpose of seeking treble damages. This presents an opportunity for the Commission to use its analytical and information advantages to advance and further develop the law without opening the door to treble damages in private suits and prompting judicial reluctance to find conduct in violation of the law.