# 1AC Filed Rates – Navy – Michigan PS

## 1AC – Plan

#### By expanding the scope of its core antitrust laws, the United States federal government should substantially increase prohibitions on nearly all anticompetitive business practices by the private sector that are currently exempted by the filed rate doctrine.

## 1AC – Energy

#### Advantage One is Energy:

#### The filed-rate doctrine is a ‘zombie energy law,’ shielding undead companies from liability for anticompetitive behavior.

Macey ’20 [Joshua; 2020; Law Professor at Cornell; Vanderbilt Law Review, “Zombie Energy Laws,” vol. 73, no. 4]

Today, these “zombie energy laws” entrench incumbent market power and prevent the deployment of renewables.15 The filed rate doctrine, for example, continues to shield energy companies from civil antitrust suits even though most energy companies no longer formally file rates with regulators.16 The requirement that regulators assess the financial viability of transmission projects before issuing a certificate of public convenience and necessity to site new transmission lines is a vestigial remnant of a rule that was once needed to prevent new entry into a utility’s exclusive service territory.17 In these ways, courts and regulators have clung to many of the rules that were created to protect customers in the public utility era but have since outlived their useful purpose.18

Footnote 16:

16. See Rossi, supra note 11, at 1646 (noting how courts have “allow[ed] the filed tariff doctrine to become an independent, firm-specific antitrust defense”). In twin cases decided in 1956, the Supreme Court instructed the Federal Power Commission (the regulatory predecessor to the Federal Energy Regulatory Commission (“FERC”)) to presume that any freely negotiated wholesale transaction was “just and reasonable” for purposes of the Federal Power Act and the Natural Gas Act. See Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 372 (1956) (holding that contract rates freely negotiated between sophisticated parties meet the just-andreasonable standard required by the Federal Power Act, even if they are unprofitable to the public utility); United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344–45, 347 (1956) (same, but for the purposes of the Natural Gas Act). The presumption that freely negotiated energy contracts are “just and reasonable” applies even if FERC did not have an initial opportunity to review the contract. See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n, 558 U.S. 165, 167 (2010) (“Under this Court’s Mobile–Sierra doctrine, FERC must presume that a rate set by ‘a freely negotiated wholesale-energy contract’ meets the statutory ‘just and reasonable’ requirement.”); Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 530 (2008) (“The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.”).

Article continues:

These zombie energy laws are now seriously degrading energy markets. They allow incumbents to raise prices and, worse, prevent clean energy companies from competing with incumbent fossil fuel generators. For example, Arkansas regulators recently blocked a multibillion dollar transmission line that would have enabled more than $7 billion of investment in renewable energy facilities after finding that only incumbent utilities are eligible to receive a certificate of public convenience and necessity in the state of Arkansas.19 Although the project would have reduced electricity prices in the southeast and provided enough clean energy to power over a million homes a year, it has been repeatedly delayed in part because state energy regulators have determined that only incumbent utilities were legally authorized to construct new transmission lines.20 The certificate of public convenience and necessity was originally designed to ensure that rate regulated utilities were able to honor their service obligations. Today, the requirement that regulators assess market demand before granting a certificate of public convenience and necessity entrenches incumbent market power and impedes the development of renewable suppliers.

Numerous scholars and policymakers have questioned the usefulness of these doctrines.21 This Article’s contribution is therefore not to provide a novel critique of these zombie energy laws. It is instead to point out that many of the seemingly diffuse problems that pervade modern electric power markets can be attributed to the historical origins of electricity regulation. All of these laws emerged to mitigate market power abuses under a regulatory system that has largely been abandoned. Their continued application is now facilitating market power abuses and blocking the development of cleaner and cheaper energy sources.

#### The doctrine serves no purpose in energy markets. Studies suggest FERC regulation can’t fix the market without restructuring the exception.

Macey ’20 [Joshua; 2020; Law Professor at Cornell; Vanderbilt Law Review, “Zombie Energy Laws,” vol. 73, no. 4]

The filed rate doctrine might have been a sensible rule when generators were regulated as public utilities. It is difficult to imagine how a plaintiff could have brought an antitrust case in court when utilities had a legal right to a monopoly and when regulators determined what prices were reasonable. The problem with the filed rate doctrine today is that many generators no longer actually file rates with public service commissioners.173

Footnote 173:

173. See Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n, 136 S. Ct. 760, 768 (2016):

Decades ago, state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in confined geographic areas. That is no longer so. Independent power plants now abound, and almost all electricity flows not through “the local power networks of the past,” but instead through an interconnected “grid” of near-nationwide scope.

(quoting New York v. Fed. Energy Regulatory Comm’n, 535 U.S. 1, 7 (2002)).

The article continues:

Energy markets look radically different than they did a century ago. Much of the country’s generation is now compensated through competitive procurements, and, as of 2018, thirty-six percent of all generation is produced by independent power producers that are unaffiliated with investor-owned utilities.174 In the mid-1950s, the Supreme Court announced that it would assume that rates that had been negotiated at arm’s length were just and reasonable.175 Thus, in most of the country, private ordering—not formal ratemaking proceedings—now determines the profits generators make when they sell electricity.176

There is therefore no need for regulators to worry that antitrust suits will prevent the public service commissions from realizing their mandate to prevent discriminatory rates, because regulators in these parts of the country no longer rely on ratemaking proceedings to ensure that rates are just and reasonable. In fact, FERC now presumes that freely negotiated contracts are just and reasonable.177 When FERC and state energy regulators presume, without reviewing contracts in a ratemaking proceeding, that all freely negotiated contracts are just and reasonable, they do not have an opportunity to assess whether a contract has anticompetitive effects.

Yet the application of the filed rate doctrine to competitive energy markets means that market participants are largely shielded from the laws that mitigate anticompetitive behavior in ordinary markets. In 1986, the Supreme Court affirmed the filed rated doctrine on stare decisis grounds, and it did so despite recognizing that the doctrine no longer served its original purpose.178 Without authority to enforce antitrust laws, consumers have to trust that regulators will prevent collusive behavior and monopolistic pricing.

And regulators have failed to prevent market power abuses in electricity markets. Consider the 2000–2001 California energy crisis. At the turn of the twenty-first century, large generators began to strategically refuse to sell electricity until prices rose to astronomical levels.179 Companies such as Enron would purposefully export electricity that was needed in the state to neighboring states such as Nevada in order to drive up California electricity prices.180 Pacific Gas and Electric (“PG&E”), one of the two California companies that purchased electricity from generators to sell to consumers, was forced into bankruptcy when it found itself unable to afford electricity it was required to supply to Californians.181 This type of behavior contributed to market inefficiencies worth an estimated $12 billion.182 Suppliers’ anticompetitive behavior was one of the reasons wholesale prices increased so dramatically and was thus one of the reasons California had to implement rolling blackouts.183

Other states have experienced similar abuses. Texas found itself in the same position in 2005, when market manipulation cost Texans more than $70 million.184 In the summer of 2006, New York market manipulation cost New Yorkers approximately $150 million.185 Studies of energy prices have demonstrated that market manipulation is an ongoing problem and that the tools FERC uses to deter manipulation are ill-equipped to prevent the types of abuses that pervade energy markets.186

It arguably made sense to funnel antitrust suits against regulated monopolies through the federal regulator charged with overseeing those monopolies. That is because judicial enforcement may undermine a market’s entire rate structure and lead to discriminatory rates. On top of that, a company that enjoys a legal right to a monopoly is by definition permitted to engage in some conduct that would otherwise constitute an antitrust violation. In such cases, it arguably made sense to have the regulator responsible for ensuring that a company charge just and reasonable rates also make sure that the company is complying with service obligations imposed by state tort, contract, and antitrust laws.

Yet courts continue to apply the filed rate doctrine in restructured energy markets. The U.S. Court of Appeals for the First Circuit, for example, has held that “utility filings with the regulatory agency prevail over . . . other claims seeking different rates or terms than those reflected in the filings with the agency.”187 According to the Ninth Circuit, the doctrine is “a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency, like FERC.”188

As explained in Section III.C, the filed rate doctrine was a judicially created doctrine intended to make sure that the judiciary did not undermine rates filed in cost-of-service ratemaking proceedings. Today, however, FERC has replaced monopoly cost-of-service ratemaking with a market-based approach to setting wholesale rates in most of the country. The Commission now seeks to ensure “just and reasonable” rates “by enhancing competition” among multiple wholesale providers of electricity.189 FERC has done so because it has concluded that competition is the most effective way “to bring more efficient, lower cost power to the Nation’s electricity consumers.”190 To achieve that purpose, FERC has endeavored “to break down regulatory and economic barriers that hinder a free market in wholesale electricity”191 and it has chosen to rely on market forces in competitive auctions to fulfill its statutory charge of ensuring “just and reasonable” wholesale rates.192 Courts thus seem to reflexively apply the filed rate doctrine in restructured markets without recognizing that the doctrine has become obsolete in markets where energy regulators do not review every energy contract before determining that the contract is just and reasonable.193

Restructured energy markets are intended to create the same incentives as ordinary markets. To that end, exempting energy companies from judicial enforcement of ordinary tort, contract, and antitrust claims gives energy companies an exceptional privilege. In the cases described in this Section, the filed rate doctrine prevented civil plaintiffs from enforcing antitrust laws.194 In this way, a doctrine that was originally meant to protect consumers by ensuring utilities treat all customers fairly has become a weapon that generators yield to exploit their market power.

#### Energy prices are rising.

Schnurman 12-30 [Mitchell; December 30; Business columnist; covers a wide range of topics; *The Dallas Morning News,* “Sticker Shock: Electricity Prices Jump 17% in Dallas-Fort Worth, With More Hikes Likely,” <https://www.dallasnews.com/business/energy/2021/12/16/sticker-shock-electricity-prices-jump-17-in-dallas-fort-worth-with-more-hikes-likely/>; KS]

Just about everyone seems worried about rising inflation, including the Federal Reserve, and prices in Dallas-Fort Worth have been climbing faster than most places.

One local item really stands out: Electricity in D-FW rose 17.3% in the 12 months ending in November. That was more than double the 6.5% increase for the U.S. city average, according to the U.S. Bureau of Labor Statistics.

D-FW’s price per kilowatt hour, estimated at 15.3 cents in October and November, was the highest monthly average here since the Great Recession 13 years ago. For much of the past two decades, electricity prices in D-FW were lower than the U.S. city average, but that changed in the fall.

“Prices are up and they’re likely to continue to stay up,” Tim Morstad, associate state director of AARP Texas, said during a virtual presentation on the Texas energy market Wednesday.

The cost of natural gas, which sets the price in Texas’ deregulated electricity market, has jumped sharply in the past year. That’s usually the biggest factor in higher rates passed on to consumers and businesses. But more price pressure is on the horizon, including recouping some of the costs from last winter’s big freeze and the expense of hardening the Texas grid.

There are also design changes in the works for the state’s electric market, primarily aimed at improving reliability and keeping the lights on during severe weather. Those reforms won’t come cheap, either.

One estimate projects that average residential bills in Texas could increase by 14.3% next year — apart from increases tied to natural gas, according to a filing this month with the Public Utility Commission.

“These possible bill increases could apply for many years into the future,” said the filing by the Texas Consumer Association and energy consultant Alison Silverstein.

Manufacturers already are dealing with higher costs for most of their inputs, including electricity, said Tony Bennett, CEO of the Texas Association of Manufacturers. He cited higher natural gas prices and higher hedging costs that reflect greater risks.

Some pricing premium for electricity stems from last winter’s storm, he said, but most of those expenses have not kicked in yet: “Higher electricity costs are certainly in our future,” Bennett wrote in an email.

Most Texans live in a deregulated electric market, and shoppers can usually get lower prices than the averages reported by government agencies. For example, the average one-year fixed-rate plan without fees available in the region was 12.4 cents a kWh on Dec. 1, according to the Association of Electric Companies of Texas.

That’s lower than the average D-FW rate reported by the Bureau of Labor Statistics, but it’s nearly 23% higher than the group’s same metric a year ago.

“There is a bottom to the consumers’ pocketbook,” Morstad said.

Most inflation increases in Dallas-Fort Worth over the past year were relatively similar to national trends. Housing costs rose 5.9% here compared with 4.8% for the U.S. average city, for example. But in several categories, D-FW stood apart.

The gap in electricity was notable both for the size of the increase and the fact that local average prices surpassed the national benchmark. That wasn’t the case with gasoline.

D-FW had a sharper rise in gasoline prices than the average city — up 70% in the past year compared with 58%. But the larger jump stems, in part, from gas prices starting at a lower point here.

Despite the larger year-over-year increase, the price of a gallon of unleaded regular gasoline in D-FW was almost 40 cents lower than in the average U.S. city, according to government figures.

Higher energy prices, including oil and natural gas, have been a big contributor to the sharpest rise in inflation in nearly 40 years.

The Federal Reserve, which earlier said that rising prices during the pandemic were transitory, took moves to tamp down inflation. On Wednesday, Fed officials said they would reduce bond purchases earlier than planned and indicated they would raise the federal funds rate up to three times next year.

#### Private utilities are creating artificial shortages – limits supply and raises prices.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Plaintiff-appellant accuses Eversource Energy and Avangrid (two vertically integrated utilities that distribute gas and electricity to end-use customers and own power generation assets) of misusing their market power at the natural gas resale level and engineering a chain of events that inflicted substantial harm on New England residents. The defendants-appellees abused their gas pipeline use rights to create an artificial shortage of resale gas, a key input for generating electricity in New England. By limiting the supply of gas in New England and raising the price of natural gas, the defendants-appellees increased the costs of generating electricity. And by raising the costs of generating electricity, they increased wholesale electricity prices and ultimately retail electricity costs for New Englanders by more than $3 billion.

#### Market power abuses drive up prices and grid vulnerabilities.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

B. The Unique Nature of the Electricity Market and the Greater Potential for Market Abuse

The electricity market is different from any other competitive market in a way that makes it hard to control. This makes the electricity industry particularly prone to market power abuse by individual utilities.45 The wholesale electricity market is currently under FERC's jurisdiction.46 That means that private utilities are required to file their tariffs with FERC for its review and approval.47 During the approval process, FERC reviews the market share of the utility in order to determine whether the utility possesses the market power necessary to manipulate the market.48 Market power means the power of a single firm to drive prices upwards without losing its consumers.49 In its extreme form, market power leads to monopoly.50 Monopolies hurt consumers because they produce too little and charge too much.51

Currently, FERC employs the Federal Guidelines developed by the DOJ and the FTC for nonelectricity markets as a benchmark for the critical market share under which the utility is incapable of exercising market power.52 This market set by DOJ and FTC stood at twenty percent.53 What FERC does not account for is that the unique characteristics of the electricity market "directly translate into enhanced market power for generators and traders holding much smaller market shares than 20%."54 The nature of the electricity market is such that when the right conditions are met, even a utility with as little as one percent of the market share can exercise significant market power by withholding capacity and driving the prices upwards.55

The electricity market is unique in several ways. First, the demand for electricity is highly inconsistent over time.56 Second, electricity cannot be stored.57 That means that "[e]ach unit consumed must be produced at exactly the nanosecond it is consumed."58 Thus, unless consumers are responsive in their demand for electricity, the only way to stabilize prices is to add more generators because the future capacity cannot balance out the present capacity.59 The demand for electricity is fairly inelastic due to the lack of price information among consumers.60 Price elasticity of demand describes "the extent to which quantity demanded decreases in response to an increase in the price of a good or service."61 Therefore, consumer demand does not act as a constraint upon market power because consumption will continue at the same rate regardless of the price charged.62 Further, the number of generating facilities is relatively fixed due to the substantial entry barriers for production of electricity.63

Thus, varying demand for electricity and the inability to store electricity may result in tremendous price volatility in the electricity market.64 Further, these characteristics open the door to potential market power abuse by making it possible for one firm to artificially inflate prices by withholding its electricity generation capacity or raising its prices with impunity.65 The fact that the exercise of market power in the electricity market does not demand collusion makes the electricity market particularly vulnerable to abuse.66 In case of collusion, however, the price of electricity can soar even higher.67

Third, electricity is transmitted through an integrated transmission grid which may include several regions in the United States and Canada.68 Consequently, individual states can impact the market significantly yet have very little power to control it.69 Further, because electricity cannot be stored, the only way to operate the grid without causing blackouts is to balance generation and demand carefully in order to avoid surplus in the wires.70

#### Rising prices guarantee demand outpaces supply – ensures grid failure.

Kocieniewski & Malik 11-5 [David and Naureen; November 5; Reporters at Bloomberg; *Bloomberg;* “The Power Grid Is Just Another Casino for Energy Traders,” <https://www.bloomberg.com/news/features/2021-11-05/why-is-my-electric-bill-so-high-energy-traders-bets-could-be-the-culprit>; KS]

Anyone who pays a utility bill in the U.S. is familiar with the symptoms of an aging power grid perpetually in need of upgrades. Less visible are the entities that bet on, and make multimillion-dollar profits from, the grid’s shortcomings. GreenHat’s story shows that not only do American power customers have to contend with high electric bills, rolling blackouts, and increasingly common outages—they’re also underwriting a trading system that allows speculators to pocket the winnings and sticks ratepayers with some of the biggest losses.

Andrew Kittell grew up in the shadow of Wall Street. His father, Donald Kittell, was an executive with Morgan Stanley Dean Witter and later served as the chief financial officer for Sifma, the Securities Industry and Financial Markets Association. Andrew liked excitement—he skied and surfed—but told friends he’d learned from summer jobs on Wall Street that he didn’t care for financial risk. At Columbia Business School, he wrote in-depth research on the odds of winning at a casino, reaching conclusions that soured him on gambling, close associates say.

Kittell was hired out of school by Bear Stearns, for a unit that aimed to wring profit from the investment bank’s portfolio of power plants. After Bear’s 2008 bankruptcy, he wound up in Houston at JPMorgan Ventures Energy Corp. (JPMVEC), where he worked alongside fellow trader John Bartholomew. Bartholomew had spent years as a power purchaser at a Southern California utility; he boasted on his résumé that the experience had taught him how to take advantage of flaws in the state’s payment formulas for power generators.

In the broadest terms, power traders try to anticipate when demand will rise and supply will falter. JPMVEC did all that—and also focused on finding rules it could exploit. One example: During times of heightened demand, California officials would pay plant owners hefty ramp-up fees to bring more generators online. So JPMVEC wouldn’t switch on the handful of plants under its control until it could charge as much as 83 times the normal price of power. The plants would run for a bit, then shut down to await the next demand peak. In all, the firm employed 12 different strategies that federal officials determined went beyond typical behavior and were designed to game the system.

According to internal emails, senior JPMorgan executives expected the power unit to reap hundreds of millions of dollars, but by 2013 regulators had intervened. JPMorgan agreed that year to the second-largest settlement in FERC’s history: It paid a $285 million fine for what the settlement called “manipulative bidding strategies” and returned $125 million more in “unjust profits.”

The next year, Kittell, Bartholomew, and a third JPMVEC alumnus, Kevin Ziegenhorn, formed GreenHat. Through their lawyers, Bartholomew and Ziegenhorn declined to comment for this story.

FERC is the main enforcement authority for U.S. electricity markets. The Securities and Exchange Commission has also led major investigations into energy trading firms, including Enron, whose market manipulation and accounting fraud led to bankruptcy in 2001 and landed top executives in prison. But consumers’ first line of defense consists of four regional transmission organizations, or RTOs, and three single-state independent system operators, or ISOs (New York, California, and Texas have their own grids). These private companies grapple with a system that is part Escher, part Rube Goldberg. Day to day, the essential task is balancing supply and demand—and the power flow has to be precise, at a frequency of 60 hertz, or the grid can become unstable. It’s a daunting task considering that the grid is a sprawling patchwork cobbled together from lines running along paths built a century ago and vulnerable to challenges as unpredictable as extreme weather, mechanical breakdowns, falling tree limbs, cyberattacks, and solar flares. The grid operators also run the markets for financial instruments based on the cost of those disruptions.

GreenHat traded in a market operated by the largest of the grid keepers, the RTO known as PJM Interconnection LLC. PJM (the name originally stood for Pennsylvania, New Jersey, and Maryland) directs power from 1,400 generators through 85,100 miles of high-voltage cables in 13 Eastern states and the District of Columbia. Its 65 million electricity consumers have been spared the widespread blackouts that have affected tens of millions of people in Texas and California lately, but they’ve paid for that stability.

PJM is supposed to balance the interests of power companies, consumers, and communities, but for years it’s allowed major suppliers such as Exelon, Duke Energy, and American Electric Power to bill ratepayers for high-priced upgrades to sections of the grid where they predominate, according to an assortment of studies. Ari Peskoe, director of the Electricity Law Initiative at the Harvard Law School Environmental and Energy Law Program, says PJM’s reliable checkoff on new projects allows suppliers to preserve their market dominance and freeze out competition. It’s effectively “a protection racket” for the biggest providers, Peskoe says.

PJM has also allowed power providers owned by Wall Street firms such as Blackstone Inc. and KKR & Co. to tap into the billions of dollars a year PJM pays for what’s called reserve generation—the maintenance of clunker plants that are used only in emergencies, typically a few days a year. That limited role has been a lifeline for aging plants like the 52-year-old Homer City Generating Station in western Pennsylvania, once owned by General Electric Co. It’s a coal-burning plant made all but obsolete by the shale gas boom in the surrounding area. PJM pays it to stay online to help meet peak demand. Federal regulators, academics, consumer advocates, and market participants all say PJM pays for far too much capacity. PJM disagrees.

GreenHat found a similarly accommodating environment in PJM’s market for congestion contracts. Grid operators dole out rights to the excess congestion revenue they collect to utilities and other power suppliers. At regular auctions, the recipients can resell such rights as futures contracts. Winning bidders, including speculators like GreenHat, acquire their positions on credit; no money changes hands until the contracts’ terms end. That can be years in the future.

Similar markets operate around the country, but GreenHat found PJM’s especially attractive. In comments to close associates, Kittell cited one particular aspect: PJM allowed traders to buy large numbers of congestion contracts while posting very little collateral. To secure the positions that ultimately lost $180 million, PJM required GreenHat to pledge less than $600,000, FERC records show.

PJM declined to comment on the GreenHat case, citing FERC’s ongoing investigation. In emailed statements, PJM has said that since GreenHat’s default it has implemented “a comprehensive overhaul of credit reform, mitigation policies and procedures” that include stricter collateral requirements and the appointment of a chief risk officer in 2019. The new policies give PJM officials “authority to limit, rescind or terminate participants.”

PJM has also closed another regulatory gap. When GreenHat set up shop, PJM had no screening process in place for new traders or trading firms. It does now. The applications of the GreenHat executives were approved without so much as a Google search.

Anyone who’s paid surge pricing for an Uber has a general idea of what creates congestion revenue: Prices and surcharges climb steeply whenever demand exceeds suppliers’ capacity. In the electricity market, there are additional wrinkles. Overloading a power line causes wires to retain heat and stretch, putting them at risk of failure, so grid operators like PJM have to balance the limited capacity of the lines against the ceaseless ebb and flow of demand. When needed, they bring on additional power providers, at higher prices. Say the price on a given day is $30 per megawatt-hour. When there’s a little pressure on supply, that might rise a few dollars. As the pressure increases it might double, then increase tenfold, then twentyfold. PJM finally caps prices at $1,000 per MWh—but in the most extreme conditions they could surge to $3,750. Next year those prices can rise to more than $12,000.

When prices jump, grid operators charge every ratepayer the new, higher price—even though the initial providers continue to receive the previous, lower price. Imagine you’re riding in an Uber economy car when demand leaps so high that the only option available for new riders is limousines. And then imagine that the price you have to pay automatically increases to the limousine rate—even though your driver will collect only the economy rate.

The money that grid operators collect from consumers but don’t pay to power providers is congestion revenue. During the first six months of this year, consumers in PJM’s service area kicked in $354 million in such revenue, a 97% increase from a year earlier.

#### Blackouts causes extinction

Martin **Rees 18**. Astronomer Royal, founded the Centre for the Study of Existential Risk, Fellow of Trinity College and Emeritus Professor of Cosmology and Astrophysics at the University of Cambridge. 10/16/2018. On the Future: Prospects for Humanity. Princeton University Press.

2.5. TRULY EXISTENTIAL RISKS? Our world increasingly depends on elaborate networks: electricity **power grids**, **air traffic control**, **international finance**, globally dispersed **manufacturing**, and so forth. Unless these networks are **highly resilient**, their benefits could be **outweighed** by **catastrophic** (albeit rare) **breakdowns**— realworld analogues of what happened in the 2008 global financial crisis. Cities would be ~~paralysed~~**[gridlocked] without electricity**— the lights would go out, but that would be far from the most serious consequence. Within a few days our cities would be **uninhabitable** and **anarchic**. Air travel can spread a pandemic worldwide within days, wreaking havoc on the disorganised megacities of the developing world. And social media can spread panic and rumour, and economic contagion, literally at the speed of light. When we realise the power of biotech, robotics, cybertechnology, and AI— and, still more, their potential in the coming decades— we can’t avoid anxieties about how this empowerment could be misused. The historical record reveals episodes when ‘civilisations’ have **crumbled** and even been **extinguished**. Our world is so interconnected it’s unlikely a catastrophe could hit **any region** without its consequences **cascading globally**. For the first time, we need to contemplate a collapse— societal or ecological— that would be a truly **global setback to civilisation**. The setback could be temporary. On the other hand, it could be **so devastating** (and could have entailed so much environmental or genetic **degradation**)that the survivors could **never regenerate** a civilisation at the present level.

#### The filed rate doctrine insulates price manipulation from private suits.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Legislative and regulatory action have transformed the governance of gas and electricity industries since the 1970s. For much of the twentieth century, comprehensive public utility regulation governed the production and sale of gas and electricity. Federal and state regulators treated both industries as generally monopolistic and subjected firms to price regulation. Under this cost-of-service regulation, federal and state regulators established rates that allowed sellers of gas and electricity to recover their costs and earn a reasonable rate of return on their capital investments. Over the past 40 years, Congress and the Federal Energy Regulatory Commission (FERC) have curtailed the public regulation of prices in natural gas and electricity and introduced market competition in both industries. These legislative and regulatory actions have replaced regulator-approved rates with market-based prices in one or more levels of the gas and electric supply chains. Richard J. Pierce, Jr., The Evolution of Natural Gas Regulatory Policy, 10 Nat. Res. & Env. 53 (1995); Paul L. Joskow, Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector, 11 J. Econ. Persps. 119 (1997).

Under a system of market-based pricing, full and robust antitrust enforcement is vital to protect the public from the collusive, exclusionary, and unfair practices of producers and traders of electricity and natural gas. See Alfred E. Kahn, Deregulatory Schizophrenia, 75 Calif. L. Rev. 1059, 1059 (1987) (“While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.”). In this case, however, the Court expanded the filed rate doctrine, which was created to protect the integrity of regulatorapproved rates, to immunize Eversource Energy and Avangrid’s manipulation of market prices for electricity and gas from a private antitrust lawsuit. In broadening the filed rate doctrine to dismiss the plaintiff-appellant’s lawsuit, the district court granted a de facto license for sellers of gas and electricity to use their market power to transfer millions or even billions of dollars from the public into their own coffers.

Traditionally, the filed doctrine protected the integrity of rates that federal regulators had approved. Under the filed rate doctrine, the Supreme Court and this Court have declined to retrospectively alter rates that a regulator had approved in advance of taking effect. Square D Co. v. Niagara Tariff Bureau, Inc., 476 U.S. 409 (1986); Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000). With market-based pricing, however, regulators do not require the prospective filing of rates and approve any rates in advance of their effectiveness.

The district court’s expansion of the filed rate doctrine to insulate marketbased prices from private antitrust lawsuits is both bad law and bad policy. First, the decision, in addressing the relationship between the Natural Gas and Federal Power Acts and the antitrust laws, repealed the Clayton Act’s private right of action. The Supreme Court has established a strong presumption against such implied repeals of federal statutes, including the antitrust laws. United States v. Borden Co., 308 U.S. 188 (1939). The Supreme Court has held that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.” United States v. Philadelphia National Bank, 374 U.S. 321, 350–51 (1963). Second, the decision undermines effective antitrust enforcement and the public benefits of market-based pricing regimes. With market-based pricing in gas and electricity, private antitrust lawsuits complement federal regulatory oversight and public antitrust enforcement, provide essential deterrence against collusive, exclusionary, and other unfair practices, and compensate the victims of antitrust violations in gas and electricity markets.

DESIRABILITY OF PARTICIPATION

The district court’s opinion improperly expanded the scope of the filed rate doctrine. The district court disregarded both the strong presumption against implied repeals of the antitrust laws and the importance of antitrust enforcement for competitive market-based pricing in gas and electricity. Amicus curiae will explain the legal authorities and policy considerations that support denying filed rate protection to the market-based prices at issue in this case. Amicus curiae’s brief will not duplicate arguments made by the parties. It will instead provide the amicus curiae’s distinct perspectives on the issues facing the Court.

CONCLUSION

For these reasons, the motion for leave to file an amicus curiae brief in support of the plaintiff-appellant should be granted.

#### Private right of action is key – it’s empirically more effectively than the DOJ and FTC.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Although it did not even consider whether a clear repugnancy exists between the implicated statutes, the district court nonetheless repealed the Clayton Act’s private right of action. 15 U.S.C. § 15. The court ignored the strong presumption against implied repeals and improperly broadened the filed rate doctrine. In natural gas resale and wholesale electricity markets, market-determined pricing is the norm. See supra Part I. The plaintiff-appellant’s complaint “challenge[s] the background marketplace conditions” and not “the reasonableness of any rates expressly approved by FERC.” Oneok, 135 S. Ct. at 1602. See also Otter Tail, 410 U.S. at 374 (“When [commercial] relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.”).

No “clear repugnancy” exists between the Clayton Act and the Federal Power and Natural Gas Acts. The plaintiff-appellant’s complaint does not ask or threaten to unsettle any prices individually filed with FERC before they took effect. In contrast to the individual rates that were prospectively filed in Town of Norwood and Square D, the defendants-appellees here did not file rates with FERC in advance of their effectiveness. Instead of charging regulator-approved or - validated rates, the defendants-appellees’ discretionary conduct4 helped set prices in the market. Indeed, as discussed infra in Part III.B, private antitrust enforcement and federal regulatory oversight complement each other in industries with marketbased prices – and together constrain the discretion of market actors and ensure that they cannot profit through collusive, exclusionary, and other unfair practices.

B. The Full Application of the Antitrust Laws Is Essential for Competitive Market-Based Prices

Since Congress and FERC have committed to market-based pricing in wellhead gas, resales of gas, and wholesale electricity, the full application of the antitrust laws is critical for ensuring the success of this legislative and regulatory market creation. Even as FERC maintains oversight of the electricity and natural gas markets, this regulatory supervision has important limitations and cannot be expected to root out all anticompetitive conduct. Antitrust enforcement complements FERC oversight and provides vital deterrence against anticompetitive practices in gas and electricity markets. Specifically, antitrust suits brought by injured consumers and businesses provide strong deterrence of anticompetitive conduct as well as compensation. In dismissing the plaintiffappellant’s suit, the district court severely weakened the effectiveness of the antitrust laws and empowered sellers of gas and electricity to profit through anticompetitive market conduct.

FERC oversight is not adequate to prevent anticompetitive conduct and ensure that markets in natural gas and electricity are free from collusive, exclusionary, and other unfair market conduct. Although FERC has an obligation to maintain “just and reasonable rates” under the Natural Gas and Federal Power Acts, 15 U.S.C. § 717c, it has only very limited tools to police specific anticompetitive conduct in the gas and electricity markets and to provide any remedy for anticompetitive market conduct it discovers after the fact.

Even assuming FERC acts against anticompetitive and other unfair conduct,5 its remedies provide inadequate deterrence and cannot be counted on to compensate injured parties. FERC can impose monetary penalties of up to a fixed maximum amount per day on parties over whom it has jurisdiction and who have violated FERC rules in gas or electricity markets. 15 U.S.C. 717t-1; 16 U.S.C. 825o-1(b). All such penalties, however, go to the United States Treasury, not to the injured customers, absent agreement by the defendant. FERC can also order disgorgement of ill-gotten profits as a result of market manipulation. Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 (2008). Both remedies are, at best, an imperfect approximation of market-wide injury to purchasers and, at worst, a small fraction of market harm and woefully inadequate to deter market misconduct. And they offer no guarantee of full compensation for injured parties.

Given FERC’s limited market oversight powers, antitrust enforcement plays an important role in gas and electricity markets. Antitrust lawsuits help identify and stop anticompetitive practices and ensure that market-based pricing serves the public. When sellers engage in collusion, exclusion and mergers, they can enhance and maintain their market power and profit at the expense of purchasers and rivals. See, e.g., Keyspan, 763 F.Supp. at 636 (describing alleged effects of anticompetitive swap agreement involving rival generators in New York City). As federal regulators have renounced or been deprived by Congress of direct pricesetting authorities, the full effectiveness of the antitrust laws is essential. Jim Rossi, Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era, 56 Vand. L. Rev. 1591, 1648 (2003). See also Alfred E. Kahn, Deregulatory Schizophrenia, 75 Calif. L. Rev. 1059, 1059 (1987) (“While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.”).

The filed rate doctrine’s limitation on private antitrust enforcement subverts the effectiveness of the antitrust laws. The ability of injured consumers and businesses to bring antitrust suits is a pillar of the American antitrust enforcement regime. Under the Clayton Act, “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ., and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.” 15 U.S.C. § 15. See, e.g., Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (quoting Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948)) (“Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. . . . As we have recognized, ‘[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.’”).

Empirical research shows the public importance of “private attorneys general” and the value of having more enforcers on the beat against corporate collusion, consolidation, and monopolization. A study of 60 private antitrust lawsuits between 1990 and 2011 found that these actions generated more deterrence than the federal government’s entire criminal antitrust enforcement activity over the same period. Joshua P. Davis & Robert H. Lande, Defying Conventional Wisdom: The Case for Private Antitrust Enforcement, 48 Ga. L. Rev. 1, 26 (2013). And these lawsuits compensated injured parties, whereas public enforcement generally did not.

Under the district court’s neutering of private antitrust enforcement, market participants have expansive power to control markets through collusive and exclusionary conduct and extract billions in overcharges from the public. Their discretion and power are subject only to the limited oversight of FERC, supra, and resource-constrained public antitrust enforcement agencies. Kadhim Shubber, Staffing at Antitrust Regulator Declines under Donald Trump, Fin. Times, Feb. 7, 2019. Federal antitrust enforcers themselves have recognized the central role of suits brought by consumers and businesses injured by antitrust violations. See, e.g., Study of Monopoly Power: Hearing Before the H. Comm. on the Judiciary, 82 Cong. Rec. 15 (1951) (Statement of H. Graham Morison, Assistant Attorney General in charge of Antitrust Div., Dep't of Justice) (“[I]f you did away with the triple damages suit entirely and still wanted substantial enforcement in order to have economic freedom you would have to quadruple the size of the Antitrust Division.”).

The district court’s expansion of the filed rate doctrine establishes for gas and electricity a regime of “radical deregulation—markets absent common law and antitrust protections.” Rossi, supra, at 1596. By barring purchasers of power and potentially other market participants from bringing antitrust suits for damages, the court’s ruling blocks arguably the most effective antitrust enforcers—individuals and businesses—from vindicating their rights and protecting the public.

CONCLUSION

For the foregoing reasons, this Court should limit the filed rate doctrine to its scope as articulated by the Supreme Court in Square D and this Court in Town of Norwood. The district court improperly expanded the filed rate doctrine to cover market-based prices that are not filed with a federal regulator before they take effect. Accordingly, this Court should reverse the district court’s granting of the defendants-appellees’ motion to dismiss and remand the case for discovery.

#### The plan solves by ensuring arbitrarily approved rates are subject to antitrust.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

This Article argues that judicial review of private party antitrust claims, predicated upon market-based tariffs and filed with a regulatory agency, is not precluded by the filed rate doctrine. Th study is limited to the electricity market. In order to argue in favor of judicial reviewability of private conduct under antitrust law, this Article analogizes the filed rate doctrine with agency inaction in law, which is governed by the doctrine of nonreviewability. In Heckler v. Cheney, the United States Supreme Court gave policy reasons for its conclusion that agency inaction was unreviewable.1 I will apply the reasoning offered by the Court in Heckler to the specifics of a case study and conclude that agency market-based tariff-approval decisions should be reviewable. The case study is California's electricity crisis of 2000-2001. In particular, the examination will concentrate Federal Energy Regulatory Commission's (FERC) poor handling of the crisis, its aftermath, and the antitrust claims that followed.

The presumption of reviewability shifts the burden to show that its approval of a marked-based rate was not arbitrary. Courts should subject an agency's decision to the arbitrary and capricious standard of review. This standard would require agencies to give explanations and standards. If the agency fails to show that the decision was not arbitrary, courts should refuse to apply the filed rate doctrine and should subject the claim to the operation of antitrust laws. Courts should not, however, determine which tariff would best serve the interests of the properly functioning deregulated electricity markets. Such determinations are best left to the legislature or the agency because antitrust law and agency regulation are complementary to each other.

#### That shields against market abuse by promoting accountability and preventing arbitrariness.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

VI. Judicial Review and the Filed Rate Doctrine

There is little reason to continue to disallow judicial review of antitrust claims against utilities on account of the filed rate doctrine. As argued in the preceding section, such claims are likely to be found reviewable if subjected to the Heckler standard in lieu of FERC 's limited expertise with the competitive markets, and its subsequent lack of capacity to monitor and effectively deter market abuse by private utilities.237 Such claims should be subjected to the same principles courts utilize in reviewing claims arising from agency action under the arbitrary and capricious standard of review, namely, the requirement for explanation-giving and standard-setting.

Judicial scrutiny should be limited to the determination of whether the agency's decision was arbitrary, and if it was, courts should then subject the claim to antitrust laws. The determination as to whether rates approved by the agency were indeed sufficient for the proper functioning of a competitive market should be left to the legislature. The courts are poorly suited for the determination of proper rates prices.238

There are several other alternatives to judicial review of agency decision-making process for tariff approval, such as the expansion of the filed rate doctrine or judicial deference to the most politically accountable figure.239 However, judicial review seems to be the most workable solution in light of "the founding principles of the administrative state [which] are dedicated not only to promoting political accountability, but also to preventing administrative arbitrariness."240

The danger of arbitrariness undermines the legitimacy of an agency's decisions by generating "conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment."241 Such arbitrary results are evident in the continuing application of the filed rate doctrine, which shields private utilities from antitrust claims and prevents remedy even when such rates were approved as a result of an inadequate agency review process and lack of agency expertise.242

Further, the filed rate doctrine, as it exists in its current form and application, poses a serious problem as an impediment to the effective operation of properly functioning deregulated electricity markets.243 The doctrine has to be either abolished or revised. The latter solution would result in keeping the doctrine while expanding an agency's enforcement authority. This solution is simply not workable, because expanding agency authority will not be an effective substitute for agency expertise and experience with competitive markets. Abolishing the doctrine entirely is a more viable answer to the problem at hand. Abolition, however, must be accompanied by judicial review of agency decision- making processes related to tariff approval.

Keeping the filed rate doctrine in its current state is an unwise policy decision. As elaborated earlier, the filed rate doctrine was developed by the courts as a rule of statutory construction out of "deference to a 'congressional scheme of uniform . . . regulation'" delegated to the agency.244 The construed congressional intent behind the filed rate doctrine was to protect consumers from price discrimination by public utilities.245 This intent, however, was later perverted when courts started employing the doctrine to shield regulated utilities from antitrust claims. The mere act of filing with an agency, such as FERC, effectively insulates the utility from antitrust claims, even when the agency's market- based rate-approval process is nothing more than rubber stamping the submitted rates.246 Thus, the doctrine opens the door to market power abuse which poses a serious danger to the proper functioning of deregulated electricity markets.

## 1AC – Economy

#### Advantage Two is the Economy:

#### Business confidence is low – numerous indicators.

Marcos 9-28 [Coral; September 28; Business Reporter; *New York Times*, “Stocks Tumble in Worst Day Since May, as Tech Shares Slide and Bond Yields Climb,” <https://www.nytimes.com/2021/09/28/business/stock-market-today.html>; KS]

The prospect of the Federal Reserve not reaching as deep into its bottomless pockets is starting to hit home for investors.

The S&P 500 tumbled 2 percent on Tuesday — the worst one-day slide for the benchmark U.S. index since May — as investors faced the expected wind-down of the enormous bond purchases the central bank has made since the start of the pandemic.

“The deep sell-off highlights the extent of the nerves in the markets surrounding the moves of the Fed,” said Fiona Cincotta, senior financial markets analyst at Forex.com.

The coming slowdown of bond purchases is a sign of the Fed’s confidence that the economy is recovering from the upheaval of the pandemic. But, Ms. Cincotta noted, other factors are still making Wall Street wary.

“There’s also a combination of rising energy prices, concerns that inflation could be more entrenched in these elevated levels and the fact that consumer confidence is slowing,” she said.

The tumble extended into the Asian trading day on Wednesday, though investors signaled that confidence might be returning.

Stocks in Japan were down more than 2.6 percent midday. But losses in other Asian markets, like Hong Kong and mainland China, were more moderate. Futures markets were signaling that Wall Street would open modestly higher.

The trigger for Tuesday’s tumble, which cut across sectors, was a rise in the yield on the benchmark 10-year Treasury note. With the Fed preparing to slow its purchases as soon as November, investors have been selling off bonds before demand ebbs. On Tuesday, that pushed the 10-year’s yield up to 1.54 percent, its highest level since June.

Even though the Fed has said it doesn’t plan to increase interest rates for months or years, government bond yields are the basis for borrowing costs across the economy. When bond prices fall, yields rise — a move that can hinder the stock market’s performance because it makes owning bonds more attractive and can discourage riskier investments.

Higher rates would make borrowing more expensive for smaller companies, and the jump in yields was a blow to shares of several high-flying stocks. Etsy, the online craft marketplace, dropped 6 percent, and Shopify fell more than 5 percent. Both companies have soared during the pandemic.

“With tech stocks, you’re betting for a company to have a breakthrough years from now,” said Beth Ann Bovino, the chief U.S. economist at S&P Global. “If interest rates go up today, that value that you receive years from now is discounted.”

The biggest technology stocks — particularly Amazon, Apple, Microsoft, Google and Facebook — have a vast pull on the broader market and helped drag down the S&P 500. Apple fell 2.4 percent and was the best performer of the tech giants. Amazon dropped 2.6 percent while Microsoft, Facebook and Google were down by more than 3.5 percent.

But the declines cut across many sectors. Energy stocks were the exception, rallying after oil prices climbed early in the day. Schlumberger, ConocoPhillips, Halliburton and Exxon Mobil were among the best-performing shares in the S&P 500, though some of their gains faded as oil futures turned lower in the afternoon.

The Delta variant of the virus remains a concern for investors, while persistent supply-chain bottlenecks have affected everything from auto production to school lunches. In Washington, lawmakers remain deeply divided over spending on infrastructure and expanding social programs.

And another pressing fight is brewing over raising the nation’s debt limit — a dispute that could trigger a government shutdown. Treasury Secretary Janet L. Yellen warned lawmakers on Tuesday of “catastrophic” consequences if Congress does not deal with the debt limit before Oct. 18.

The unease is apparent in stock performance the past four weeks. The S&P 500 is approaching a 4 percent drop for September, ending seven straight months of gains. The winning streak had lifted stocks more than 20 percent, as investors seemed to largely shrug off any bad news.

Bumpy moments have usually involved the Fed. Tuesday’s trading echoed the volatility of earlier this year, when a jump in rates roiled financial markets. That rise happened as traders worried that higher inflation might cause the Fed to increase rates sooner than officials had forecast.

“There’s no doubt that the equity market does not like higher rates — there’s just no debate about it,” Ralph Axel, director of U.S. Rates Strategy at Bank of America.

Lauren Goodwin, an economist at New York Life Investments, wrote in a note to clients that investors have begun seeking out safer investments while weighing concerns including the debt-ceiling fight and regulatory actions in China.

#### **Energy prices drive inflationary pressures.**

Eberhart 9-21 [Dan; September 21; CEO of Canary, LLC.; *Forbes,* “Rising Energy Poses Big Inflationary Threat To U.S. Economy,” <https://www.forbes.com/sites/daneberhart/2021/09/21/rising-energy-poses-big-inflationary-threat-to-us-economy/?sh=7ada2d4377b2>; KS]

Fears about inflation are rampant in Europe where natural gas and power shortages are colliding with the onset of winter to drive energy prices to record-breaking levels. Mix in the effects of supply chain bottlenecks caused by the global pandemic and you have a dangerous cocktail of rising prices and falling purchasing power of must-have energy products.

And while the situation in the United States is not as bad, consumers and investors can’t afford to be complacent. Wall Street traders are watching what’s happening in Europe and anticipating inflation will continue to rise on these shores, too.

Concerns about the most recent Consumer Price Index (CPI) report put the jitters in traders that knocked the wind out of the sails of the stocks market. The year-over-year CPI rose 5.3 percent over its level last August and the core CPI is up 4 percent over the same period. That’s a slight decrease from where they were in July, but it’s still double the 2 percent inflation rate targeted by the Federal Reserve.

U.S. consumer prices increased at their slowest pace in six months in August, however those figures ignore the volatile food and energy components of the market. Consumers don’t have the luxury of ignoring rising prices for energy commodities like crude oil, natural gas, gasoline, and diesel. The cost of energy impacts prices throughout the supply chain – from production to transportation – and those extra costs ultimately filter down to the consumer at the end of the line.

Benchmark Brent crude oil now trades above $75 a barrel, or more than 45 percent above where it started the year, and analysts warn that a tightening oil market could prompt further gains.

Average U.S. retail gasoline prices are some 50 percent higher than a year ago at $3.19 a gallon, and with crude feedstock costs rising and some refineries still constrained after Hurricane Ida, they could also move higher.

The situation is most alarming in natural gas, which many consumers rely on to power and heat their homes. At over $5 per million Btu, benchmark Henry Hub natural gas prices are more than twice as high as a year ago, at an annualized rate equal to a $109 billion increase to consumers. The Energy Information Administration (EIA) reports that working natural gas stocks are 17 percent lower than a year ago and 7 percent below the five-year average.

Gas shortages in Europe and Asia are drawing more U.S. gas abroad as exports of liquefied natural gas (LNG), exacerbating market tightness here despite America’s vast gas reserves. The EIA says that natural gas exports are up 41 percent from a year ago.

The consultancy S&P Global Platts calculates that Henry Hub prices would have to increase to $10 per million Btu to provide incentive to U.S. producers to fulfill domestic natural gas demand rather supply the export market. At those price levels, which the United States experienced in 2008, would cause demand destruction in the manufacturing sector. Many manufacturers that consume large quantities of natural gas can no longer compete in the market at those prices, which results in a loss of jobs.

Low gas inventories and rising prices are a concern because the United States should now be building stocks for the winter when the heating season creates peak demand. The market is now in what’s known as a “shoulder season” when demand is structurally lower because the market is in between robust summer cooling demand and peak winter heating demand.

Instead, American consumers could be facing an uncomfortable winter if natural gas prices spike at the same time as crude oil and refined products push higher while the economy continues to recover from the pandemic.

It’s a dangerous prospect, particularly for lower income families who are hurt most by rising energy prices. A 50-cent-a-gallon increase in retail gasoline prices may not dent the wallet of wealthier consumers, but it can be incredibly painful for those with lower or fixed incomes.

And there’s another side to inflation in energy that can squeeze consumers. Investors use commodity markets to hedge their inflation risk, meaning they buy oil and gas futures contracts to hedge against the risk of consumer prices rising across the board. This speculative buying can drive up the price of the underlying commodity for consumers.

The Biden administration is understandably worried about rising energy prices but its attempts to blame the oil and gas industry are off base and show a lack of understanding of energy markets.

#### Inflation raises costs and decreases discretionary spending.

Troise 10-28 [Damian; October 28; Journalist at Associated Press; *Associated Press,* “Energy Prices Lift Oil and Gas Stocks, Weigh on the Economy,” <https://apnews.com/article/business-economy-prices-a906dbc90bf85a3caa11882e1eb861ec>; KS]

Energy prices are soaring in 2021 and oil and gas stocks are the clear winners, but the losers might just turn out to be businesses and consumers.

The energy sector has far outpaced the broader market in 2021. The S&P 500’s energy stocks are up more than 50%, compared with a roughly 20% gain for the overall index. Devon Energy, Marathon Oil and Occidental Petroleum have all more than doubled in value this year.

While energy stocks are reaping the benefits from high demand and lagging supplies, other areas of the economy are having a tougher time coping.

Surging oil and gas prices are adding to broader inflation pressures that are squeezing businesses and driving up costs. A wide range of manufacturers are finding it more costly to ramp up operations as energy costs rise. Airlines are getting hurt by higher jet fuel costs as they try to rebuild profits. Consumers in the U.S. and around the world are facing a tighter squeeze on their wallets from rising energy costs.

Fertilizer maker CF Industries briefly halted operations at two facilities in the U.K. in September because of high natural gas prices. Delta Air Lines CEO Ed Bastian warned investors earlier in October that fuel prices will hurt its ability to remain profitable through the end of the year. It expects a “modest” loss in the fourth quarter.

Consumers are already paying more for goods as companies pass through higher fuel costs, raw materials costs and supply chain disruptions. More worrisome to some analysts is what happens if people have to cut back on spending in order to pay for higher gas and home heating costs. The economic recovery depends on continued consumer spending, but higher energy costs could mean less discretionary spending on services, travel and goods.

#### The economic effects ripple through every industry and sector.

Salzman 11-9 [Avi; November 9; Senior writer at Barron's, covering stocks, the economy, and the impact of new technology on financial markets; *Barron’s,* “High Energy Prices Are Rippling Through the Economy,” <https://www.barrons.com/articles/high-energy-prices-are-rippling-through-the-economy-51636477167>; KS]

The latest government inflation figures show that prices are rising fast, and much of the momentum is coming from energy. The trends are already hitting businesses in several industries and will continue rippling through the economy. Investors should keep an eye out for shrinking margins—and possibly pressure on valuation—in the months ahead.

On Tuesday, the Bureau of Labor Statistics released the monthly producer price index, which measures prices of goods and services as they make their way through the supply chain. The report showed that the PPI rose 0.6% in October on a month-over-month basis, and 8.6% on a year over year basis, in line with economists’ expectations.

The consumer price index, which measures prices at the retail level, is scheduled to be released on Wednesday. That report is likely to show that escalating energy prices are forcing consumers to pay up for heating oil, propane, gasoline, and other fuels.

“I think more pain is going to come to the consumer, certainly, for this winter,” said Marcus McGregor, an energy analyst at asset manager Conning. “I think if you look at the latest reports, costs for propane, natural gas and any sources that are leading into the consumer’s home—if we have a really cold winter—are expected to increase significantly this winter. So I see more pain before relief when it comes to the U.S. consumer.”

Businesses are already having to adjust. The PPI shows how the escalating energy costs are affecting corporations—and how they may end up flowing through to consumers in several industries. The price of goods that were at the final stage of production (as opposed to component parts) rose 1.2% in the month, with three quarters of that jump having to do with a rise in the price of energy, according to the report. In October, oil prices rose 13%. Natural gas prices were flat in October, after jumping 34% in September, the largest one-month gain in 12 years.

That has been a boon for energy companies, which have led the market higher this year after trailing for much of the previous decade. Exxon Mobil (ticker: XOM) stock has soared 58% this year, and BP (BP) is up 34%.

But escalating energy prices are a draw on several other industries. Consumer goods get more expensive because it costs more to truck them to warehouses and stores.

“Higher commodity and freight cost impacts combined were a 400 basis point hit to gross margins,” said Procter & Gamble (PG) CFO Andre Schulten on the company’s earnings call last month.

Airlines get pinched, too, because fuel can account for about one-fifth of their expenses. Delta Air Lines (DAL), for instance, said on its latest earnings call that high fuel prices “will pressure our ability to remain profitable in the December quarter.”

“At present time, we’re expecting a modest loss in the fourth quarter with crude prices driving that up nearly 60% year-to-date and more than 15% just over the last month,” said CEO Ed Bastian.

Companies that make or process fuels and chemicals often run on natural gas. Refinery operator Valero Energy (VLO) said that its refinery operating expenses rose 6% in the third quarter largely because of higher natural gas prices. And any other business—including office work—that uses substantial amounts of electricity can be hurt when energy prices rise. Natural gas now accounts for the largest share of U.S. electricity generation.

Industrial companies can be hit too, as their operating expenses rise. Processed fuels used in manufacturing—things like oils, greases, natural gas, and diesel—are on average 34% more expensive than they were a year ago, according to the PPI. That, along with supply-chain problems around the world, are causing some industrial companies to warn investors that their margins could be hurt.

German chemicals company BASF (BASFY) said that high natural gas prices cost it 600 million euros in the first nine months of the year, but that October prices increases would make its operations even more expensive.

“Throughout basically all value chains, our suppliers, our customers and we ourselves continue to be confronted with increasing raw material, energy and transportation costs, supply chain constraints and the related and largely unforeseeable issues with material availability,” said CEO Martin Brudermüller on the company’s latest earnings call.

It’s a global problem that won’t be going away soon, and one that consumers are starting to feel too.

#### **Slows the U.S. economic recovery and guarantees recession.**

Mitchell 10-10 [Josh; October 10; Covers the U.S. economy from the Journal's Washington, D.C. bureau. He previously covered transportation policy and the bailouts of General Motors and Chrysler. Prior to the Journal, he worked as a reporter for the Baltimore Sun and the Palm Beach Post; *Wall Street Journal,* “Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy,” <https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800>; KS]

The U.S. economy is facing a new threat: rising energy prices.

Crude oil has risen 64% this year to a seven-year high. Natural-gas prices have roughly doubled over the past six months to a seven-year high. Heating oil has risen 68% this year. Prices at the pump are up nearly a dollar over the past 12 months to a national average just over $3 a gallon. Coal prices are at records.

Higher energy prices could push up inflation in coming months, damp consumer spending on other products and services, and ultimately slow the U.S. recovery, economists say.

“For consumers it’s like a tax,” economist Kathy Bostjancic of Oxford Economics said of the price increase. While consumers will likely be squeezed, the energy-price rise “would have to be extreme and prolonged” to halt the economic recovery, she added. More likely, “we would just see growth decelerate more or a longer pause before growth resumes, and that we just get a bit stickier inflation in the meantime.”

Andreas Steno Larsen, an analyst at Helsinki-based Nordea Bank ABP, is more pessimistic. He said this year’s rise in energy prices has caused him to cut his estimate for U.S. growth next year to 1.5% from 3.5%. While he believes oil and gas prices will remain flat in coming months, he also sees a worst-case scenario in which they rise by another 40% some time next year, enough to push the U.S. and global economy into a brief recession in mid-2022.

The higher prices are being driven by rising demand and tight supplies. As the pandemic fades and consumers around the world step up spending, factories and service providers are ramping up production, which requires energy. Oil supplies are tight because oil-exporting countries have decided to increase production in measured steps instead of opening the taps more widely.

#### Economic decline causes interstate war.

Brands ’21 [Hal and Michael Beckley; September 24; Global Affairs Professor at Johns Hopkins University; Political Science Professor at Tufts University; Foreign Policy, “China Is a Declining Power—and That’s the Problem,” <https://foreignpolicy.com/2021/09/24/china-great-power-united-states/>]

Slowing growth makes it harder for leaders to keep the public happy. Economic underperformance weakens the country against its rivals. Fearing upheaval, leaders crack down on dissent. They maneuver desperately to keep geopolitical enemies at bay. Expansion seems like a solution—a way of grabbing economic resources and markets, making nationalism a crutch for a wounded regime, and beating back foreign threats.

Many countries have followed this path. When the United States’ long post-Civil War economic surge ended, Washington violently suppressed strikes and unrest at home, built a powerful blue-water Navy, and engaged in a fit of belligerence and imperial expansion during the 1890s. After a fast-rising imperial Russia fell into a deep slump at the turn of the 20th century, the tsarist government cracked down hard while also enlarging its military, seeking colonial gains in East Asia and sending around 170,000 soldiers to occupy Manchuria. These moves backfired spectacularly: They antagonized Japan, which beat Russia in the first great-power war of the 20th century.

A century later, Russia became aggressive under similar circumstances. Facing a severe, post-2008 economic slowdown, Russian President Vladimir Putin invaded two neighboring countries, sought to create a new Eurasian economic bloc, staked Moscow’s claim to a resource-rich Arctic, and steered Russia deeper into dictatorship. Even democratic France engaged in anxious aggrandizement after the end of its postwar economic expansion in the 1970s. It tried to rebuild its old sphere of influence in Africa, deploying 14,000 troops to its former colonies and undertaking a dozen military interventions over the next two decades.

#### Economic decline ensures leadership turnover.

Brückner ’19 [Markus and Hans Grüner; October 31; Economics PhD and Professor at Australian National University, External Consultant to IMF and World Bank; Economics PhD and Professor at the University of Mannheim, External Consultant to European Central Bank; Public Choice, “Economic growth and political extremism,” no. 185]

Abstract

We argue that the growth rate, but not the level of aggregate income, affects the support for extreme political parties. In our model, extreme parties offer short-run benefits to part of the population at the expense of a minority. Growth effects on the support for such parties arise when uncertainty exists over whether the same subset of individuals will receive the same benefits in the future. More people are willing to take political risks if economic growth is slow. Based on a panel of 16 European countries, our empirical analysis shows that slower growth rates are associated with a significant increase in right-wing extremism. We find no significant effect of economic growth on the support for extreme left-wing parties.

1 Introduction

Distributional consequences are associated with political extremism, both in the short run and in the long run. Extreme political parties often propose to redistribute resources away from specific subgroups of society, such as the rich, ethnic minorities, or citizens living in specific regions. This paper analyzes the impact of economic growth on the support for extreme political parties in western democracies. We argue that the growth rate, but not the level of aggregate income, affects the support for extremism.

In the first part of our paper, we discuss three alternative explanations for why an increase in the economic growth rate reduces the support for extreme political parties. Two well-known explanations are related to retrospective voting and behavioral effects, the latter meaning that voters may react more strongly to changes in than to levels of economic well-being. The third, novel explanation is that parties with extreme political platforms are perceived to create considerable uncertainty about the future distribution of income.

We develop a simple game-theoretic model that analyzes that uncertainty effect. In our model, extreme political parties offer short-run gains from redistribution to a group of individuals. However, the same individuals also face long-run losses owing to the higher income risk that is associated with an extreme regime.1 The model permits a comparative static analysis with respect to several key variables of interest. The growth rate is associated with larger future income risk. Such risk reduces the number of voters favoring extreme parties. The level of aggregate income has no effect on the support for extremism. Income inequality raises support for redistribution and affects the impact that a change in the growth rate has on the support for extremism.

An important feature of our model is that the effect of economic growth on the support for extremism depends on uncertainty of future income redistribution. If redistributive policies are perceived as predictable—in the sense that the same group will have income taken away from it in the future—then the political support for an extremist party is unaffected by growth.

In the empirical part of our paper, we estimate the relationship between economic growth and the support for extreme political parties using a panel dataset comprising 16 European countries. Our dependent variable is a survey-based measure, compiled by Euro-barometer, of respondents' support for extreme right-wing parties and extreme left-wing parties. We use that data, which spans more than three decades and contains entries on a semi-annual frequency, to estimate the effects of economic growth on the support for extremism. Our empirical analysis shows a significant negative effect of real per capita GDP growth on the support for extreme right-wing parties: controlling for country and time fixed effects, a one percentage point decline in real per capita GDP growth increases the vote share of extreme right-wing parties by up to one percentage point. We document that the negative effect of economic growth on the support for right-wing extremism is robust across estimation techniques and model specifications. We do not find a systematic effect of growth on the support for left-wing extremism.

A possible explanation for the differential effects between left-wing and right-wing extremism that relates closely to our theoretical model is that right-wing extremism might be associated with more uncertainty over what groups will be subject to income expropriation in the future. Left-wing extremism is associated with income redistribution, but little uncertainty exists over its target. Communist doctrine (see, for example, the Communist Manifesto by Marx and Engels 1848), envisions a classless society; i.e., a society wherein incomes are distributed equally. Over the past century, extreme left-wing parties have followed closely that doctrine by proposing to redistribute incomes from rich to poor; as opposition parties they have voted against laissez faire policies and, when in power, they have implemented programs that reduced the wealth and income prospects of the rich (see, e.g., Brown 2010).

Right-wing extremism, in contrast to left-wing extremism, does not advocate a classless society. Instead, it often is associated with discrimination against specific groups of society for racial, religios, political or other reasons.2 An extreme case of a murderous and discriminatory regime was the German fascist rule during the first half of the 20th century. One can see it as a direct consequence of the Nazi party's "Fuhrerprinzip"—"the principle of unconditional authority of the leader" (Bernholz 2017, p.9)—which created considerable uncertainty over who might be stigmatized, imprisoned or killed in the future.3 Indeed, from the Nazi period we know that various groups were stigmatized for different reasons4 and that stigmatization also was particularly erratic.5,6

The empirical analysis of our paper is related to Stevenson (2001), who examines the determinants of aggregate policy preferences in a panel of 14 European countries. One of Stevenson's main findings is that declines in economic growth cause policy preferences to shift to the right, while increases in economic growth cause policy preferences to shift to the left.7 Our paper differs from Stevenson in at least three important aspects. First, in contrast to Stevenson, we show that our empirical results are robust to controlling for country fixed effects, meaning that our results also hold at the within-country level, and not just in cross-section. Relatedly, Acemoglu et al. (2008, 2009) showed that the cross-country relation between income and democracy turns insignificant when country fixed effects are entered into the econometric model. Second, we provide evidence that our empirical findings reflect a causal effect of economic growth on political extremism. We show that our main findings are robust to estimating dynamic models that enable to test for Granger causality; and we also show that the main findings hold with an instrumental variables approach. Third, we distinguish in our empirical analysis between extreme right-wing and extreme left-wing parties. That distinction matters: a robust negative effect of economic growth is found on the support for extreme right-wing parties, whereas no systematic effect exists for the support of extreme left-wing parties. Our finding of a significant negative effect of economic growth on the support for right-wing extremism is in line with the finding of Bromhead et al. (2012), who show that the vote share of right-wing extremists during the Great Depression was significantly larger in those countries that experienced a more severe economic crisis. Using subnational data for 218 European regions during 1990-2016, Rao et al. (2018) find a significant negative effect of regional output on the vote share of extreme right-wing parties, but no signicant effect on extreme left-wing parties.

**Leadership turnover causes nuclear war.**

Bertoli ’18 [Andrew, Allan Dafoe, and Robert F. Trager; May 9; PhD and International Relations Professor at IE University, Spain; PhD and International Relations Professor at UCLA; Political Science Professor at UCLA; Journal of Conflict Resolution, “Is There a War Party? Party Change, the Left–Right Divide, and International Conflict,” vol. 63, no. 4]

Is the likelihood that a democracy will take military action against other countries largely influenced by which party controls the presidency? Many believe so (Palmer, London, and Regan 2004; Arena and Palmer 2009; Clare 2010). In modern American politics, one party is consistently identified as more hawkish than the other. Surveys have revealed that Republican voters consistently prefer more aggressive policies (Eundak 2006; Trager and Vavreck 2011; Gries 2014). Moreover, many believe that Al Gore, had he been elected, would not have invaded Iraq like President George W. Bush did (Jervis 2003; Lieberfeld 2005), and that the foreign policies of Hillary Clinton and Donald Trump would be similarly opposed (Paletta 2016).

Nevertheless, it is very difficult to determine whether the party in control of the presidency really has an important impact on foreign policy due to the selection of parties into particular domestic and international contexts. Put simply, which party controls the presidency is not random. For example, the victory of George W. Bush in 2004 can be attributed to a number of domestic and international factors at the time, including the American public's heightened concerns over national security following September 11. Similarly, Barack Obama's success in 2008 was influenced by problems at home and a decrease in public willingness to engage in military adventurism. Therefore, an observational analysis would likely be biased by such selection processes. Thus, even if countries behave differently when certain parties control the presidency, it would be very difficult to know if that difference is explained by the parties or by the environments into which the parties are selected.

In principle, we could overcome this problem by running an experiment in which we randomly assigned countries to be ruled by leaders from different parties. Such an ideal research design would avoid the confounding problem, making it possible to test whether countries tend to be more or less aggressive when certain parties control the presidency. Experiments are unmatched in their ability to identify causal effects, so this type of study could greatly improve our understanding of how electing candidates from different parties influences foreign policy.

We approximate this ideal experiment by using a regression discontinuity (RD) design. Specifically, we look at close presidential elections where a candidate from one party barely defeated a candidate from a different party. Such a design works if it is close to random which party won in these cases, a premise which is plausible given the inherent randomness in large national elections. Thus, we use close elections to get data that are similar to what would result from a real experiment. Such natural experimental designs are extremely rare in the study of war and thus warrant attention in the exceptional instances when they do occur.

We run two main analyses. First, we look at whether countries tend to be more (or less) aggressive when presidential candidates from right-wing parties barely defeat candidates from left-wing parties. This quasi-experimental comparison involves a small sample size (n = 29), but we still find noteworthy evidence that electing right-wing candidates increases the likelihood that countries will initiate high-level military disputes against other states. Second, to increase our statistical power, we examine cases where candidates from incumbent parties barely won or barely lost to candidates from challenger parties (n = 36). Specifically, we test whether countries experienced a larger change in their propensity to engage in military disputes when the candidate from the challenger party barely won. Thus, our key outcome of interest here is how much countries deviated from their prior levels of dispute involvement. We find statistically significant evidence that electing candidates from challenger parties causes countries to experience a larger change in their propensity to engage in military conflict with other states.

Upon further examination of the data, we find that the results from our second test are largely explained by a tendency for candidates from challenger parties to initiate military disputes in their first year in office. Thus, these findings support the theory that major leadership transitions tend to increase the chances of state aggression, either because new leaders lack the experience to manage international crises effectively or because they need to prove their resolve by acting tough.

This article makes several important contributions to the study of international relations. First, there is a long-standing debate in political science over whether leaders have an important independent impact on interstate conflict or whether their influence is largely constrained by strategic realities (Byman and Pollack 2001; Mearsheimer and Walt 2003; Jones and Olken 2009; Chiozza and Goemans 2011; Saunders 2011; Horowitz, Stam, and Ellis 2015; Croco 2015). This study provides quasi-experimental evidence that leaders do have a meaningful impact on foreign policy. Second, the results presented here suggest that domestic political ideology can spill over into the international realm. One of the main explanations for the democratic peace is that democracies act in accordance with their domestic norms when it comes to foreign policy (Morgan and Campbell 1991). The findings presented here support that hypothesis by showing that left-wing leaders do tend to behave more dovishly in international affairs. Third, these results suggest that we should be alert to the potential for interstate conflict when right-wing leaders are in office, as well as after elections where party control of the presidency changes hands.

This study is also notable because it is one of the first in the international relations literature to use a preanalysis plan. Prior to looking at any of the results, we pre-registered the main tests that we planned to conduct in this article. Our motivation here was to tie our hands, so that there could be no question of sifting through the data to find the statistical tests that produced the most interesting or significant results. The temptation for scholars to run many tests and then report the ones that are most "interesting" can lead to misleading findings. This danger has attracted a great deal of attention across scientific fields over the last decade, and it is seen by many as a major problem for quantitative research (Nosek et al. 2015). The purpose of preanalysis plans is to help ensure that research remains credible.

The article proceeds as follows. We first discuss the theoretical bases for the claim that party control of the presidency influences conflict decisions and review the existing empirical work on this subject. We then outline the research design in more detail. Next, we conduct design checks to verify that the research design is appropriate. We then present the results for party ideology. After that, we test whether party turnover leads to changes in the likelihood of state aggression. We then discuss the findings and conclude.

Leaders, Parties, and International Conflict

In recent years, much debate has arisen over whether leaders influence the chances of interstate conflict, and if so, how. A major question in this research program is whether leaders from certain parties are more likely to behave aggressively in foreign affairs or whether the ideology of the leader is largely unrelated to state behavior.

The theory that party control of the presidency influences the chances of interstate conflict can be derived from three premises. The first is that conservatives and liberals hold different views about the legitimacy or efficacy of military force. This assumption is backed by cross-national survey data showing that liberals tend to be more concerned with fairness, duties of care, and preventing harm, while conservatives tend to favor the preservation of social orders, the purity of sanctified objects, and loyalty to in-groups (Graham, Haidt, and Nosek 2009; Boer and Fischer 2013). Several studies have also found that these differences in moral foundations influence foreign policy attitudes (Schwartz 1992; Kertzer et al. 2014; Kertzer and Rathbun 2015). In particular, liberals are more "prosocial" and seek compromise internationally, in contrast to conservatives, who are more "proself” and therefore bargain more aggressively (Schwartz, Caprara, and Vecchione 2010).

The second assumption is that general differences in party attitudes appear at the elite level. There are two ways that these differences could affect the behavior of political elites. First, the political leaders could sincerely hold beliefs and preferences similar to those of their constituents, leading them to have different foreign policy strategies and goals. Alternatively, the leaders could have different beliefs and attitudes than their constituents, but nonetheless recognize that they must carry out their supporters' agenda if they hope to stay in office.

Although it is difficult to know the extent to which leaders true foreign policy preferences reflect those of their constituents, several observational studies show that changes in a leader's base correlate with changes in their approach to international affairs. First, Mattes, Leeds, and Carroll (2015) find that changes in the supporting coalitions of leaders predict foreign policy change, measured by the policy positions taken by nations in the United Nations General Assembly. Rathbun (2004) and Haas (2005) come to a similar conclusion looking at support for peace-enforcement missions, and Solingen (2009) finds that economic interests and the ideologies of partisan coalitions influence nuclear weapons policy. Therefore, even when a leader has different foreign policy beliefs and goals than the rest of the party, there may still be pressure to toe the party line.

The third assumption is that leaders from different parties can act on their divergent preferences. This means that international and domestic constraints on leaders cannot be so powerful that they largely limit leaders to a single course of action. For example, some realists argue that there is little room for leaders to have an independent impact on foreign policy because they all need to defend and advance the national interest (Mearsheimer 2001; Mearsheimer and Walt 2003). Regarding domestic constraints, Trager and Vavreck (2011) find that right-wing and left-wing leaders can have incentives to hide their "types." Liberal leaders may be forced to adopt more hawkish foreign policies because they fear that their moderation will sometimes be interpreted as weakness (Schultz 2005), whereas conservative leaders may have incentives to adopt more moderate policies because the public would likely judge them unduly aggressive if they acted hawkishly. Thus, leader preferences and political incentives could actually push in opposite directions.

Several previous studies have examined whether right-wing leaders tend to behave more aggressively in foreign policy than left-wing leaders. Using logistic regression on panel data covering eighteen parliamentary democracies from 1949 to 1992, Palmer, London and Regan (2004) find that right-wing governments are more likely to be involved in military disputes, while left-wing governments are more likely to see the disputes in which they are involved in escalate. Their explanation is that right-wing parties favor using force more often, so their leaders will engage in military conflict more often. However, when left-wing leaders engage in conflict, they will need to emerge victorious to justify their involvement, so they will be more likely to bargain tough and escalate if necessary. These researchers find that a shift from left to right government increases the chances of dispute initiation by about 50 percent and that left-wing governments are about twice as likely to escalate conditional on being in a dispute. Second, Arena and Palmer (2009) apply a probit model to panel data covering twenty stable democracies from 1960 to 1996 and find that right-wing governments are more likely to initiate disputes. Their theory is based on the finding that right-wing leaders are less likely to be removed from office for using force unwisely than left-wing leaders. This makes right-wing leaders more likely to start international conflicts in the hopes of increasing their domestic support. Third, Clare (2010) applies logistic regression to twenty parliamentary democracies from 1950 to 1998 and finds that parliamentary democracies are about twice as likely to initiate disputes when they are controlled by right-wing parties.

The central limitation of these studies is that their conclusions rest on the results of regression analysis on cross-national panel data. Such an approach is not guaranteed to eliminate bias from omitted variables. In fact, the results from this type of analysis can be badly biased, even when researchers control for a wide range of important covariates (Clarke 2005). In some cases, controlling for potential con-founders can even amplify bias (Pearl 2013). Thus, the results from these past studies should be interpreted as a tentative first cut at answering this question rather than the final word on the subject.

The design-based approach that we employ in this article gets around the omitted variable bias problem because the as-if random assignment of leaders to office should create balance across observable and unobservable pretreatment characteristics. In many other scientific fields, the results of conventional observational analyses have been overturned by design-based studies. For example, the validity of hormone replacement therapy and a variety of theories in development economics, psychology, and elsewhere have been overturned when experimental and quasi-experimental approaches were brought to bear (Women's Health Initiative 2002; Freedman 2009; Dunning 2012). Therefore, the tests that we present in this article provide an important step forward in our understanding of the empirical relationship between party control of the presidency and interstate conflict.

Before moving on to our research design, though, we should first lay out the hypotheses that we want to test. As we detail in our preanalysis plan, we started this project with the belief that leaders do matter and that electing leaders from different parties does affect the likelihood of state aggression. Given this prior, we formulated two main hypotheses. The first is the party ideology hypothesis, which predicts that electing leaders from right-wing parties will increase the likelihood of state aggression. The second hypothesis is highly general and speaks directly to the question of whether leaders matter in international relations. It posits that electing a leader from the incumbent party will lead to less change in international dispute behavior than electing a leader from a challenger party. We refer to this as the incumbent/challenger hypothesis.

Party Ideology Hypothesis: Electing presidential candidates from right-wing parties will make countries more aggressive than electing candidates from left-wing parties.

Incumbent/Challenger Hypothesis: Electing candidates from challenger parties will lead to a greater change in state aggression than electing candidates from incumbent parties (the absolute difference in aggression between presidential terms will be greater when there is party turnover).

One issue that is related to the incumbent/challenger hypothesis is that new leaders may be particularly likely to act aggressively early in their terms. There are several reasons why this might be the case. First, new leaders may lack the experience to manage international crises effectively, making it more likely that disagreements with other states will turn into military conflicts (Potter 2007). Second, new leaders may be more likely to want to show the international community that they are willing to use force abroad, which could strengthen their bargaining leverage in future international negotiations (Wolford 2007; Dafoe 2012). Third, new leaders may want to send a signal to their domestic audiences that they are tough when it comes to foreign affairs, which could increase their popularity at home. This idea that leaders are more likely to get involved in military disputes when they first arrive in office has received support from cross-national logistic regression analysis on panel data (Gelpi and Grieco 2001) and a mixed-methods analysis that looks at American presidents (Potter 2007).

While most of the existing theory and research on leadership transitions has focused on cases where new leaders come to office, a similar logic might be applied to party control of the presidency, particularly when it comes to the reputational mechanisms. New leaders who are from the same party as the old one should be able to associate themselves with the previous leader's reputation, giving them less of a need to signal their resolve. On the other hand, when leaders from challenger parties come to power, there should be less certainty that the new leader will have an approach to foreign policy that is similar to the old one's. In short, when party control of the presidency changes hands, it marks a more significant leadership transition (Mattes, Leeds, and Matsumura 2016). Thus, even if parties tend to behave pretty similarly across ideologies, we might still find that leaders from challenger parties might be much more aggressive early in their tenures.

Challenger Aggression Hypothesis: Electing candidates from challenger parties will lead to an increase in state aggression when the new leader takes office.

We did not preregister the challenger aggression hypothesis prior to looking at the results, but this was the only hypothesis we tested outside of those we preregis-tered. Thus, the findings do not reflect data mining. Nevertheless, some readers may wish to interpret the test of this particular hypothesis as exploratory.

Research Design

There are several different design-based approaches that could be used to investigate how leaders affect state behavior. One would be to look at all cases of leadership turnover and compare how countries behaved before and after the leadership change. This research design rests on the idea that countries are comparable before and after leadership transitions. This assumption may be plausible in some cases, but in others, it is clearly invalid. For example, the periods before and after normal electoral leader transitions are usually not comparable. Many countries elect the leader and members of the legislature at the same time, making it difficult to determine the effect of leadership change by itself. Similarly, looking at cases when leaders were forcibly removed from office also has its limitations, since leaders are usually removed at times of extreme political tension. Likewise, leadership changes that are caused by assassinations are not likely to provide valid comparisons. The new leader will probably have to deal with a more complicated political situation in the aftermath of the assassination, making the beginning of their term much different from the end of the previous leader's term.

Another potentially promising approach would be to focus on changes in leadership that resulted from the natural deaths of leaders. The timing of natural leader deaths should be fairly unrelated to the domestic and international environments. Moreover, the legislature will typically not change following the natural death of a leader, making it much easier to isolate the independent effect of leaders on foreign policy. However, the natural death approach is not well-suited for this particular study. The reason is that the new leader almost always comes from the same party as the old leader. Thus, this exogenous change in leadership does not provide much leverage in determining how party control of the presidency affects interstate conflict. This research design could be useful in looking at other types of variation in leaders, such as age, military experience, and occupational background. However, it is not a promising design for this study.

The approach that we take instead is to use an RD design. RD involves comparing units that barely surpassed and barely fell short of an important cut point that influenced treatment assignment. For example, if there was a test where everyone who scored a fifty or higher got a scholarship, researchers could assess the effects of getting the scholarship by comparing the students who scored fifty and fifty-one to the students who scored forty-eight and forty-nine. So long as there is no sorting at the cut point, as could happen if the graders had opportunity and motive to nudge some test takers above the cut point, it should be close to random which of these students won the scholarship, since they were all on the verge of getting it (Lee 2008).

Close elections provide an excellent opportunity to use RD analysis. Given the inherent randomness in the electoral process, whether candidates barely win or barely lose in close elections is plausibly as-if random (Eggers et al. 2015).1 Political scientists have used RD to study questions like how winning an election influences a party's likelihood of winning the next election (Lee 2008) and how winning an election affects a candidate's wealth later in life (Eggers and Hainmueller 2009). Scholars have also used RD to test how economic and political outcomes differ when Republican candidates for mayor barely defeat or barely lose to Democratic candidates (Pettersson-Lidbom 2008; Gerber and Hopkins 2011; Beland 2015; de Benedictis-Kessner and Warshaw 2016).

In this article, we look at close presidential elections. To our knowledge, this study is the first to apply RD specifically to presidential elections. For our analysis, we followed the procedures that were outlined in our preanalysis plan (which is available at the end of the Online Appendix). We will briefly summarize these procedures in the remainder of this section.

Our Statistical Approach

There are two general ways to analyze an RD. The first, known as the continuity approach, involves plotting two smoothing functions on either side of the cut point and estimating the difference at the cut point (Voeten 2014). This method should be used when the score, or "forcing variable," is continuous. The second method is the local-randomization approach, appropriate when the forcing variable is discrete (Lee and Card 2008; Cattaneo, Frandsen, and Titiunik 2015; Bertoli 2017). It involves drawing a window around the cut point and treating the units within that window like they were in a randomized experiment.

Since the forcing variable in this study is vote share in a presidential election, which is essentially continuous, we would normally use the continuity approach. However, we discovered in our preanalysis plan that the continuity approach had a type 1 error rate (false-positive rate) of 12 percent for this study, which we believe is due to our small sample size. Since the type 1 error rate should be 5 percent by design, we chose not to use this method, since it was overly likely to give us significant results. Instead, we used the local-randomization approach, which we found had a type 1 error rate of about 4 percent.

Defining Close Elections

We considered elections to be close if the top two candidates were within 2 percent of the cut point (48 percent to 52 percent range). Data on close races were available in the data set constructed by Bertoli, Dafoe, and Trager (2018). This data set includes every democratic election between 1815 and 2010, where democracies are defined as countries with Polity IV Institutionalized Democracy scores above five. The data set provides information on the top two candidates including their names, parties, and vote shares in the election. If there were more than two candidates running in an election, we focused only on the votes for the top two candidates, rescaling their vote shares accordingly. In cases where there were runoffs, we used their vote shares from the runoff rather than the initial election. We also excluded close elections in nondemocracies because we were concerned about fraud in these cases. Given the possibility of fraud, we did not feel confident in assuming that the outcomes of these elections were as-if random.

One complication that arose is that the United States elects presidents through the electoral college. This system makes it possible for candidates to lose the popular vote but still win the election if they defeat their rival in the electoral college. To deal with this issue, we counted the electoral college vote rather than the popular vote when looking at the United States. This decision is consistent with other similar studies (Bertoli, Dafoe, and Trager 2018). For every other country, we used the popular vote.

Measuring Party Ideology

To identify parties as left or right-wing, we evaluated the parties against each other according to their positions at the time of the election on social questions associated with liberalism and conservatism. Parties were judged further to the right when they expressed support for "traditional values," national, religious, racial, or ethnic in-groups, or the benefits of authority and traditional sources of authority such as a monarchy. Parties were judged further to the left when they expressed inclusive sentiments, a duty of care for vulnerable groups, and support for democratic principles. Secondarily, we evaluated parties as left or right on economic policy preferences. Advocacy for wealthier interests placed a candidate further to the right, and advocacy for the less well-off is associated with the left. These two social and economic dimensions are highly correlated, with the principal exceptions coming from communist and postcommunist countries. In these cases, the primary social dimension determined the left-right coding. When parties could not be easily classified as left or right according to these metrics, we excluded the election from the ideology test.

Main Analyses

We looked at two different types of close elections. The first were close elections between right-wing and left-wing parties, where it was essentially random whether the presidency was controlled by a leader with a right-wing or left-wing ideology. In total, we have twenty-nine close elections between right-wing and left-wing parties. The second set of close elections that we analyzed was narrow races between an incumbent and challenger party. In these cases, it was as-if random whether the country experienced party continuity or change in the executive branch. We have thirty-six of these close elections in our data set. For this group of cases, we were particularly interested in testing whether a change in party control of the presidency increased the likelihood of a change in state aggression.

Although our sample sizes are not large, the power tests that we ran at the beginning of this project indicated that we had a good chance of picking up a medium-sized or large effect. For the test of left- versus right-wing parties, we determined we would correctly detect (at a = .05) a medium-sized effect (0.5 standard deviation [SD]) 30 percent of the time, a large effect (0.8 SD) 54 percent of the time, and a very large effect (1.2 SD) 82 percent of the time. In the incumbency power analysis, we found that we would detect a medium-sized effect 55 percent of the time, a large effect 93 percent of the time, and a very large effect over 99 percent of the time. Also, if the effects were small or nonexistent, the power tests indicated that we would be able to establish confidence intervals that were precise enough to rule out very large (+1.2 SD) positive and negative effects.2

Moreover, although the results turn out to be significant at conventional levels, we encourage readers to avoid interpreting p values as either significant (p < .05) or not while reading this article and to bear the bias-variance trade-off in research design in mind. Almost all quantitative research in international relations lacks any claim to strong causal identification, being based on observational data and linear adjustment of largely ad hoc covariate sets. By contrast, the design presented here has a strong claim to causal identification and unbiasedness, providing a crucial complement to the vast majority of the literature which does not. Thus, since p values provide a continuous measure of how inconsistent the evidence is with the null hypothesis, a higher p value in an unbiased design may actually reflect more evidence against the null than a lower p value in a biased one. Small p values (e.g., p < .2), even if not significant at conventional standards, also provide important evidence in these contexts.

In addition to our two main tests, we examined whether candidates from challenger parties are more likely to initiate military disputes at the beginning of their terms than candidates from incumbent parties, which would be consistent with the theory that major leadership transitions make state aggression more likely. Our motivation for running this test came from reading Wolford (2007), Dafoe (2012), and Wu and Wolford (2016). These articles advance a compelling theory and intriguing empirical evidence that new leaders have reputational incentives to act tough when they first come to office. We find strong evidence consistent with this hypothesis.

Outcomes

We measured aggression using the number of militarized interstate disputes (MIDs) that a country initiates. These disputes are cases where countries explicitly threatened, displayed, or used force against other states (Ghosn, Palmer, and Bremer 2004). Specifically, we look at the number of these disputes that a state initiated starting from when the leader took office and ending at the date that the winner of the next election was scheduled to start. In cases where leaders were replaced part of the way through their term, we used the day that they left office instead. Since the length of time that candidates held office varied, we divided the total number of disputes by the duration of the time period. Thus, the unit of measurement is military disputes initiated per year in office.

We use slightly different versions of the outcome variables for our different tests. For the ideology test, we use military disputes initiated per year, as described in the previous paragraph. For the main incumbency test, we use the absolute change in military disputes initiated per year from the previous term. We use this variable because we are interested in evaluating whether there was a larger absolute change in military aggression when the challenger party barely won. Thus, the measure is:

Absolute change in military aggression =|MIDs/year during winner's term

—MIDs/year during previous term|

In other words, we are testing whether challenger parties gaining control of the presidency makes countries with high levels of prior aggression more likely to experience a decrease in dispute initiation and countries with low levels of prior aggression more likely to experience an increase in dispute initiation. We conduct a one-sided test for this analysis, since we expect that the absolute change will be larger for countries where the challenger party barely wins. Lastly, for the exploratory test about whether challenger candidates tend to be more aggressive when they first take office, we look at the number of disputes that each country initiated in the first year of the new presidential term.

Across these tests, our main outcomes are (1) military disputes initiated and (2) high-level military disputes initiated. High-level disputes are cases where countries used force against other states or entered into international wars.3 Following the preanalysis plan, we examine high-level disputes, which constitute actual uses of force, separately because the factors that drive posturing may be different from those that drive actual violence. As secondary outcomes, we look at (3) all disputes that countries engaged in and (4) all high-level disputes that countries engaged in. These cases include disputes that countries did not start but participated in nonetheless.

Estimation

We employ two estimation strategies. Our primary statistical analysis involves t tests. This is a simple approach, recommended for its parsimony and robustness, which is appropriate given the assumption that close elections were as-if random (Dunning 2012). As a secondary test, we plot the outcome as a function of the electoral result and estimate how the expected value of the outcome changes at the cut point using local linear regression, as is often done for RD designs. An advantage with using this approach is that it makes it possible to visualize how outcomes change at the cut point.

Design Checks

Our research design rests on one main assumption, necessary for internally valid estimates: the outcomes of the close elections considered in this study are as-if random. For example, the design would be invalid if any candidates could precisely manipulate their vote shares around the cut point, such as by counting the votes and adding just enough to win. This assumption should be valid for democracies provided that elections are fair (Eggers et al. 2015).

A second "representativeness" assumption facilitates generalizing from our results, and this is that the democracy years experiencing close elections are not dissimilar to democracy years in which elections are not close. If this assumption is reasonable, then we can generalize from our results to all democracy years. However, if the countries that had close elections are not representative of other democracies, then the causal estimates that we find may not reflect broader patterns in international relations.

We can test the as-if randomness assumption in two ways. First, we can check that the samples are balanced on important pretreatment characteristics. Figure 1 plots the balance using two-sided t tests. The graph on the left shows that countries where right-wing parties barely won were very similar to countries where left-wing parties barely won, and the graph on the right shows that countries where incumbent parties barely won were similar to countries where challenger parties barely won. In Figure 1, we look at twenty-four covariates, and not a single one is significantly imbalanced. Thus, the data are consistent with the assumption that who won these close elections was as-if random.

[[FIGURE ONE OMITTED]]

[[FIGURE TWO OMITTED]]

Second, we can test whether there is balance in the number of cases on either side of the cut point. Figure 2 shows how close right-wing and incumbent parties were to winning the presidency. For the twenty-nine close elections between right-wing and left-wing parties, there were sixteen cases where the right-wing party won and thirteen cases where the left-wing party won (p = .71). Similarly, for the thirty-six close elections between incumbent and challenger parties, there were seventeen cases where the incumbent party won and nineteen cases where the challenger party won (p = .87). Thus, there is no evidence of sorting in either sample.

[[FIGURE THREE OMITTED]]

We can also evaluate the external validity assumption by comparing the two samples to the broader population of all democracies since 1815. Figure 3 uses box-plots to compare our samples to the broader population with respect to covariates related to military power. The comparisons show that our samples are very similar to the broader population of democracies from 1815 to 2010. Thus, at least with respect to these covariates, there is little reason to believe that either of our samples consist of an idiosyncratic group of countries that would behave differently than most other democracies. Rather, the representativeness of our samples indicates that our results should be indicative of broader trends in international relations.

In sum, the outcomes of the close elections appear to be random, and the countries where the close elections happened are fairly representative of all other democracies. Therefore, the design appears to have worked very well. In the next two sections, we will look at how electing presidential candidates from different parties affects state aggression using this new empirical approach.

Results for Party Ideology

Our results indicate that right-wing parties tend to be more aggressive than left-wing parties. Table 1 shows the aggression levels of the countries that had close elections between right-wing and left-wing candidates. On average, the countries where right-wing parties barely won started .06 more disputes per year than countries where left-wing parties barely won. Similarly, they engaged in .10 more high-level disputes per year than countries where left-wing parties barely won. Given that the average duration of a presidential term for these countries is 4 years and 169 days, this adds up to .32 more disputes initiated and .43 more high-level disputes initiated over an average presidential term.

Figure 4 plots the estimates for the two main outcome variables along with the two other indicators of aggression. The confidence intervals are based on two-tailed t tests. They suggest that electing right-wing parties does increase state aggression, particularly when it comes to high-level disputes. Of course, all of these confidence intervals cover zero, so we cannot rule out zero effect with 95 percent confidence based on this analysis alone. The estimate most different from zero is of high-level disputes initiated (p = .25). For disputes initiated, the results appear to be more consistent with no effect (p = .64), as do the results for the supplemental tests of all disputes and all high-level disputes.

[[TABLE ONE OMITTED]]

[[FIGURE FOUR OMITTED]]

However, if we look at the specific disputes in more detail, the evidence that electing right-wing leaders increases state aggression grows stronger. While all the high-level disputes that the right-wing leaders engaged in involved unequivocal uses of force, the only high-level dispute that any of the left-wing leaders initiated is questionable and should probably be excluded. This dispute was between Costa Rica and Nicaragua in 1995, and it did not involve any military action by either country. Costa Rican police crossed the Nicaraguan border in pursuit of suspects and were arrested. Two days later, the Costa Rican police force retaliated by arresting two Nicaraguan police officers who had crossed the border "to get a drink of water." The two sides made a prisoner swap on the following day. If this case is dropped, then electing right-wing parties appears to lead countries to initiate . 12 more high-level disputes per year (p = .162).4

Moreover, the only reason that these results are not significant is because the United States (2001) is an outlier, which inflates the standard errors. We can address this issue by modifying the outcome to a simple indicator variable for whether countries initiated any high-level disputes (no = 0, yes = 1), which makes our test insensitive to outliers. The estimates then suggest that electing right-wing parties increases the chances that countries will initiate high-level military disputes by 25 percent (p = .041). Therefore, even though the initial tests were not statistically significant, they become more conclusive after we address some minor issues with the data.

Given the number of democracies in the world today, there may be enough close elections to get much more precise estimates a decade or two from now or maybe even after the next expansion of the MID data set. This design is definitely worth returning to in the near future. However, for the present, we will turn to a second test in the next section on more data that yields increased statistical power. This test provides further evidence that which party controls the presidency does affect the likelihood of state aggression.

Results for Incumbent versus Challenger Parties

The second test that we run compares cases where challenger parties barely defeated incumbent parties to cases where they barely lost to incumbent parties. In these cases, it was as-if random whether the incumbent or challenger party won. Thus, we can test how much military aggression changes when the party that controls the executive branch changes. The outcomes that we use for this test are the absolute changes in the military indicators between the term when the incumbent or challenger party barely won and the previous term. For this analysis, we use one-sided tests that assume that there will tend to be a larger change in military aggression when the challenger party barely wins.

Table 2 shows the absolute change in aggression levels for the countries that had close elections between candidates from incumbent and challenger parties. When the candidates from challenger parties barely won, the absolute change in disputes initiated per year was .031 greater than when candidates from incumbent parties barely won (p = .30; 26 percent increase from baseline). For high-level disputes, the difference is even more notable. The absolute change in high-level disputes initiated per year was .074 greater than when candidates from incumbent parties barely won (p = .046, 133 percent increase from baseline). The average length of the presidential terms for these data was 4.42 years, so this adds up to a difference of .33 high-level disputes initiated per presidential term. Figure 5 plots the confidence intervals for the aggression indicators.

This estimated effect is substantively large relative to other determinants of conflict that international relations scholars have analyzed. For example, past studies have found that revolutions increase the likelihood that countries will initiate military disputes by about 74 percent (Colgan 2010), arms transfers by about 60 percent (Krause 2004), and neutrality pacts with potential conflict joiners by about 57 percent (Leeds 2003). The effect of challenger parties winning appears to be in the ballpark of these estimates, although it is hard to nail down this effect very precisely because of the relatively small sample size.

Figure 6 illustrates the effect for high-level disputes across a greater range of margins of victory. As countries move from incumbent party victories (the points on the left) to challenger party victories (the points on the right), there is a large shift in the absolute change in high-level disputes initiated. Countries where the challenger party barely won experienced a much larger change than countries where the incumbent party barely won. Although this method of estimating the treatment effect was not the primary method that we discussed in our preanalysis plan, the results for this approach are fairly conclusive.

## 1AC – Federalism

Advantage Three is Federalism:

#### Circuit splits over the filed rate doctrine makes enforcement incoherent.

First ’12 [Harry and Christopher Sagers; November 28; Law Professor at NYU; Law Professor at Cleveland-Marshall; Brief of Antitrust and Economics Professors, “McCray v. Fidelity National Title Insurance Company,” http://sblog.s3.amazonaws.com/wp-content/uploads/2013/02/McCray-Final-File-Copy-as-Filed.pdf]

Some courts, though not all, have found that this complex of theoretical considerations has no relevance as soon as a state adopts the simple expedient of a rate-filing system, even if it is identical to the unreviewed, file-and-use system that Ticor found so lacking. They do this on their view that the filed rate doctrine should apply in such cases, and in their view the filed rate rule precludes private remedies even where the agency engages in no actual review of rates filed.3 Amici are eager to undo this extraordinary elevation of form over theoretical substance, and to bring consistency to all cases in which states attempt to limit federal antitrust.

Footnote 3.

3 Not all courts so hold, and the Circuits are accordingly split. Compare Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992) (rejecting filed rate protection for state-filed rates), with Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir.1994) (finding filed-rate protection for state-filed rates), H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir.1992) (same), and Taffet v. S. Co., 967 F.2d 1483, 1494 (11th Cir. 1992) (same).

Footnote 3 ends.

To be clear, Amici stress as the justification for certiorari not the lack of “active supervision” in and of itself, but the expansion of the heavily disfavored filed rate doctrine to state-filed rates, an expansion that creates serious theoretical tension. If “a doctrine [so] indefensible . . . should be narrowly construed,” as one leading antitrust authority has said, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 19.6 (4th ed. 2011) (emphasis added), then there can be no call for expanding it in this way, beyond any traditional basis in the intent of the federal Congress, and in a way so far at odds with this Court’s theory of antitrust federalism. Accordingly, while there may be support for the view that federally filed rates can enjoy filed rate protection without actual review, and while some such support was cited below,4 it is inapt to this case.

Amici will explain three related reasons that the theoretical conflict renders certiorari appropriate. First, only this Court is likely to restore consistency across factual contexts that some lower courts have taken to be distinct and unrelated. Failure to find that consistency causes there to be inexplicably and undesirably different antitrust treatment of state regulatory regimes that do not differ in any respect relevant to any value of federalism or federal antitrust. Second, this Court will consider another matter this Term raising importantly similar issues, Federal Trade Commission v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir.), cert. granted 2012 WL 985316 (2012) (No. 11-1160). Consideration of both matters would complement one another, as they raise the same fundamental concern: what precisely should be required of state governments before they excuse private persons from federal antitrust liability. And finally, confusion of this central theoretical point caused the court below explicitly to break with a decision of the Ninth Circuit on essentially identical facts, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992). Amici submit that Brown properly applied this Court’s larger framework for balancing state regulation and federal antitrust.

III. REASONS FOR GRANTING THE PETITION

This case is not, as the court below took it to be, about minor points of detail within the widely disparaged “filed rate” doctrine, commonly associated with Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156 (1922). It has little to do with the since-repealed federal statute at issue in that case, or with any similar federal statute, or with Justice Brandeis’s views of the largely defunct Progressive-era rate and-entry regulatory regimes of which those statutes were a part.

Instead, this case is about federalism. Specifically, it is about what should be required before a state government excuses private persons from the federal antitrust laws. The court below forgot that “a state”—unlike the federal Congress— “does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .” Parker v. Brown, 317 U.S. 341, 351 (1943).

The opinion below crystallized the central problem in the following, nearly hidden observation: while not denying that some of this Court’s state action cases seem hard to square with its decision, the court simply found “no apparent requirement to reconcile the filed rate and state action doctrines . . . .” McCray v. Fidelity Nat’l Title Ins. Co., 682 F.3d 229, 238 n.6 (3d Cir. 2012). The court gave no explanation for that view, cited two circuit opinions for it that are logically irrelevant,5 and was evidently unaware of judicial6 and academic7 authority for the seemingly self-evident point that antitrust scope doctrines should be consistent with one another. In fact there is a need for theoretical consistency, and certiorari is made appropriate by the court’s failure to seek it.

A. Serious and Unexplained Theoretical Conflict in the Scope of Antitrust

The decision below, when taken together with this Court’s Ticor decision, gives rise to the following puzzle. If State X and State Y both had title insurance regimes like those at issue in Ticor, then title insurers in both states would be fully subject to government antitrust remedies. Ticor so held. But the effect of a ruling like that below is to bar private damages remedies. So if State X did not have a ratefiling requirement, then private plaintiffs could challenge price-fixing by State X title insurers, but a rate-filing requirement in State Y would bar private challenges there, even though in every other respect the regulatory regimes remained identical. Nothing seemed relevant to filed rate protection below except for the tariff filing itself. In its absence, the filed rate doctrine would not apply, and Ticor would preclude state action immunity, making private damages actions possible.

The same result would hold even if both states’ regulators had the same power to enforce the same reasonable rate and non-discrimination rules, and even if both states explicitly authorized price-fixing by statute. Filed rate protection would still be unavailable, and Ticor would still deny state action immunity from private remedies. And it would be so even though the State Y filing system were exactly like the one found inadequate in Ticor—a file-anduse system in which the regulator never actually uses its power of post-filing review. The Third Circuit would preclude the federal remedies of Clayton Act § 4 in State Y but not State X, even though the only difference between them is State Y’s requirement to file a piece of paper that no one ever looks at.

This result is at odds with seventy years of this Court’s elaborate balancing of state and federal interests in antitrust cases, a framework that began in Parker in 1943. Where the Court has permitted states to deviate from the federal competition mandate, it has been solely to respect their sovereign interests in regulating trade within their borders. The states have no such interest in cases in which they do not in fact regulate. Accordingly, antitrust is relaxed in light of state policy only where the state itself has actively used its regulatory power. Ticor, 504 U.S. at 639-40; Midcal, 445 U.S. at 105-06.

Ticor, this Court’s last statement on the issue, remains its fullest theoretical elaboration. As Ticor explained, on a thorough canvass of the Court’s prior decisions, the Court’s purpose has never been “to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.” The Court asks only “whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, [and] not simply by agreement among private parties.” Ticor, 504 U.S. at 634-35; see also id. at 633 (“Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.”). And the Court judges the degree of the state’s “independent judgment and control” by measuring precisely the variable that the court below said was irrelevant: the Court requires evidence of “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law . . . .” Ticor, 504 U.S. at 633. Critically, the Court added that:

state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.

504 U.S. at 634 (quoting Patrick v. Burget, 486 U.S. 94, 100-01 (1988)).

Therefore, the result in this case should not stand unless there is some difference between the filed rate doctrine, applied below, and the state action doctrine explained in Ticor, and the difference serves some relevant policy goal important enough to justify radically different exposure to liability in otherwise similar contexts. But the only difference in consequence between the two doctrines is that the state action immunity precludes all antitrust and the filed rate rule ordinarily precludes only some private remedies. No policy goal of either antitrust or federalism is served by precluding private federal remedies in only one of two markets identical except that one observes a pro forma state-law filing requirement.

First, the policy values on which Keogh and other filed rate cases are justified have no force where rates are filed with a state agency.8 The goal of preventing price discrimination among customers—the filed rate doctrine’s “paramount purpose,” Square D Co. v. Niagara Frontier Tariff Bur., 476 U.S. 409, 417 (1986) (quoting Keogh, 260 U.S. at 163)—has no relevance here. First of all, as petitioners observe, Delaware’s regulatory regime explicitly permits varying prices and contemplates that they may be set competitively. Compl. ¶ 34 (quoting Del. Code Ann., Tit. 18, § 2501). But even if Delaware did prohibit discrimination, a state non-discrimination rule should be no basis for disregard of federal antitrust laws. A mere state government desire to prevent price discrimination—which is an ordinary feature of many healthy, competitive markets— should receive no more federal deference than any other state intrusion into normal competition. It would be no different than when a state “simply authorizes price setting and enforces the prices established by private parties.” 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344-45 (1987) (quoting Midcal, 445 U.S. at 106). Especially where the state engages in no actual oversight of the rates set, it would do no more than “cast[ ] . . . a gauzy cloak of state involvement over what is essentially a price-fixing arrangement.” Id.

Likewise, mandating deference to regulatory authority, the other major policy goal commonly associated with filed rate protection, would make little sense here, for that is precisely the value precluded by Ticor. A state government cannot by mere fiat declare that antitrust does not apply. No policy goal of antitrust or federalism would make that more true simply because a state has adopted a pro forma rate-filing requirement.

Second, it is no reply that filed rate protection leaves open federal enforcement. Ticor stressed the danger, in terms of the lost values of healthy competition, were states allowed to displace antitrust by fiat. See 504 U.S. at 632 (“The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. . . . A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people.”). It follows that if private remedies are needed for the actual preservation of those values, then private remedies too cannot be dispensed with by state fiat.

#### Filed rate has become a judicial bypass for enforcement.

Rossi ’3 [Jim Rossi; 2003; Law Professor at Florida State University; Vanderbilt Law School, “Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,” vol. 56]

B. Antitrust Defenses and Immunities

Modern antitrust defenses and immunities provide courts an opportunity to safeguard the public interest in deterrence - largely ignored by the filed tariff shield - in the context of federal antitrust litigation. To be sure, per se defenses provide an important set of protections against judicial overreaching on the basis of antitrust law into competitive markets. 236 However, allowing the filed tariff doctrine to become an independent, firm-specific antitrust defense - as courts have - is unnecessary and harmful, given other doctrines that protect agency discretion and state jurisdiction while also providing courts the flexibility to evaluate dual enforcement issues. Courts should independently assess whether tariffs qualify for immunity from antitrust enforcement, using traditional antitrust law doctrines, rather than using filed tariffs as a shorthand way of bypassing the antitrust laws. In contexts in which in the filed rate bar has been raised, antitrust defenses arise in two distinct scenarios: 1) horizontally, in instances where federal regulators, rather than federal courts, might assert jurisdiction over allegedly anticompetitive conduct; and 2) vertically, in instances where federal regulators approve one tariff and state regulators approve another tariff, and hence a jurisdictional conflict arises because the allegedly [\*1647] anticompetitive conduct is arguably within the realm of state regulators or falls into a jurisdictional gap. In both scenarios, antitrust law already provides ways to respect the agency regulatory process, making the filed tariff doctrine redundant.

1. Horizontal Jurisdictional Conflicts: Regulatory Compliance and Primary Jurisdiction

In the horizontal scenario, courts since Keogh have invoked the filed tariff shield to bar most antitrust claims, but do recognize certain exceptions. 237 Nearly twenty years ago, Judge Friendly called the doctrine into question in this context. 238 Although in Square D the Supreme Court refused Judge Friendly's invitation to overturn Keogh, Justice Stevens and a majority of the Court were notably sympathetic to his critique. 239 Given the more prevalent emergence of market norms, Judge Friendly's critiques resound even more clearly today. Although recent Ninth Circuit cases refuse to allow deregulation to threaten the application of the filed tariff doctrine, these cases are solidly preemption cases rather than cases applying the basic principles of Keogh. 240 Federal courts have yet to fully assess Keogh's fate against the backdrop of electric power and telecommunications deregulation.

Where federal regulators have approved all tariffs related to allegedly anticompetitive conduct, the continued rationale for allowing the filed rate doctrine to bar antitrust liability is questionable. The strongest rationale for invoking the filed rate doctrine in this context is out of respect for the expertise of agency regulators, reflected in the deference strand of the filed tariff doctrine. In Town of Norwood, the First Circuit characterized the legal foundations of the filed rate doctrine as "extremely creaky," 241 but when invoked as a bar to antitrust enforcement, the filed rate doctrine is also incoherent. To begin, as with state contract and tort law claims, if misconduct requires modification of tariff terms, regulators could easily accommodate this need in future rate cases. 242 But also, as the court [\*1648] itself noted in Norwood, in the context of the tariff approval action, FERC had waived requirements that filed rates or tariffs be accompanied and justified by cost-of-service data. 243 Such data would be necessary for the agency itself to evaluate the price squeeze claim.

Notwithstanding the fact that the agency lacked sufficient data to evaluate a claim of price squeeze, the court in Norwood concluded that "it is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." 244 This is dangerously broad language. By focusing on the filing of tariffs by regulated firms, the court privileges private behavior rather than the actual or anticipated actions by regulators that traditional deference concepts evaluate. It is difficult to reconcile invocation of the filed rate doctrine in the context of price squeeze claims - as the court struggled with in Norwood - with other antitrust claims, in which the filed rate doctrine has not been successfully invoked as a bar to litigation. For example, mergers and sales of assets by utilities have been subject to antitrust challenge even though the resulting rates were subject to federal regulation and the merger or sale had been approved by regulators. 245 Since Otter Tail, which allowed antitrust claims when an agency had some jurisdiction, the simple filing of tariffs has not precluded antitrust claims, even where regulators have partial jurisdiction over conduct. 246 In a deregulated market, courts have a particular responsibility to carefully assess tariffs in order to help ensure that anticompetitive and otherwise illegal private conduct does not "escape scrutiny" of applicable legal standards. 247 Otherwise, as Judge Boudin (who penned Town of Norwood) warned in an earlier-published article, through the repeated use of the filed tariff doctrine the "metaphor is likely to exhaust itself," 248 undermining the very competitive process it is designed to protect.

#### Causes jurisdiction hunting. State action immunity makes it coherent.

Rossi ’3 [Jim Rossi; 2003; Law Professor at Florida State University; Vanderbilt Law School, “Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,” vol. 56]

2. Vertical Jurisdictional Conflicts: State Action Immunity

Modern antitrust jurisprudence also potentially extends the filed tariff doctrine's reach to a second context, vertical, in which both federal and state regulators have approved tariffs relating to allegedly anticompetitive conduct. In this context, it is conceivably the state-approved tariff that makes antitrust enforcement unnecessary. Some states do not explicitly endorse the filed tariff doctrine, as a matter of state law, 261 but, regardless of whether a state independently does so, state action immunity serves functions similar to those the filed tariff doctrine purports to serve, again making it unnecessary.

State action immunity is designed to accommodate the federal antitrust interest in promoting competition with state interests in regulation. When state regulation works to restrict competition, these two interests may collide. In Parker v. Brown, the United States Supreme Court addressed this conflict in reviewing the potential antitrust liability of state officials enforcing a program that fixed raisin prices and restricted competition between growers. 262 The Court held that the Sherman Act was not intended to restrain "state action," effectively creating absolute immunity for pure state actors, but the Court did not address the potential liability of private parties operating under the auspices of state law. 263

Later cases extended state action immunity to private parties whose allegedly anticompetitive acts were the product of, or approved by, state action. As the Supreme Court stated in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., immunity for private actors exists only if the challenged restraint is taken pursuant to a ""clearly articulated and affirmatively expressed … state policy'" 264 and is subject to active state [\*1653] supervision. 265 The clear articulation requirement does not require a defendant to show that state law compelled the challenged actions, 266 but instead only that the state affirmatively contemplated the type of activity challenged. 267 Given this low threshold, the active supervision requirement does most, if not all, of the heavy lifting in determining whether state action immunity applies to private actors. 268 Courts have held that this requirement is not automatically met when the state "simply authorizes price setting and enforces the prices established by private parties" because such a broad authorization would merely "cast[] … a gauzy cloak of state involvement over what is essentially a price-fixing arrangement." 269

In the context of dual rate regulation schemes, state action immunity can have the same effect as the filed rate doctrine at the state level, while also providing courts flexibility to evaluate the deterrence implications of declining jurisdiction. In Town of Concord v. Boston Edison Co., then-Judge Breyer assessed a price squeeze claim brought under these circumstances. 270 FERC regulated Boston Edison's wholesale electric power rates, while its retail rates were regulated by state authorities. 271 Municipal utilities, such as the Town of Concord, challenged Boston Edison's wholesale prices as anticompetitive, on the grounds that the utility's wholesale price increases, approved by FERC, had not been matched by corresponding retail price increases at the state level. 272 The municipality claimed that the disparity between the two rates put the towns in a price squeeze, making retail customers more likely to purchase directly from Boston Edison and thus placing the municipal customer base at risk. 273 Properly declining to apply the filed rate shield - because this basis for refusing jurisdiction is particularly problematic in the context of price squeeze claims, where sometimes neither the federal [\*1654] nor state regulator has authority to rectify an antitrust violation 274 - Judge Breyer reasoned that Boston Edison enjoyed no express immunity from the application of the antitrust laws, but recognized that careful analysis of the price squeeze claim is necessary in the context of regulated industries. 275 Regulators continue to monitor the reasonableness of rates, as well as the relationship between utilities and their competitors. 276 In addition, Judge Breyer noted that regulation makes it less likely that a price squeeze would drive independent distributors from the marketplace, since the permission of regulators is required to take on new customers. 277 He further observed that supporting a price squeeze claim in such circumstances is at odds with the goals of price competition to the extent that it would encourage greater retail rates, and that there were potential institutional concerns with courts telling regulators what rate to apply under the circumstances. 278 Judge Breyer concluded that "a price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct' under [the] Sherman Act … ." 279

Judge Breyer's analysis addressed the price squeeze claim on its merits. This is understandable given that, in the context of this specific price squeeze claim, it was unclear whether the anticompetitive conduct was the wholesale rate, the retail rate, or both. 280 However, on similar facts - where the state regulates retail rates and the allegedly anticompetitive conduct is at the retail level [\*1655] only - state action immunity might allow a more complete analysis of the deterrence benefits of allowing an antitrust claim to go forward. 281 If a state actively supervises the regulation of retail rates, for example, this could implicate state action immunity in price squeeze and other antitrust claims. 282 Thus, if courts are satisfied with the monitoring provided by state regulators (including their ability to deter wrongdoing by regulated firms), there may be no need to address the merits of antitrust claims, creating the same effect as the filed tariff shield - even in instances where a state lacks its own state-law version of the doctrine.

Such an approach has significant advantages over the filed rate doctrine, as it focuses on the degree and effectiveness of overlapping state supervision, rather than on the simple act of filing or approving a tariff. Courts have yet to fully determine how state action immunity will apply in a full or partially deregulated environment. It is fair to predict, though, that as market norms emerge in formerly regulated industries, state action immunity will likely be available less often than was previously the case. 283 For example, in a recent case involving a utility's offer of a discounted rate to a customer that was conditioned on the customer's agreement to forego development of its own generation plant, a United States District Court agreed with the Department of Justice's Antitrust Division that such conduct was not protected from antitrust attack by state action immunity. 284 Although the New York state legislature had authorized reduced rates to "prevent loss of … customers," and the New York Public Service Commission had approved the reduced rate contract, the court held that the state legislature did not foresee or intend the anticompetitive [\*1656] features of this arrangement, particularly to the extent it resulted in the removal of a competitor. 285

None of these doctrines - robust federal preemption, primary jurisdiction, or state action immunity from antitrust enforcement - was available early in the twentieth century, when federal courts first developed the filed tariff doctrine to help protect customers against discrimination in rates. 286 The filed tariff doctrine was questionable even before these doctrines developed, but today it is even more unnecessary. Further, by encouraging perverse behavior by private actors that is largely beyond the reach of the judiciary - thus widening the jurisdictional gap in enforcement of market norms - the doctrine is harmful. Using the filed tariff doctrine as an independent legal reason to preempt state law claims, or refuse jurisdiction over antitrust and other federal claims, gives short shrift to the public interest in the context of dual regulatory enforcement. In a dual enforcement regime, the jurisdictional inquiry must focus on the relationship between the agency and the courts, or the agency and state law, rather than on the deceptively simple act of filing a tariff with a regulatory body. These alternative doctrines provide federal courts the flexibility necessary to do this. Similarly, in states that recognize the doctrine, an analysis of primary jurisdiction would suffice to protect agency discretion.

#### Chills telemedicine which would solve the aging crisis.

Sklar ’20 [Tara and Christopher Robertson; 2020; Health Law Professor at the University of Arizona; Law Professor at the University of Arizona; American Journal of Law and Medicine, “Telehealth for an Aging Population: How Can Law Influence Adoption Among Providers, Payors, and Patients?” vol. 47]

Notwithstanding these avenues of reform, many states continue to restrict healthcare providers from practicing telemedicine by requiring a full license in the state of service.102 These states often define “the practice of medicine broadly to include phone calls, e-mails, and on-line discussions, circumscribe[ing] the use of the new technology.”103 To the extent that these state licensing laws are designed to favor local providers, they may arguably be subject to challenge under the dormant commerce clause of the U.S. Constitution,104 or under federal antitrust laws.105 Regardless, Congress should consider affirmatively preempting them as hindrances to interstate commerce and federal spending, such as Medicare. Likewise, Congress preempted state doctrines around corporate practice of medicine, to the extent that they interfere with the work of Health Maintenance Organizations (“HMOs”).106

Similar to when and how a healthcare relationship should be established, states may claim that strict licensure laws improve standardization and quality of care,107 but if the benefit is slim, then it may not offset the chilling effect of the on cross-border practice, and hence, provider participation and patient access. In fact, state licensure laws do not vary substantially, and a more ambitious alignment seems to be a promising path forward.108

C. REIMBURSEMENT OF COSTS

\*322 In this section, we describe current approaches by insurers, including Medicare, Medicaid, and private carriers, to reimburse for telehealth services. We discuss related state laws, and suggest how to optimize reimbursement for greater telehealth adoption.

On the private payor front, 40 states and the District of Columbia have laws governing reimbursement for telehealth.109 These laws either require coverage parity, which ensures that a service is reimbursed if provided through telehealth, or payment parity, which ensures that reimbursement is at the same rate as when care is delivered in-person.110 If the policy goal is to increase use of telehealth, then payment parity can reassure doctors that telehealth will not undercut their revenues. However, payment parity laws can defeat the policy advantage of telehealth to reduce costs.111

Because the majority of states have private-payer reimbursement laws of some sort, the current practice is to amend a law to expand its applicability to additional specialties.Minnesota, for example, did this when it expanded its private-payer law to cover dental coverage, while Utah's expansion singles out telepsychiatry services,112 and Washington allows telemedicine to be offered from “any location determined by the individual receiving the service.”113 It is important to question whether these private-payer laws are necessary to expand reimbursement efforts given increasing market demand. A Milbank report documented interviews in six states that did not have parity in payment laws, yet found that almost all private health insurers covered telehealth services and paid the same rate as in-person services.114

The aforementioned expansion of MA plans to cover telehealth could be an excellent natural experiment to compare before and after 2020. The clear implementation date could determine whether and how much reimbursement changes are improving overall utilization, access to care, better health outcomes, and lower costs when compared to the traditional Medicare population, in essence the control group. Comparisons between states may also be striking as most MA enrollees, forty percent, reside in six states (Florida, Hawaii, Minnesota, Oregon, Pennsylvania, and Wisconsin) and Puerto Rico, and, by contrast, rural states have lower rates of MA enrollees.115

MA's expansion into the telehealth may create additional market pressure for private insurers (who often also administer MA plans) to voluntarily reimburse for telehealth services. Traditional Medicare may follow the pathway that MA is starting with a bipartisan bill that was reintroduced on October 30, 2019 entitled Creating Opportunities Now for Necessary and Effective Care Technologies “CONNECT” for Health Act, which is currently pending in the Senate Finance Committee.116 This bill would reduce geographic and site-specific requirements for traditional Medicare so \*323 that these beneficiaries would also receive telehealth delivered care directly in their homes.117 This pending legislation could make an enormous impact on telehealth utilization nationwide where the pool of patients would surge to nearly 60 million people.

The MA move may also influence Medicaid, especially as the largest payor for long-term care in America. There are over six million older adults on Medicaid who have both Medicare and Medicaid coverage (aka “dual-eligibility”), and this is largely attributable to them going through their savings paying for some form of long-term care.118 In an effort to extend personal finances, a phenomenon of “aging in place” is gaining primacy as the preferred long-term care model, rather than a nursing home or institutional setting.119

Telehealth coverage and reimbursement in state Medicaid programs vary considerably. Almost all states (49) and the District of Columbia have some coverage for telehealth, and nearly all reimburse for live video telehealth.120 Some state Medicaid programs impose restrictions such as limits on the sort of facilities where telehealth care can be received, by what type of healthcare provider, and geographic restrictions.121 As of 2016, eight state Medicaid programs reimbursed for telehealth under their home health services, but this number more than doubled to 19 states by 2019.122 Patients are eligible for these Medicaid services if they have two or more chronic conditions, one chronic condition and are at risk for a second, or have one serious and persistent mental health condition.123 Given the prevalence for chronic conditions and mental health among older adults, as previously discussed, many will be able to meet the eligibility requirement.124

States are removing some of these restrictions, for instance, the majority of state Medicaid programs no longer have rural requirements that must be met for telehealth reimbursement.125 Additionally, a number of states are demonstrating innovative efforts with funding support from the federal government, namely through grants and waivers for home health programs.126 With the consent of the U.S. Department of Health and Human Services, Alabama, Iowa, Maine, New York, Ohio, and West Virginia have all used state plan amendments that include telehealth coverage in their home health proposals.127 Similarly, Kansas, Pennsylvania, and South Carolina have used waivers to cover remote patient monitoring for long-term care services.128

Across all these domains of insurance, the quick expansion of telehealth coverage may be worrisome if it forces patients who would otherwise prefer an in-person visit to only have access to care via telehealth. One option to help curtail this \*324 issue is for insurance regulators to require that insurers maintain an in-person option for members. Nonetheless, such insurance mandates may wreak inefficiency, if they do not reflect consumer preferences.

CONCLUSION

Telehealth is increasingly important to the future practice of medicine, but poses a unique set of challenges for state lawmakers as they attempt to navigate interstate practice. Additionally, state and federal lawmakers are being confronted with how to provide high-quality, affordable care for an aging population that will live for an average of two decades with multiple chronic conditions.129

It is clear that law plays a substantial role in how quickly telehealth operators can achieve the scale necessary to provide care for an older population in their homes. Fortunately, state licensure laws are actively reducing some of the administrative burdens that had limited cross-border practice with support for an interstate compact.130 But much more can be done on this front; the fragmentation of state-based licensure likely does not promote quality or efficiency compared to a unified or seamless system. Furthermore, the CMS rule to allow MA plans to reimburse for care received in the home is an essential move for telehealth to suddenly reach a much broader and older population where utilization has been disproportionately low compared to other age groups.131 This federal-private insurer effort combined with the work already underway via state Medicaid programs should continue nationwide growth for telehealth adoption.

An area that continues to remain variable across states is the establishment of a healthcare relationship. The position of the AMA and the states that follow it reflect a presumption that in-person interactions should remain the baseline for healthcare standards. Also discussed, to require an in-person visit for patients who cannot leave their homes without substantial difficulty, and for conditions where the standard of care would not require a physical exam, seems unnecessarily onerous and costly for all parties. A more flexible, forward-looking approach would be for lawmakers to allow alternatives or exceptions that recognize telehealth's unique capabilities and the patients that would most benefit from this form of care.

#### The aging crisis causes extinction.

Vladev ’20 [Ivaylo and Rositsa Vladeva; July 1; Konstantin Preslavsky University of Shumen, Faculty of Natural Sciences; Sciendo, “The Demographic Problem – One of the Main Problems of Contemporary,” vol. 7, no. 2]

The aim of the present study is to analyze the essential features of the global problems of the contemporary stage in the development of human society and to highlight the place of the demographic problem as an objective factor for the existence of modern civilization.

To realize the goal it clarifies the criteria for determining a problem as a global one and makes classification of the global problems from a geographic point of view. It identifies the causes for the demographic problem, analyses and specifies its different dimensions at the global, regional and national levels.

Materials and Methods

In order to study the processes of globalization and the specific features of the demographic problem, comparative analysis, content analysis and quantitative methods are applied. In order to clarify the criteria for determining a given problem as a global one, methods of systematization and classification from a geographic point of view are applied.

Results and Discussion

One of the essential characteristics of the modern development of the society is its globalization. It is known as international integration on a large scale in all areas of economics, culture and society. The processes of globalization should be explored in the context of the relationship of the planetary problems with some aspects of economic and social life on a global, regional and national level [2].

Globalization is a complex process that provokes many controversies, but also determines the overarching changes in our times. According to U. Bek, „globalization is certainly the most commonly used - the wrongly used - and the most rarely defined, probably the most vague, the most fuzzy and the most politically influential word in the last but also in the coming years“ [1, p. 42]. Most researchers regard globalization as an inevitable process of forming common principles of current civilization development and common criteria for the qualitative assessment of the development.

We can therefore accept globalization as a complex integrative process, characterized by the following main features:

- universality - a tendency towards integration of all economic, social, political, cultural, environmental and demographic processes in their entirety and interdependence;

- democracy - engaging and actively participating in the process of globalization of all social strata;

- spontaneity - absence of an external source as a special moderator;

- chaoticity - inconsistency of the ongoing integration processes and presence of random fluctuations.

Globalization is a phenomenon, but it is not an ideal process as well as its results and it affects differently individuals, social communities, countries, regions, and the planet as a whole. It has its positive and negative consequences, encompassing socio-economic, demographic, natural-geographic processes, transforming human relationships into a state of globality.

Globality as a problem is also associated with the global problems of civilization. During its development the human society frequently encounters complex problems originating from its local nature and cover significant parts of the globe. According to P. Lakov, „the global problems are provoked by the chronological unity and the rapid rate of destruction of the balance between nature and society and should therefore be considered as an undivided system of dynamically changing interdependent phenomena in the space“ [3, p. 24].

The global problems of the contemporary stage of the development of the world civilization are already fully manifested in the second half of the 20th century, but from the end of the 1990s to the present day as a result of the introduction of the new information and communication technologies and the enhanced processes of economic and political integration a kind of „globalization boom“is observed. Therefore, the studying of the global problems is necessary to take into account both the general patterns and trends in the development of the world economy, as well as the action of the social factors of development, including the rapid growth of the population of the planet, the strengthening of interaction and interdependence between states.

According to their origin, the global problems are the result of the processes of globalization that are taking place in today's world and play the role of drivers for the development of the world system. Because they arise from the functioning of the global systems and their interaction, they can not be considered in isolation, but their unity and interrelation must be taken into account.

The global problems are wide ranging and continually create hazards for the existence and development of human society. The world of the 21st century inherited from the 20th century poverty, economic problems, resource shortages, mass diseases and nationalism and religious fanaticism, dozens of „hot spots“ and international terrorism. The old dangers in the form of weapons of mass destruction are complemented by new ones.

Though diverse in nature, the global problems have a common specificity that separates them from the other processes and phenomena in world development and they are distinguished by certain features:

- they endanger the future of all human civilization;

- they are an objective factor for the world development;

- targeted and coordinated actions of much of humanity are needed to overcome them;

- failure to resolve them can lead to serious and irreversible consequences for the whole of humanity. Some authors believe that the global problems are the result of the following inconsistencies:

- between the unlimited production factors entering the system „technically“ and the limited reproduction capabilities of the system of nature;

- between the „industrial“ system widely used in the technics and the other „small craft“ and „,partly craft“ system under the name „human“;

- between the unique products of the „classical culture“ and the unrestricted circulation of „mass culture“ products;

- between the global balances according to which the stability of processes in nature and society depends on the degree of their balance [4, p. 280-281].

The territorial character of the global problems could be pointed out as their specific feature. Geographically they cover the whole of the world, but at the same time they are manifested at the regional level as well, with local indications in different countries. This proves the relationship between the categories: „common“(global) – „special“(regional) – „individual“(local).

In order not to identify the public, regional and local problems with global ones, it is necessary to specify criteria that can define a given problem as a global one (Figure 1).

[FIGURE 1 OMITTED]

It should be noted that these criteria together can only establish the global nature of a given problem, because each of them can not be a decisive factor. At the same time, we must emphasize the high dynamism of every global problem caused by the combination of many different factors and their state in specific historical conditions and geographic regions.

There is a wide variety of views regarding the classification of global problems: depending on their severity, the time of their emergence, their nature, the actual real dependencies between them, the sequence of decision-making to overcome them, etc. Their grouping according to certain attributes helps to identify the existing links, to specify the priorities, to determine the degree of exacerbation of objectively existing global problems and to rank the sequence of the actions for their solution.

In order to realize the purpose of the study and to clarify the essence of the global problems, an attempt was made to create a geographical classification. Without claiming to be exhaustive, we formulate fourteen global problems on the basis of their relevance, severity and importance. They are grouped into three large groups depending on the spheres in which they appear and prove the trinity of nature – man – society. Accordingly, the groups are geodemographic, population-related; natural-geographic, arising from the components of the natural environment and socio-economic, related to the economy, the social sphere, the culture, the social development (Figure 2).

Based on the classification, the following conclusions can be made:

- Global problems increase their number and sphere of manifestation;

- The greatest number of global problems (1/2 of all classified) occurs in the contact areas of interaction;

- Regardless of the conditional and relative nature of the proposed classification, the occurrence of the global problems is in close interdependence and interrelation;

- Most of the global problems has a complex nature because they occur under the influence of two (3, 4, 6, 8) or three main groups (2, 5, 7);

- Due to their complex nature the global problems require a system of comprehensive measures to resolve them.

From these examples it can be summarized that the assignment of one or another problem to a given group is conditional and depends on the criteria of partitioning, the degree of relevance of the individual problems and the regional view of the authors on them. Therefore, the proposed classification should be seen not as a definitive solution to the issue but as a possible way of reconstructing the complex system, helping to better understand the essence of the interrelations between the global problems.

[FIGURE 2 OMITTED]

1. Demographic

2. Food-related

3. Healthcare problems

4. Educational problems

5. Preservation of world peace

6. Problems of international security

7. Ecological

8. Depletion of natural resources

9. Global warming

10. Water-related

11. Global catastrophes and natural disasters

12. Socio-economic conflict between poor and rich countries

13. Social inequality

14. Spiritual and moral crisis of humanity

Every global problem should be seen from three main points: what is the present situation, where, how and why the situation has become dangerous and how we can try to change it for the better by applying different strategies. The choice and the decision depend to a great extent on the social-ethical and moralhumanistic norms created in society, which is also the goal of its development [5, p. 12].

It is known that the problem is a scientific or public issue that has to be investigated and solved. It is caused by a certain inconsistency in the course of a natural, social or demographic process, the carrying out of some human activity and the lack of the expected result.

The demographic problem is a leading among the global problems of our time, because its emergence and solving influence the solution of food problems, the environmental problem, the preservation of the world peace, the problems of the international security, the health care and the education.

Demographic problems arise in the reproduction of the population and the level of compliance of resources for the development of humanity and of individual peoples and societies. The main criterion for assessing the course of demographic processes is the ability to carry out normal and appropriate reproduction of the population according to the conditions and resources. Demographic development is not limited only to the process of increasing the number of inhabitants of the planet, but also includes the problems of increasing population in relation to the natural resource potential of the territory, the condition and quality of the environment, hindering the food supply of the population, urbanization, inter-ethnic relations, refugees, lack of employment. All this proves that the interrelations between demography, economy and politics are complex and multilayered.

Therefore, the demographic problem is the mismatch between the level of socio-economic development, the resource availability for the economy, food and commodity production and population growth. Generally speaking, the demographic problem is that the population is rapidly growing due to the high fertility rate and life expectancy, the shortage of natural resources and production capacities for food and consumer goods.

Today, the effects of relative and absolute population growth become so topical that they are becoming a global problem. The dynamics of population growth in the world, presented in Table 1, is very distinctive.

The point of 1 billion is exceeded at the beginning of the 19 century. While the first doubling after 1810 required 110 years, the second one was in 40 years (1920 – 1960), the third one in 14 years (1960 – 1974) and the last one in 12 years (1999 – 2011). For the last 18 years, the population has increased by more than 1.5 billion and 94.5% of the growth is in the developing countries and only 5.5% of the developed ones. At the end of 2017, the world population reached 7.5 billion.

[TABLE 1 OMITTED]

The rate of population growth is the rate at which demographic indicators change. The highest rates of population growth in the world occurred in the 1970s and 1980s – about 2% average annual growths. Then they began to decline and in the first decades of the 21st century they were set at 1.2%. It is expected that in the middle of the 21st century they will increase again to 2.8%.

According to estimates of UN experts, the world population by 2025 will reach 8.2 billion, by 2040 – 9.2 billion, by 2050 – 9.7 billion and by 2055 – almost 10 billion. Population growth, according to the expected trends for this period, will be formed by developing countries in a ratio of 97: 3.

Much or little is the present world population of 7.5 billion people? The world population itself, however significant, can not be considered as large or little, isolated from the natural and human resources and the established political and socio-economic conditions.

Scientists maintain two different opinions and carry on intensive discussions. Some of them believe that the Earth is still far from absolute overpopulation and unlikely to reach it. Another part of them believe that the Earth is already overpopulated. Reason for this opinion is the misery, malnutrition and hunger, avalanche escalation of environmental problems in overpopulated areas.

Very often, population growth is seen as one of the factors not only hindering the fulfilment of life needs, but also threatening the viability of human civilization. Together with the increased consumption of natural resources, technical and energy equipment, the amount of waste resulting from human life and production activity is constantly increasing. Moreover, the socio-demographic situation in developed and developing countries is diametrically opposed, denoted by the term „demographic division of the world“.

In different countries and regions, the demographic problem has different dimensions. In developed countries, the demographic problem is mainly reflected in the aging of the population and the reduction of human resources for the economic development of the countries. In developing countries, the demographic problem is reflected in a predominant increase of the population to the basic necessities of life and the occurrence of significant difficulties in feeding the population, its health care and the development of education. The extent and the nature of the demographic problem in individual countries depend to a large extent on their socio-economic development and the stage of the demographic transition they are on. At a regional and national level, demographic problems, depending on the type of reproduction of the population, have different dimensions – demographic explosion, demographic stagnation and demographic crisis. Human development across individual regions and countries is assessed through the two problems – a demographic explosion and a demographic crisis.

The rapid increase in population in the world, in a particular geographic region or in a particular country is defined as a demographic explosion. It is characterized by a high birth rate, a sharp drop in mortality, and especially child mortality and increased life expectancy. This is an unfavourable demographic situation because it reduces the opportunities for most people to feed, the opportunities for health care, education, jobs, etc.

The accelerated growth of the world population is now predominantly determined by the developing countries. Due to the high relative share of the population at sub-working age (1/4 of the population up to 16 years old) these countries will preserve the high growth rate of their population. Demographic explosion has a restraining effect on the country and region's development prospects. It is characteristic for the most countries in Africa, some countries in Asia and Latin America. At present the epicentre of the demographic explosion is in Africa.

High birth rate is the main prerequisite for triggering the demographic explosion. It, under the conditions of decreasing mortality, ensures the large population growth. The most significant birth rates occur in the continent of Africa and mostly in the West, Central, East and partially in South Africa.

In 2017, 43 African countries had birth rates above 30‰. The highest figures are in Niger (50‰), Chad (48‰), Angola (46‰), Democratic Republic of Congo (46‰), Central African Republic (45‰), Mozambique (45‰), Mali (44‰), Somalia (44‰), Burkina Faso (44‰), Burundi (43‰), Zambia (43‰) and others. The countries in Asia are with high birth rates too. 5 of them have a birth rate above 30‰: the Democratic Republic of Timor – Leste (36‰), Afghanistan (34‰), Yemen (33‰), Tajikistan (33‰), Iraq (31‰); and in 34 of them the birth rate is between 20 and 30‰. Haiti, Bolivia, Guyana and Guatemala in Latin America have a birth rate of between 25 and 30‰.

The decreasing overall mortality is the second most important prerequisite for the demographic explosion. It is mainly due to the development of healthcare and medicine and to the raising living standards of the population. Under this influence is the mortality rate in most European countries, East Asia, North America, the Gulf region (Oman, UAE, Qatar, Bahrain, Kuwait, Saudi Arabia). Decreasing mortality rate in these countries leads to an increased average life expectancy and aging of the population. The lower mortality rate in a number of countries is due to the age structure of the population with a strong predominance of younger generations (25-30% of the population up to 16 years old) and is denoted by the term „demographic spring“. This applies to most African countries.

The mortality rate is in close relation with the average life expectancy. The latter grows almost continuously. This is due to the increased living standards, the way of life and the improvement of health care.

According to UN data in 2017, the expected average life expectancy in the world is 69 years, for men 67 years and for women 71 years [6]. The highest average life expectancy is in the developed countries: Monaco (89.4 years), Japan (85.5 years), Singapore (85.5 years), Iceland (83.1 years), Israel (82.7), Switzerland (82.7), Malta (82.7 years), the Republic of Korea (82.5 years), the Australian Union (82.4 years), Italy (82.4 years), Luxembourg (82.4 years) and others.

Geographical regions with the highest average life expectancy are Western Europe and North America. For men, life expectancy is the highest in Monaco (85.5 years), Singapore (82.8 years), Japan (82.2 years) and Iceland (80.9 years). Women have the highest life expectancy in Monaco (93.4 years), Japan (89 years), Singapore (88.3 years) and Republic of Korea (85.8 years). The lowest life expectancy is in the poor African and Asian developing countries, such as Mozambique (54.1 years), the Central African Republic (53.3 years), Somalia (53.2 years), Zambia (53 years), Lesotho (53 years) and Afghanistan (52.1 years). Decreasing child mortality in developing countries and the high birth rates have an impact on the population growth and hence on the demographic explosion. At the end of the 20th century, child mortality in the world was about 54‰ and in 2017 it declined to 32.9‰. Thus, while in 2000 the continent with the highest child mortality rate in the world, Africa, it ranged from 87‰ (West Africa) to 140‰ (Central and Eastern Africa), in 2017 there was no African country with child mortality over 100‰.

Today, it varies in a wide range from 20 to 93‰ and decreases as a result of measures to combat diseases, hunger and malnutrition and to improve healthcare. Over the last decades, the child mortality rates in Arab countries rapidly decrease, especially in the Persian Gulf region (below 8‰), where it has reached the level of the most developed countries.

Analyzing the demographic situation in the world in the context of the demographic explosion, we should note that the larger population has a stronger impact on the environment and increases the „demographic burden“ on the territory.

It is simultaneously influenced by several factors: the absolute population growth, the extent of consumption (lifestyle, income, and infrastructure development), the social inequality of the population, and the level of technology used. The development of the modern economy requires the use of an increasing amount of natural resources. The acuteness of the problem is related not only to the depletion of the limited resources, but also with the nature of their impact on the environment during use. The increase of the population in the world and its migration intensify this impact by preventing the stabilization of the unemployment problem; make it difficult to solve the problems of education, healthcare and social welfare. Consequently, any socio-economic problem includes a demographic problem as well.

Decreasing the population in a particular geographic region or country forms the situation of a demographic crisis. It is due to low birth rates, average mortality rates, aging of the population, negative or zero natural growth and shortage of labour resources.

As a global problem it is still considered the demographic explosion, not paying due attention to the upcoming demographic problems as depopulation, narrowed reproduction of the population and its aging, which will cause irreversible negative social and economical problems and demographic crises, especially among the small nations.

The aging of the population forms an unfavourable demographic situation, consisting in increasing the number and relative share of people in over-working age, reducing the number of people in sub-working age and limiting the labour resources. It is especially distinctive for most countries in Europe, Japan and others.

The aging of the population is characterized by the average age of the population (a characteristic of the age structure of the population, which is calculated as a weighted average value of the population in all age groups). It reveals the level reached in the process of population aging in the world and countries.

In 2017, the average age of the population in the world is 30.6 years. It ranges from a low age of 15.5 to 16 years in the African countries of Niger, Mali, Chad, Uganda and Angola up to 43 years or more in some European countries and Japan. The countries with high living standards and high life expectancy have the highest average age like Monaco (53.8 years), Japan (47.7 years), Germany (47.4 years) and Italy (45.8 years). The high average age is a feature of countries with a very high level of emigration of young people, such as Slovenia (44.2 years), Lithuania (44), Latvia (43.9 years), Croatia (43.3 years), Bulgaria (43 years), Estonia (43 years) and others [6].

Thus, the relative share of the population in over-working age in 2025 in these countries will account for over 1/4 of the total population, which will cause significant losses for health care and social security. At the same time, the birth rate in most economically developed countries can no longer provide for simple reproduction of the population. This process is called „demographic winter“.

The phenomenon of the demographic crisis is primarily centred on the countries of Eastern Europe and is not yet typical for the developed countries. It becomes topical to the researchers of the population from the mid-1990s when the most unfavourable parameters of the demographic situation are reached – very low birth rates, high total mortality and high mortality in the individual age groups, old age structure, emigration, high unemployment, etc. About 80% of the natural population growth of the EU member states since 1994 is due to emigrants. According to demographic projections, almost all countries in Europe are expected to be covered by a demographic crisis in 2025.

The demographic crisis has its strongest manifestations in countries like Bulgaria, Latvia, Lithuania, Estonia, Hungary, Romania, Croatia and others. It is due to the negative natural growth and mass emigration of young population to Western Europe and North America. The term „demographic crisis“ can be interpreted as a profound violation of reproduction of the population. In 2017, Lithuania (14.8‰), Bulgaria (14.5‰) and Latvia (14.5‰) are at the top of the world's highest mortality rates, followed by Ukraine (14.3‰), Serbia (13.6‰), Belarus (13.2‰) and others. The lowest birth rates are in Japan (7.5‰), Puerto Rico (8‰), Portugal (8.2‰), Greece (8.3‰), Bulgaria (8.5‰) 5‰), Germany (8.6‰).

Since the beginning of the 21st century, the continent of Europe has a negative natural growth, with the highest negative figures being in Bulgaria (-6‰), Lithuania (-5‰), Latvia (-4.9‰), Serbia (-4, 7‰), Ukraine (-4.2‰), Hungary (-3.9‰), Croatia (-3.6‰). Thus, due to the low birth rates and high mortality, there is a disruption of the normal reproduction of human generations. The demographic crisis naturally reduces the population of a given country or region to a different extent, with a severe disruption of the basic demographic structures.

The demographic crisis is characterized by the fact that the real growth (the total value of the natural and mechanical growth) of the population in these countries is negative and forms a reduction of the population. In 2017, the reduction of the population is most pronounced in Lithuania (-11.1‰), Latvia (- 11‰), Moldova (-10.8‰), Bulgaria (-6.3‰), Estonia (-6‰), Croatia (-5.3‰), Serbia (-4.7‰), Ukraine (- 4.2‰), Romania (-3.5‰), Montenegro (-3.4‰), Hungary (-2.6‰), Belarus (-2.5‰) and others. The reduction of the population in each of these countries is not only related to higher mortality rates and lower birth rates but also to the significant emigration rates. The demographic crisis exists in Puerto Rico (-16‰) and Lebanon (-11.3‰) and the European countries Germany, Poland, Italy, Portugal, Greece are entering the crisis as well as Japan in Asia.

Many countries in the world are characterized by demographic stagnation. Its typical feature is maintaining the constant population. The actual growth is zero or around zero. This demographic situation is formed at and is characteristic for countries on different stages of demographic transition and different levels of socio-economic development. This group includes mainly developed countries with almost zero natural growth and a positive mechanical population growth, such as Austria, the Czech Republic, Slovakia, Slovenia, Finland, Spain and others.

The indicated negative trends in population development cover all developed and highly developed countries. The consequences for the society and the demographic systems in the developed countries are similar, but they vary in intensity over time. As the demographic crisis in these countries is largely blunted by immigration and increasing the average life expectancy.

Conclusions

Based on the report we can formulate the following results:

- The processes in the globalizing world are generating the global problems of today. They act as driving forces in the development of the world system.

- On the basis of their relevance and significance, in order to prove the trinity of nature – man – society, fourteen global problems are formulated in three large groups, depending on the spheres in which they manifest.

- Problems related to the dynamics of the human population affect the whole world and in some parts of the planet there is overpopulation, which can lead to depletion of natural resources as well as poverty and malnutrition.

- Global efforts to resolve the global demographic problem are contrary to the interest of countries that have unfavourable demographics including Bulgaria.

- There are countries with decreasing birth rates and increasing life expectancy everywhere in the world. The aging population leads to higher healthcare and pensions costs, and the number of workers and tax payers is steadily decreasing. As a result, these countries are at risk to become „demographic bombs“ which means a crisis due to too few people working.

- The demographic picture of the world is highly contrasting and moves between the two extremes - a demographic explosion and a demographic crisis. The factors that determine it affect the socio-economic development, income distribution, employment, unemployment, social security, health care, education, housing and the sources of water, food, energy, raw materials as well as environmental conditions and climate change.

- Stabilizing the population of our planet and resolving the demographic problem in the future is not an end in itself but a means of improving the lives of the present and future generations.

#### Sweeping antitrust now – the regulatory apparatus is packed, it reaches all sectors, AND will intensify.

Economist ‘1-15 [The Economist; forthcoming January 15; British news organization; Economist, “The growing demand for more vigorous antitrust action,” <https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action>]

Such actions mark a departure from the antitrust philosophy that has dominated regulatory thinking and judicial decisions in the past half-century. Associated with Robert Bork, an American judge from the late 1970s, it held that consumer welfare and the protection of competition, rather than of particular competitors, should be the only goals of antitrust law. Business practices were deemed fine so long as they did not result in harm to consumers from excessive prices. Most mergers were either competitively neutral or enhanced efficiency, even if they led to oligopoly; only those creating a dominant firm or monopoly were likely to be bad for consumers.

Bork’s work was itself a reaction to an earlier approach linked to Louis Brandeis, a former us Supreme Court justice. Brandeis believed that size was nefarious in itself. Curbing market power was a tool to fight other ills, such as mistreatment of workers, the stiffing of suppliers or even threats to democracy. This may have led to some perverse outcomes. In one notorious example in 1966, the Supreme Court blocked a merger between two grocers in Los Angeles with a combined market share of 8%.

Chinese trustbusters are now the most enthusiastic in disavowing the price-centricity of Bork’s “consumer-welfare standard”. But it has fallen out of favour everywhere, gradually in Europe and now, tentatively, in America. One reason is a global trend towards greater corporate concentration, from medicines to manufacturing. According to The Economist’s calculations, two-thirds of 900-odd sectors covered by America’s economic census became more concentrated between 1997 and 2012. In half of these concentration has edged up further in the subsequent five years. In the two decades to 2017 the weighted average market share of the top four firms in each industry increased from 26% to 32%. The four biggest British firms accounted for a larger share of revenue in 2018 than a decade earlier in 58% of 600-odd subsectors. Concentration in the EU has been going in the same direction, albeit more slowly.

Another good reason to bin Bork was technological change. The world’s biggest tech giants charge consumers either nothing (Alphabet, Google’s parent company, and Meta, formerly Facebook) or as little as possible (Amazon). Critics say this does not stop them abusing their dominance. Amazon is attacked for its treatment of workers, suppliers and third-party sellers. Google and Apple are accused of monopolistic practices against developers in their app stores. Facebook is taken to task for “killer acquisitions” aimed at neutralising innovative challengers such as Instagram and WhatsApp. (All four companies deny all these claims.)

Choice and quality

“We need to push for a broader notion of consumer harm,” declares Margrethe Vestager, the EU’s competition commissioner. It is no excuse that “the econometrics of price may be more straightforward than the econometrics of quality and choice”, she adds. Britain’s Competition and Markets Authority (CMA) has made similar noises. Like China’s samr, it is staffing up fast, going from around 650 officials to 850 in the past five years, catching up with Ms Vestager’s directorate-general.

Antitrust voices in America go further, arguing that the consumer-welfare standard was never as scientific as its advocates claimed and that Brandeis’s vision deserves a second look. Mr Biden has installed “neo-Brandeisians” in senior trustbusting roles. Lina Khan, a 32-year-old academic, chairs the Federal Trade Commission (FTC). Jonathan Kanter, a long-time Google-basher, heads the Department of Justice (DOJ)’s antitrust division. Tim Wu, a law professor whose books include “The Curse of Bigness”, is the White House adviser on technology and competition. “The speed of the takeover by the neo-Brandeisians of the regulatory apparatus has been extraordinary,” says one big asset manager.

This new competition doctrine remains a work in progress. But its contours are becoming sharper. It expands the goals of antitrust policy in two main areas: merger control and business-model regulation. For most mergers and acquisitions (m&a), regulators used to restrict scrutiny to a small number of “horizontal” deals between firms active in the same market that, if combined, could reduce competition and allow incumbents to raise prices. Today all these tenets are going out of the window.

Trustbusters now investigate “vertical” integrations between companies with separate lines of business, as well as horizontal ones with combined revenues that would not historically have warranted attention. A new procedure allows EU regulators to ask national authorities to submit deals that are potential killer acquisitions, particularly in the digital, pharma and biotech industries. They have used this to investigate Meta’s $1bn acquisition of Kustomer, an American business-software firm with low European sales, and the purchase by Illumina, a gene-sequencing giant, of Grail, a developer of diagnostic tests that does no business in the eu. Germany’s competition authority has been pushing cases like Illumina “to test its jurisdiction”, says an EU official. Britain’s cma has demanded that Meta undo its recent takeover of Giphy, a database of animated gif files.

In America the FTC and DOJ are making merger guidelines more stringent. M&A lawyers say the agencies are asking more questions, including about the impact of deals on the labour market. They already look beyond direct pecuniary harm to consumers. The FTC is backing a suit that seeks to break up Meta into Facebook, Instagram and WhatsApp, even though earlier regulators waved these takeovers through. Justifying its challenge to a merger between Simon & Schuster and Penguin Random House, the DOJ said it would give the new entity “outsized influence over who and what is published, and how much authors are paid for their work”. Ms Khan is expected to oppose Amazon’s $8.5bn purchase of mgm Studios, arguing that it would further strengthen the e-empire’s online hegemony. The fact that the entertainment market is fragmented and Amazon lets Prime-subscription customers binge-watch its videos for a fixed fee is, on this expansive view of antitrust, beside the point.

The second avenue of antitrust expansion—dictating what dominant businesses can and can’t do—is more inchoate than tougher merger control. But it could prove more consequential. Especially for America’s trillion-dollar tech giants it would be the first serious constraints on their activities since the internet made them the world’s most valuable companies.

Some edicts come from regulatory agencies. White House staff look on antitrust as a “Swiss-army knife”: a tool to fix lots of different problems, including such ills as inflation. It is early in Mr Biden’s term and they are still revving up, says one lobbyist. But “once they start going, they will be pretty muscular.” Last July Mr Biden issued an executive order, written by Mr Wu, instructing more than a dozen agencies vigorously to curb anticompetitive behaviour across the economy. It encourages agencies to create rules from weeding out “unfair methods of competition on internet marketplaces” to requiring railway owners “to provide rights of way to passenger rail”. In a memo outlining her priorities, Ms Khan declared that she would look into whether private-equity firms contribute to extractive business models in which companies raise prices or muscle out rivals.

The 107-year-old FTC Act grants Ms Khan wide latitude, so long as her rules are designed to forestall “conduct that is unfair or deceptive”. Congress may grant her even more power. Several proposals would outlaw practices deemed anticompetitive. One would treat Amazon’s marketplace or Google’s search engine as essential to commerce, rather like a dominant railway operator, prohibiting them from favouring their own products over others. Another would force Apple and Google to open up their app stores to alternative in-app payment methods and search results. A third would shift the burden of proof from regulators to dominant companies, which would need to show that any merger or acquisition does not hurt competition, rather than the other way around. All three have Democratic and Republican co-sponsors.

#### Antitrust executive action now.

**Tankersly ’12-25** [Jim and Alan Rappeport; 2021; reporters; the New York Times, “As Prices Rise, Biden Turns to Antitrust Enforcers,” <https://www.nytimes.com/2021/12/25/business/biden-inflation.html>]

WASHINGTON — As rising inflation threatens his presidency, President Biden is turning to the federal government’s **antitrust authorities** to try to tame **red-hot price increases** that his administration believes are partly driven by a **lack of corporate competition**.

Mr. Biden has **prodded** the Agriculture Department to investigate **large meatpackers** that control a **significant share** of **poultry and pork markets**, accusing them of raising prices, underpaying farmers — and **tripling their profit margins** during the pandemic. As gas prices surged, he **publicly encouraged** the Federal Trade Commission to investigateaccusations that **large oil companies** had artificially inflated prices, behavior that the administration says continued even after global oil prices began to fall in recent weeks.

The push has extended to little-known agencies, like the Federal Maritime Commission, which the president has urged to search for **price gouging** by **large shipping companies** at the **heart of the supply chain**.

The turn to antitrust levers stems from Mr. Biden’s belief that **rising** levels of **corporate concentration** in the U.S. economy have empowered a **few large players** in each industry to raise prices higher than a more competitive market would allow.

#### 2022 will bring down Big Tech.

**Swartz ’22** [Jon; January 1; reporter, citing Bhaskar Chakravorti, dean of global business at the Fletcher School at Tufts University; MarketWatch, “Big Tech heads for ‘a year of thousands of tiny tech papercuts,’ but what antitrust efforts could make them bleed?” <https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776>]

This could **finally change** in 2022 as it did in the late 1990s, when some tech companies struck a cautious stance during the Justice Department’s investigation of Microsoft for monopolistic practices, Syed said.

“The difference is that we’re talking about interconnected companies that own an industry versus just one company [with Microsoft],” she said. “And there is **bipartisan support**, which makes it **easier politically**.”

With more than a **dozen pieces** of **anti-tech legislation**, a **plethora of lawsuits** and **regulatory fines** escalating in the U.S. **and** abroad, as well as the Biden administration rounding out Big Tech’s **nightmare team** of **government agency heads**, 2022 is shaping up as a **seminal year** for tech regulation after decades of inaction.

In rapid succession this year, Biden named and nominated an antitrust team of Tim Wu (to the newly created position of head of competition policy at the National Economic Council), Lina Khan (chair of the Federal Trade Commission) and Jonathan Kanter (head of the antitrust division of the Justice Department). Each is a heralded anti-monopolist advocate who has written extensively on the topic or represented companies making antitrust claims against Big Tech.

The trio have been referred to as members of a “New Brandeis movement,” named after Supreme Court Justice Louis Brandeis, whose decisions limited the power of big business in the early 20th century. With the New Brandeis trifecta in place, and Congress evaluating more than dozen possible anti-tech bills, next year is “shaping up to be the year of Tech Takedown,” Bhaskar Chakravorti, dean of global business at the Fletcher School at Tufts University, told MarketWatch.

**More troubling** for tech CEOs, he said, are the “**many tiny actions** at the FTC, Justice Department and Congress that will continue to keep feeding the news cycles with a **steady stream of actions**” that add up to a “a **year of thousands** of **tiny tech papercuts**.”

Big Tech’s treacherous path to antitrust enforcement has three potentially **damaging roads**: federal agencies challenging acquisitions and mergers; legislation tailored to stimulate competition and curtail the influence of tech’s dominant platforms; and federal and state lawsuits.

### Grid – 2AC

### Econ – 2AC

#### Energy prices are driving inflation and rising interest rates.

Dobbs ’12-10 [Kevin; 2021; reporter, citing Morgan Stanley analyst Lisa Shalett; Natural Gas Intelligence, “Oil, Natural Gas Prices Drive Sustained Surge in Inflation,” https://www.naturalgasintel.com/oil-natural-gas-prices-drive-sustained-surge-in-inflation/]

Lofty oil and natural gas prices played outsized roles in fueling spikes in inflation this year. November proved no exception, with price increases reaching a pace last recorded nearly four decades ago.

The U.S. Bureau of Labor Statistics (BLS) said Friday the consumer price index surged 6.8% in November from the same month a year earlier, marking the fastest rate since 1982 and the sixth consecutive month of inflation above 5%.

November energy prices soared 33% from a year earlier — far more than any other category tracked by the BLS — and jumped 3.5% from October. The cost of gasoline at the pump was up more than 58% over the past 12 months, according to the federal report.

Energy commodities – chiefly oil and gas – climbed 5.9% month/month in November and 57.5% year/year.

The core price index, which excludes energy and food because of elevated volatility inherent in both categories, rose 4.9% in November from a year earlier. That marked an increase from October’s 4.6% jump and the fastest pace since 1991.

Many analysts expect inflation to persist. “The economic and market environment in 2022 will be decidedly reflationary, with higher economic growth and higher inflation, and eventually higher real interest rates,” said Morgan Stanley analyst Lisa Shalett.

#### Turns:

#### 1 – High energy prices aggravate inflation.

Mitchell 10-10 [Josh; October 10; Covers the U.S. economy from the Journal's Washington, D.C. bureau. He previously covered transportation policy and the bailouts of General Motors and Chrysler. Prior to the Journal, he worked as a reporter for the Baltimore Sun and the Palm Beach Post; *Wall Street Journal,* “Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy,” <https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800>; KS]

However, higher energy prices could aggravate inflation and prompt the Federal Reserve to withdraw its easy monetary policy sooner, damping economic growth.

JPMorgan Chase economists believe higher oil prices could push up the annual inflation rate by 0.4 percentage point in coming months.

In August, consumer prices rose 4.3% from a year earlier, according to the Commerce Department’s price index for personal-consumption expenditures, the Fed’s preferred inflation gauge. The Fed targets annual inflation of 2%. Oxford Economics projects that energy prices will help push up the annual inflation rate to 5.1% by year-end.

“It’s going to elevate inflation expectations somewhat,” said analyst Bart Melek of TD Securities. “It might change our perception of what we think the Federal Reserve does.”

In the early and mid-2010s, high oil and gas prices were generally a boon for the U.S. economy, encouraging oil and gas producers to tap ample shale deposits, driving up demand for steel, equipment, construction workers, truck drivers and other workers.

That might not happen this time, Mr. Book said. The pandemic caused global demand for energy to collapse and while demand has recovered, energy companies are still cautious about drilling because of uncertainty about global demand and investor pressure to keep profit margins high, in part by limiting supply, he said.

#### 3 – High energy prices guarantee interest rate hikes – causes corporate crunch.

Joffe ’12-20 [Marc; 2021; Finance MBA at NYU, Former Senior Director for Moody's Analytics; the Hill, “For the Fed, taming inflation has risks,” https://thehill.com/opinion/finance/586517-for-the-fed-taming-inflation-has-risks]

But the biggest fiscal risk may stem from corporate lending. Rather than issue fixed-rate bonds, many highly leveraged companies rely on the syndicated bank loan market where most borrowing takes place on a floating rate basis. According to research from Fitch Ratings, $1.6 trillion of syndicated loans are currently outstanding with almost all borrowers carrying either speculative grade credit ratings or the lowest investment grade rating (Baa3 on Moody’s scale or BBB- from S&P, Fitch and other agencies).

Syndicated loans are distributed across multiple banks with about half of the volume packaged into Collateralized Loan Obligations (CLOs). Although analogous to the subprime Residential Mortgage-Backed Securities (RMBS) that triggered the Great Recession, CLOs have generally performed well over their 30-year history.

The loans packaged into subprime RMBS and CLO deals have high default risk, but corporate borrowers have generally proven more reliable than homebuyers with low credit scores. That may change when the Fed starts raising interest rates, especially if the hikes are precipitous.

A wave of leveraged loan defaults could harm both CLO investors and banks — to the extent that they continue to hold syndicated loans on their books. Because CLOs are well diversified, it is unlikely that defaults will impact investors in the senior AAA/Aaa rated tranches.

But if a lot of leveraged corporate borrowers are forced into bankruptcy by higher interest costs, we could see waves of layoffs. Suppliers to failing companies may also face late and/or partial payments, spreading the pain around the economy.

In this way, a sharp increase in interest rates could significantly slow economic growth or even trigger a recession.

#### Precede recessions.

Mitchell 10-10 [Josh; October 10; Covers the U.S. economy from the Journal's Washington, D.C. bureau. He previously covered transportation policy and the bailouts of General Motors and Chrysler. Prior to the Journal, he worked as a reporter for the Baltimore Sun and the Palm Beach Post; *Wall Street Journal,* “Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy,” <https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800>; KS]

Energy prices are volatile even in normal times, and particularly unpredictable now because of the cloudy economic outlook and how governments and investors will respond to the shortage of supplies. Investors are pressing companies to maintain high prices and profit margins by resisting drastically expanding production.

Energy represents a sizable chunk of consumer budgets. In August, about 7% of consumer spending went toward energy, according to the Labor Department. Historically, high energy prices have often preceded recessions. Consumers can’t easily cut consumption on short notice, as they can with discretionary purchases, so higher prices act as a tax, draining the money they have available to spend on other goods and services.

Growth slowed sharply this summer as rising Covid-19 infections due to the Delta variant prompted a new round of business restrictions and consumer caution. The Federal Reserve Bank of Atlanta estimates that growth slowed from 6.7%, annualized, in the second quarter to 1.3% in the third.

#### Antitrust is good for business confidence---it’s a substitute for regulation

Edlin ‘8 [Aaron; Summer 2008; Richard Jennings Chair, Professor of Economics and Law at the University of California at Berkeley; Antitrust, “Perspectives on the Future Direction of Antitrust,” vol. 22]

My grandfather preached “moderation in all things.” Were he alive today, he would despair to see the state of U.S. antitrust.

At the crudest level, moderation would demand that sometimes the plaintiff wins, other times the defendant. Yet, if there be any consistency in today’s antitrust it is that “the defendant always wins,” criminal price-fixing aside. We have come a long ways from the days of Potter Stewart’s famous quip.

More fundamentally, strong antitrust enforcement has always been thought a good substitute for regulation and government ownership. Simply put, if antitrust ensures competition, then regulation is unnecessary. Yet, in the last three decades we deregulated and privatized substantial portions of the economy and have simultaneously pared back the antitrust laws.

Airlines, trucking, electricity, telephones, and the Internet, have all moved from full regulation or government ownership to a softer regulated competition. Banking too has been substantially deregulated and the walls between banking and insurance have come down.

With so much deregulation, my grandfather would have expected the antitrust courts and enforcement authorities to be extending their reach. Not so.

Sylvania, Business Electronics, Khan, and now Leegin, have made vertical agreements all but per se legal. In theory, tying cases remain per se illegal, but expect that to end soon enough. Section 2 seems vestigial, with no DOJ cases started this century. Predatory pricing cases seem almost unwinnable. And, the intellectually bankrupt reliance on profit sacrifice and price-cost comparisons in predatory pricing has drifted toward becoming the rule for all exclusionary cases.

And, while the substantive antitrust abuses have been cabined, pleading hurdles have been heightened. After Twombly, Nynex, and Trinko, plaintiffs are scrambling even to state a claim, let alone to meet the burden of proving one.

Ironically, because many of the deregulated industries maintain some level of regulation. Trinko and Credit Suisse provide increased immunity from antitrust violations, even when the (de)regulatory statute seems to disclaim such immunity.

So my grandfather would not be happy.

Sometimes though, the times may call for immoderateness. Could something have changed that justified less regulation and less antitrust? Many point to a rationalization with economics and a realization that the U.S. had become far too interventionist by the early 1970s. Indeed, economics does preach the virtues of laissez faire. Economists, however, also recognize that market failures from information or natural monopoly justify intervention. And, ironically, the same three decades that have seen this pullback have seen economists increasingly recognizing the myriad failures of markets.

Perhaps globalization obviates the need for antitrust? Maybe in some markets. But globalization can be easily fit in the framework of traditional antitrust analysis if it means broader geographic markets and more actual or potential competitors. No changes in law are required.

Viewed in isolation many of the changes to antitrust seem to me to be improvements. Together, though, they represent a massive shift whose justification I question. Could antitrust be losing its way?

#### Removing market manipulation increases market confidence.

FERC ’18 [Federal Energy Regulatory Commission; September; “Federal Energy Regulatory Commission Strategic Plan Fy 2018-2022;” <https://www.ferc.gov/sites/default/files/2020-04/FY-2018-FY-2022-strat-plan.pdf>; KS]

Objective 3.2: Facilitate public trust and understanding of Commission activities by promoting transparency, open communication, and a high standard of ethics.

Facilitating understanding of how the Commission carries out its responsibilities and maintaining public trust in the Commission are important components of the Commission’s commitment to organizational excellence. Trust and understanding increase acceptance of FERC decisions and reduce the potential for the public to dispute FERC rules and regulations, thus enabling the creation and enforcement of policy.

The Commission achieves this objective by maintaining processes and public information services that promote transparency and open communication with respect to the conduct of the Commission’s business. FERC’s proactive communication, along with an online document repository and timely responses to inquiries, foster awareness and understanding of the Commission’s activities.

The Commission also advances this objective by maintaining internal processes and services that ensure adherence to statutes, regulations, and self-imposed standards. In addition, FERC provides training and guidance to promote an ethically informed workforce. These activities further encourage public confidence in the Commission’s activities and ability to fulfill its responsibilities.

### Federalism – 2AC

### AT: Circumvention

### T-Economy Wide – 2AC

#### 2. Function---limits to arbitration are economy-wide.

AAA ’16 [American Arbitration Association; 2016; Non-profit organization in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court; American Arbitration Association, “Businesses and Law Firms: What Not to Believe about Arbitration,” <https://www.adr.org/sites/default/files/document_repository/2016_Myth_Busters_WhitePaper_080316_0.pdf>]

Business-to-business (B2B) arbitration is used by thousands of businesses in every industry to resolve their disputes economically and efficiently.

Counter-interpretation:

#### ‘Antitrust laws’ can target any interference with competition.

Collins ’12 [Collins English Dictionary; carbon dated April 18, 2012; “antitrust,” https://www.collinsdictionary.com/dictionary/english/antitrust]

In the United States, antitrust laws are intended to stop large firms taking over their competitors, fixing prices with their competitors, or interfering with free competition in any way.

#### ‘Anticompetitive practices’ include single firm conduct.

FTC ’13 [Federal Trade Commission; carbon dated November 19, 2013; “Anticompetitive Practices,” https://www.ftc.gov/enforcement/anticompetitive-practices]

Anticompetitive Practices

The FTC takes action to stop and prevent unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovation. Anticompetitive practices include activities like price fixing, group boycotts, and exclusionary exclusive dealing contracts or trade association rules, and are generally grouped into two types:

agreements between competitors, also referred to as horizontal conduct

monopolization, also referred to as single firm conduct

The FTC generally pursues anticompetitive conduct as violations of Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition” and “unfair or deceptive acts or practices.”

#### “Substantial” includes subsets and can be either quantitative or qualitative.

Sotomayor ’17 [Sonya; February 22; Justice of the Supreme Court of the United States, J.D. from Yale University, A.B. in History from Princeton University; Justia, “Life Technologies Corp. v. Promega Corp., 580 U.S. \_\_\_ (2017),” <https://supreme.justia.com/cases/federal/us/580/14-1538/#tab-opinion-3694340>]

The threshold determination to be made is whether §271(f)(2)’s requirement of “a substantial portion” of the components of a patented invention refers to a quantitative or qualitative measurement. Life Technologies and the United States argue that the text of §271(f)(1) establishes a quantitative threshold, and that the threshold must be greater than one. Promega defends the Federal Circuit’s reading of the statute, arguing that a “substantial portion” of the components includes a single component if that component is sufficiently important to the invention.

We look first to the text of the statute. Sebelius v. Cloer, 569 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 6). The Patent Act itself does not define the term “substantial,” and so we turn to its ordinary meaning. Ibid. Here we find little help. All agree the term is ambiguous and, taken in isolation, might refer to an important portion or to a large portion. Brief for Petitioners 16; Brief for Respondent 18; Brief for United States as Amicus Curiae 12. “Substantial,” as it is commonly understood, may refer either to qualitative importance or to quantitatively large size. See, e.g., Webster’s Third New International Dictionary 2280 (defs. 1c, 2c) (1981) (Webster’s Third) (“important, essential,” or “considerable in amount, value, or worth”); 17 Oxford English Dictionary 67 (defs. 5a, 9) (2d ed. 1989) (OED) (“That is, constitutes, or involves an essential part, point, or feature; essential, material,” or “Of ample or considerable amount, quantity, or dimensions”).

### Regulations CP – 2AC

#### Any actor can govern the ‘scope’ of antitrust law.

Sagers ’15 [Christopher L; 2015; the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator; Handbook on the Scope of Antitrust, “Introduction,” Ch. 1, p. 9]

B. Sources of the Scope of Antitrust Law

The scope of federal antitrust law is governed by three separate authorities: (1) the U.S. Constitution, (2) the language of the antitrust statutes themselves, and (3) the language of other federal statutes and regulations.

#### Key to precision. No other definitions assume all antitrust law.

Sagers ’15 [Christopher L; 2015; the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator; Handbook on the Scope of Antitrust, “Introduction,” Ch. 1, p. 2]

No prior work appears to have considered the entire law of the scope of antitrust as one body, in any comprehensive and integrated way. Integrated treatment poses certain benefits. A primary goal of this book is to aid practitioners, because several of the scope doctrines have become complex and uncertain, and their interrelationships can be especially challenging.

#### 2 – Regulations cannot create private rights of action.

DOJ ’21 [Department of Justice; February 3; Federal executive department of the United States government tasked with the enforcement of federal law and administration of justice in the United States; *Department of Justice,* “IX. PRIVATE RIGHTS OF ACTION AND INDIVIDUAL RELIEF THROUGH AGENCY ACTION,” <https://www.justice.gov/crt/fcs/T6Manual9>; KS]

The Supreme Court’s Sandoval decision left open the question whether an individual may bring an action under 42 U.S.C. § 1983 to enforce Section 602 regulations. Sandoval, 532 U.S. at 300–01 (Stevens, J., dissenting). A year later, the Supreme Court answered this question in a case brought under Section 1983 to enforce the Family Educational Rights and Privacy Act (FERPA), finding that there is no private cause of action via Section 1983. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). The issue before the Court was whether a plaintiff could bring an action under Section 1983 to enforce FERPA, even though FERPA created no private right of action. Id. The Supreme Court explained that there is no private right of action: “We have held that ‘[t]he question whether Congress … intended to create a private right of action [is] definitively answered in the negative’ where a statute by its terms grants no private rights to any identifiable class.” Id. at 283-84 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979)). Following Sandoval and Gonzaga, a majority of circuits have held that where a statute does not confer a private enforceable right, regulations promulgated under the statute cannot create a private right of action.[3] Therefore, the regulations promulgated under Section 602 are unenforceable via a private action under Section 1983.

#### 3 – No private right of action or treble damages – Vaheesan & Gorodetsky say only private right of action create sufficient deterrence.

Hovenkamp ’12 [Hebert; December 21; Ben V. & Dorothy Willie Professor of Law, University of Iowa; *Penn Law: Legal Scholarship Repository;* “Antitrust and the 'Filed Rate' Doctrine: Deregulation and State Action,” <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2853&context=faculty_scholarship>; KS]

Speaking through Justice Brandeis, the Supreme Court held in Keogh that although the Interstate Commerce Act did not exempt railroads from antitrust liability, a private plaintiff may not recover treble damages based on an allegedly monopolistic tariff rate 3 filed with the ICC. Keogh very likely grew out of Justice Brandeis's own zeal for regulation and his concern for the protection of small business—in this case, mainly 4 shippers whom he felt were protected from discrimination by filed rates. The Keogh doctrine served to absolutize regulated rates by making them nearly immune from collateral attack. Under various degrees of deregulation, the doctrine makes little sense.

Justice Brandeis gave four reasons for this rule, each of which was later criticized by Judge Friendly (although he ultimately followed Keogh) in the Square D case. First, Justice Brandeis doubted the need for an antitrust remedy, for Interstate Commerce Act §85 gave shippers injured by illegal filed rates their actual damages plus attorney's fees. However, Judge Friendly pointed out that antitrust damages are often available to those with remedies under other bodies of federal law.7

Moreover, no remedy would be available from the ICC for an approved rate that had in fact been the product of an earlier conspiracy. And increasingly under deregulation, competition has determined reasonableness.8

Second, Justice Brandeis emphasized that the filed rate was legal for all purposes and not to be “varied or enlarged by either contract or tort of the carrier.”9 Granting an antitrust damage remedy to some shippers would result in an arbitrarily discriminatory rate structure inconsistent with the purpose of the Interstate Commerce Act to prevent rate discrimination among shippers. Even if every shipper brought an action, the net rates would be discriminatory “unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.”10 But Judge Friendly pointed out that modern class actions increase the likelihood that all shippers affected by a monopoly rate can be joined and receive uniform relief and that the Brandeis argument proves too much. In all cases, one who recovers treble damages from a supplier receives a lower net price than those who do not. This puts the successful plaintiff in a favored position over the one who was equally injured but who failed to litigate or did so unsuccessfully.11

Third, Justice Brandeis noted that antitrust damages depend on proof that the rate paid exceeded the hypothetical rate that would have prevailed in the absence of the illegal conduct and that this hypothetical rate would have been approved by the ICC. What the ICC would have approved is a question better determined, at least initially, by the Commission rather than by the courts.12 But antitrust damages, far from forcing any particular rate on the ICC, merely reflect an estimate of what the price would otherwise have been­—neither more nor less accurately than in antitrust cases generally.13 Nor are damages necessarily more intrusive on agency processes than the antitrust injunctions available to private parties.15

Finally, Justice Brandeis believed that a shipper would not really be injured by an illegal rate that applied equally to its competitors, for all of them would then simply pass on the overcharge to their customers. The loss they actually absorbed would be purely speculative. But subsequent antitrust rulings have allowed those who pay an illegal overcharge to recover it (trebled) whether or not they passed it on.16 In any event, even if shippers in competition with one another are not injured significantly, the larger injury would accrue to consumers who would ultimately pay more for goods or services delivered by common carriers, or produced with energy supplied by price-regulated utilities.

The Supreme Court's Square D decision conceded that Keogh may have been “unwise as a matter of policy,”17 but reaffirmed it nonetheless on the ground that Congress had had ample opportunity to overturn it but had not done so.18 Since then the Supreme Court and lower courts have persisted in applying the doctrine and have even broadened its scope.

The implications of Keogh and Square D are that overcharge actions by consumers based on claims that a “filed” rate19 constitutes an antitrust violation will be dismissed. The rate must merely be filed and technically approved by the agency. It need not have been actively reviewed for accuracy or public interest considerations—indeed, it need not have been received at all in any meaningful sense.20 The doctrine operates as a rule against collateral attack: once filed, a rate may not be collaterally attacked in the courts. However, an objector may be able to ask the regulatory agency to review a rate within its jurisdiction, considering the objection.21 Of course, that proceeding would not be in antitrust and would not provide treble damages and attorney's fees as an inducement.

#### 4 – Agencies lack experience and expertise – rates may seem reasonable to the agency, but are the result of a price-fixing regime.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

Unfortunately, the actions by the regulators are very troubling. FERC's failure to detect market manipulation in California stems from the agency's general lack of familiarity with deregulation and market- based tariffs monitoring.159 FERC has extensive expertise with cost-of- services rates, but market-based tariffs are very different.160 Thus, while FERC has the expertise to determine just and reasonable cost-of-service rates, it lacks similar expertise in determining which market-based rates are just and reasonable.161 Further, FERC has failed to make the requisite findings to address this problem. Until recently, FERC had never taken upon itself to devise rules and parameters for efficient markets.162

Thus, judicial deference to FERC's expertise in the context of market-based tariffs is unwarranted because the agency lacks both experience and expertise in the subject matter. Further, FERC is not equipped with the proper jurisdictional authority to retroactively remedy the claims resulting from tariffs FERC itself has found to be unfair and unreasonable.163 Given the situation, judicially enforced antitrust laws would be more efficient in addressing potential market power manipu- lation. Unlike FERC, courts possess a solid and constantly evolving expertise in dealing with competitive markets.164 Further, courts are more responsive than agencies to legislative actions aimed at remedying potential market power abuse. Also, courts can issue retroactive remedies.165

During California's crisis, FERC was confronted by a market which operated extremely fast and which was not structurally competitive.166 Further, FERC was faced with "aggressive traders and generators primed to find and use loopholes in the protocols to increase their companies' profits and their personal bonuses.”167

FERC, however, did not take these competitive market realities into account. It analyzed the filed market-based rates by looking at the market share of the regulated utility under the faulty assumption that insufficient market share effectively denies the potential for market manipulation.168 FERC assumed that generators with market shares of less than twenty percent were incapable of exercising market power.16 However, the numbers employed by FERC were erroneously borrowed from the measures used by DOJ and FTC in analyzing a firm's market power in nonelectricity markets.170 The unique characteristics of the electricity market confer market power on a utility with market share as small as one percent during peak hours of demand.171

The lack of synchronization between retail and wholesale rates, which contributed greatly to the California crisis, further highlight FERC's inexperience with market-based rates. It also shows the income- patibility between the filed rate doctrine and maintenance of a properly functioning competitive market.

When California froze its retail prices, it assumed that FERC would impose much lower wholesale prices during the period of transition to the newly deregulated market.172 If such calculations were correct, the "headroom" between retail and wholesale prices would have allowed utilities to recover costs following the state-ordered unbundling.173 This assumption proved to be a serious miscalculation on the part of the state.174 When the wholesale prices soared, Pacific Gas and Electric Company started to accumulate massive debts and eventually filed for bankruptcy, unable to recover costs in the retail market.175

While the state retail market based its rate calculation on a mistaken assumption in regards to wholesale rates, FERC's wholesale rates were approved based on retail tariffs.176 FERC required that wholesale seller either show that they lacked market power or that they took measures to mitigate such power in order to have their rates approved.177 One of the "measures" taken by the wholesale sellers was to successfully claim that the retail market rate freeze would prevent them from passing higher costs to the consumers.178 However, FERC's decision to approve these wholesale rates, no matter how faulty, was immune from judicial review pursuant to the filed rate doctrine.179 In Pacific Gas & Electric Co. v. Lynch, the California district court held that FERC was not "obligated to adjust wholesale rates to harmonize with retail rates," even if FERC did rely on the state retail price freeze in its initial calculation of market- based rates.180

Further, FERC's authority to impose penalties only extends to ordering prospective refunds for rates not found to be "just and reasonable.”181 FERC cannot administer any other monetary penalties against violators.182 Thus, FERC is not effective in policing deregulated markets and deterring future violations.183 Further, the "just and reasonable" rate standard does not account for the fact that the market- based rate may seem "reasonable" to FERC yet be a result of a price- fixing conspiracy, and thus higher than the rate dictated by free market competition.184 Thus, antitrust violations could pass FERC's review unnoticed.

FERC's Order, issued on December 15, 2000, in response to California's electricity crisis, revealed the extent of FERC's inability to discipline the wholesale market.185 The Order announced that FERC would not intervene and stated two major conclusions.186 One acknowledged that FERC was under the obligation to ensure that wholesale prices were just and reasonable and that the state's current wholesale rates, all previously filed and approved by the FERC, were neither just nor reasonable.187 That conclusion notwithstanding, FERC refused to cap the current wholesale prices.188 The second conclusion referred to the demand for retroactive relief, which FERC denied.189 It cited the filed rate doctrine as justification for the assertion that all rates previously found by FERC to be just and reasonable were not eligible for a refund.190

FERC's Order made it clear that the filed rate doctrine applied to cost-of-service and market-based rates alike, thus revealing FERC to be a "paper tiger" incapable of disciplining competitive markets.191 The file rate doctrine became a legal loophole for rampant abuse in the already dysfunctional California market. 192 The Order, coupled with the knowledge that FERC was probably incapable of deterring price and market power manipulation, invited utilities to "game the system at will" by manipulating electrical supply and demand and driving prices upwards.193 Predictably, prices increased substantially, and the general result of the FERC Order was that "[t]he equivalent of outright looting occurred in plain sight.194

The extent of FERC 's lack of expertise in dealing with deregulate market prices was further confirmed by the findings of the Senate Committee on Governmental Affairs staff report in regards to FERC investigation of the Enron scandal.195 The report cited a "shocking absence of regulatory vigilance on FERC's part and a failure to structure the agency to meet the demands of the new, market-based system that the agency itself has championed.”196

#### Filed rate prohibits the CP – no retroactive remedies.

Spence 12 [David B. Spence, Rex G. Baker Centennial Chair in Natural Resources Law at the University of Texas School of Law, and Professor of Business Government & Society. Robert Prentice, Professor and Department Chair, Business, Government and Society, McCombs School of Business, UT Austin. The Transformation of American Energy Markets and the Problem of Market Power.” 1/1/12. https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3184&context=bclr]

The California crisis revealed that while FERC had anticipated some of the forms of unfair competition that emerged after restructuring (such as discrimination by owners of gas and electric transmission lines in favor of their affiliates), it apparently had not foreseen some of the ways in which sellers on competitive wholesale markets were able to capture and abuse market power, or to influence prices in the spot and derivatives markets. Exercising its continuing responsibility to regulate competition and ensure that wholesale rates (including market-based rates) were “just and reasonable,”149 the agency’s initial response to the crisis focused on preventing and deterring wholesale sellers from acquiring and abusing market power. FERC’s previous grants of authority to charge market prices for energy had always been conditioned on the sellers’ lack of market power; however, long-standing precedent under both the FPA and the NGA—the so-called “filed rate doctrine”150— prohibited FERC from retroactively penalizing sellers who charged market rates that had been “filed” with FERC.151 In the wake of the California crisis, courts affirmed the agency’s conclusion that the market rates charged by FERC-authorized sellers in the California spot markets were “filed rates” for purposes of the filed rate doctrine.152 Therefore, in the event a seller authorized to charge market-based rates acquires market power—the power to capture scarcity rents by influencing price—the only remedy available to FERC at the time was to revoke that seller’s authority to charge market-based rates prospectively. FERC can do this in either of two ways: (1) by reimposing cost-based rates for that seller, or (2) by imposing rate caps for that seller in the relevant market (what it calls “mitigation”).

#### Struck down.

Quinn 20 [Jennifer Quinn-Barabanov is a partner and co-leader of Steptoe and Johnson’s Energy Litigation practice. Shaun Boedicker is a member of the Energy practice in Steptoe’s Washington, D.C., office. “Filed Rate Doctrine: A Powerful Tool in Energy Litigation.” 6/1/2020. https://www.powermag.com/filed-rate-doctrine-a-powerful-tool-in-energy-litigation/]

The regulatory landscape for the energy industry has changed significantly in the past few decades, but a century-old Supreme Court canon—the filed rate doctrine—continues to be a valuable tool for regulated parties in litigation. The doctrine can provide a basis for a court to dismiss many types of lawsuits, including antitrust, tort, and contract claims. Evaluating the extent to which a claim may improperly infringe upon a filed rate, whether at the state or federal level, is a critical first step in litigation that may save parties substantial time and money.

### States CP – 2AC

#### Preemption precludes any deviation.

Ikuta ’18 [Sandra S. Ikuta; January 22; Federal Court of Appeals Judge on the Ninth Circuit; Westlaw, “CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.,” 880 F.3d 1048]

It has long been established that the tariff requirement of § 203 preempts state law. Because § 203 was modeled after similar provisions of the Interstate Commerce Act (ICA), “and share[s] its goal of preventing unreasonable and discriminatory charges,” the Supreme Court concluded that “the century-old ‘filed rate doctrine’ associated with the ICA tariff provisions applies to the Communications Act as well.” Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998). As applied to state law, the filed rate doctrine “is a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency.” Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225 (9th Cir. 2007). Under the doctrine, “the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.” Cent. Office Tel., 524 U.S. at 222, 118 S.Ct. 1956 (quoting Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97, 35 S.Ct. 494, 59 L.Ed. 853 (1915)). The doctrine “embodies the policy which has been adopted by Congress in the regulation of interstate [telecommunications services] in order to prevent unjust discrimination.” Id. (quoting Maxwell, 237 U.S. at 97, 35 S.Ct. 494).

7 When the filed rate doctrine applies, it generally precludes a regulated party from obtaining any compensation under other principles of federal or state law that is different than the filed rate. See Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 163, 43 S.Ct. 47, 67 L.Ed. 183 (1922). In Keogh, a manufacturer claimed it was entitled to damages under the Sherman Act caused by certain carriers that had conspired to set an unreasonably high filed rate. Id. at 160, 43 S.Ct. 47. The Court rejected this argument, reasoning that the rate approved by the Interstate Commerce Commission (ICC) was the legal rate and could not be “varied or enlarged by either contract or tort of the carrier.” Id. at 163, 43 S.Ct. 47. “This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention [sic] of unjust discrimination—might be defeated.” Id. The Court reasoned that if one manufacturer was able to recover for damages resulting from paying the filed rate, it effectively received a rate different than the filed rate, and would have a preference over its competitors. Id.

8 The Supreme Court later applied the doctrine to preclude state courts from awarding damages under state law, where doing so would interfere with the exclusive rate-setting authority of federal administrative \*1054 agencies. “In this application, the doctrine is not a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies, but a matter of enforcing the Supremacy Clause.” Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). In Arkansas Louisiana Gas Co. v. Hall, for example, the Supreme Court overturned a state court’s award of damages for breach of contract to federally regulated sellers of natural gas. 453 U.S. 571, 584, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). The sellers had filed rates with the Federal Energy Regulatory Commission (FERC), as required under federal law, but alleged that they were entitled to a higher rate under a contract with their customer than the rate they had filed with FERC. Id. at 573–74, 101 S.Ct. 2925. The state court agreed, and held that the sellers were entitled to damages for breach of contract, notwithstanding the tariff-filing requirements and the filed rate doctrine. Id. at 575, 101 S.Ct. 2925. The state court reasoned that if the sellers had filed rate increases with FERC based on their negotiated contracts, the rate increases would have been approved. Id. The Supreme Court reversed, explaining that, in order to award damages, the state court had to “speculat[e] about what the Commission might have done had it been faced with the facts of this case.” Id. at 578–79, 101 S.Ct. 2925. Such an approach, the Court concluded, “would undermine the congressional scheme of uniform rate regulation” by allowing “a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act.” Id. at 579, 101 S.Ct. 2925. Because “under the filed rate doctrine, the Commission alone [was] empowered to make that judgment,” the Supreme Court concluded that the state court had “usurped a function that Congress has assigned to a federal regulatory body,” in violation of the Supremacy Clause. Id. at 582, 101 S.Ct. 2925.

The Supreme Court has consistently applied the filed rate doctrine to preclude the award of any rate other than the filed rate, even where doing so has resulted in harsh consequences. In Maislin Industries, U.S., Inc. v. Primary Steel, Inc., for example, the Supreme Court considered whether the bankruptcy trustee for a motor common carrier could collect undercharges for the difference between the rate the motor common carrier had negotiated with a shipper and the higher rate the motor common carrier had filed with the ICC. 497 U.S. 116, 122–23, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). The Supreme Court held that the trustee could collect undercharges because the filed rate alone governed the legal relationship between the carrier and the shipper. The Court explained that “[i]n order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the legal rates, that is, those which must be charged to all shippers alike.” Id. at 126, 110 S.Ct. 2759 (alterations in original) (emphasis in original) (quoting Az. Grocery Co. v. Atchison, T. &S.F. Ry. Co., 284 U.S. 370, 384, 52 S.Ct. 183, 76 L.Ed. 348 (1932)). Strict adherence to the filed rate doctrine was necessary to prevent carriers from “misquoting” rates, as a means of charging different rates to different customers. Id. at 127, 110 S.Ct. 2759. The Supreme Court rejected the shipper’s argument that awarding the filed rate rather than the negotiated rate would give the carrier a windfall, explaining that federal law “requires the carrier to collect the filed rate.” Id. at 131, 110 S.Ct. 2759 (emphasis in the original). Allowing the collection of any other rate would “sanction[ ] adherence to unfiled rates,” thereby “undermin[ing] the \*1055 basic structure of the Act.” Id. at 132, 110 S.Ct. 2759.

9In short, § 203 and the accompanying filed rate doctrine preempts state law claims that conflict with the rate-setting authority of the FCC. Courts have applied the filed rate doctrine strictly in order to ensure that Congress’s goal of uniformity and reasonableness in rates, “which lies at ‘the heart of the common-carrier section of the Communications Act,’ ” is not undermined. Cent. Office Tel., 524 U.S. at 223, 118 S.Ct. 1956 (quoting MCI Telecomms., 512 U.S. at 229, 114 S.Ct. 2223).

#### 9th circuit confirms.

Mohler ’12 [Paul; Solo practitioner in the Washington, D.C. area. He formerly represented an investor-owned utility in the California Refund Proceedings; *Energy Law Journal,* “HAS THE “COMPLETE AND PERMANENT BOND OF PROTECTION” PROVIDED BY FERC REFUNDS ERODED IN THE TRANSITION TO MARKET-BASED RATES?,” <http://www.eba-net.org/assets/1/6/12-41-mohler-ferc_refunds.pdf>; KS]

G. The FERC’s Authority Preempts State Action

It is settled law that the FERC’s authority to set interstate wholesale rates preempts state authority over those rates.49 “Moreover, the filed rate doctrine is not limited to ‘rates’ per se,”50 but may also extend to issues affecting rates, such as the allocation of low-cost power.51 Nantahala explains that this preemption authority derives from the filed rate doctrine as enforced by the Supremacy Clause of the U.S. Constitution.52

The FERC’s jurisdiction over wholesale market-based rates and contracts likewise has been held to preempt state jurisdiction.53 As explained by a U.S. District Court where plaintiffs had sought rate relief from market-based rates charged in California markets during 2000 and 2001:

markets’ reliance on “market-based rates.” These rates are still subject to FERC oversight, but to a much lesser extent than traditional “cost-based rates.” Thus, the determinant question in this case in regard to the application of the filed rate doctrine is whether the doctrine applies to the relatively new innovation of “market based rates” governing wholesale energy trading.54

Finding that the filed rate doctrine did apply, the court concluded:

The Court agrees with Defendants – the filed rate doctrine indeed bars Plaintiff’s claims. As the Ninth Circuit stated in County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 863 (9th Cir. 1997), “the filed rate doctrine bars all claims – state and federal – that attempt to challenge a rate that a federal agency has reviewed and filed.” Moreover, the Ninth Circuit has made clear that “the filed rate doctrine [prohibits] not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC.”55

### FTC DA – 2AC

No link---likely actor is the FERC AND the enforcers of the plan are private plaintiffs, not the FTC.

Farmer ’88 [Kiplyn; American lawyer specializing in personal injury, criminal law, and worker compensation; “FERC WAIVER OF THE FILED RATE DOCTRINE: SOME SUGGESTED PRINCIPLES,” <https://www.eba-net.org/assets/1/6/31_9EnergyLJ497(1988).pdf>; KS]

On April 22, 1988 the D.C. Circuit, on rehearing, affirmed that the Fed- eral Energy Regulatory Commission (FERC)1 is free to consider whether it has the authority to waive the "filed rate doctrine.' 2 This determination was the result of a suit brought by Columbia Gas Transmission Corporation (Columbia), a gas purchaser, after the FERC authorized five pipelines to col- lect a surcharge over and above the rates which were filed with the Commis-sion at the time of sale.3 The FERC maintained that it has implied authority to waive the filed rate doctrine4 under the Natural Gas Act (NGA) and that its authority was upheld in City of Piqua v. FERC.6 Although the court over- ruled the Commission's decision in ColumbiaGas7 because the affected parties were not on notice as to the increase in rates caused by the waiver,8 it opened the door to the possibility of allowing the FERC to establish guidelines regard- ing the circumstances in which it could waive the filed rate doctrine in the future. If the FERC is to retain authority to waive the doctrine when it determines that such a waiver is required in order to carry out its statutory mandate that rates and charges be just and reasonable,1" it must establish cri- teria consistent with the principle that the FERC is prohibited from retroac- tive rate-making.'1 This article focuses on the issue of the FERC's authority to waive the filed rate doctrine by permitting rate changes to be made effective retroactively and recent judicial interpretations of the doctrine which the FERC will be required to consider in establishing its guidelines.

#### Massive overstretch now

Mary Ashley Salvino 11/1, Privacy Attorney and Senior Legal Specialist at Bloomberg Law, JD from the City University of New York School of Law at Queens College, BA in Political Science from Duke University, “ANALYSIS: How Will the FTC Get Its Privacy Mojo Back in 2022?”, Bloomberg Law, 11/1/2021, https://news.bloomberglaw.com/banking-law/analysis-how-will-the-ftc-get-its-privacy-mojo-back-in-2022

The Federal Trade Commission has faced a multitude of challenges to its enforcement authority, but there are signs that a recharged Commission will seek a consumer privacy comeback in the next year. So it bears asking: What would a restrengthened—and well funded—FTC look like? And what can legal practitioners reasonably expect regarding the FTC’s priorities in the new year?

Beleaguered by major enforcement hits, lack of staffing, and funding issues, the FTC has hit a regulatory rough patch these last few years. By my lights, it is worth examining three possible FTC strategies to bolster the regulator’s consumer privacy power:

1. Institutional innovation and creativity in rulemaking
2. Leveraging new leadership with congressional Dems’ political capital
3. Exploring unprecedented funding initiatives

Practitioners should be on notice about an active FTC that seeks to clarify data security standards and expedite the creation and passage of uniform federal privacy legislation.

Major Enforcement Hits

2021 has been a devastating year for the FTC’s remedial consumer privacy authority. The Supreme Court’s AMG Capital Mgmt. v. FTC ruling delivered a death blow to the Commission’s ability to obtain restitution and equitable redress for defrauded consumers in federal court, a powerful weapon that the Commission has wielded for nearly four decades to recoup billions.

Simply put, the SCOTUS ruling decimated the privacy agency’s longstanding and effective ability to obtain equitable monetary remedies (restitution and disgorgement) under Section 13(b) of the FTC Act. To add insult to injury, the ruling further kneecapped the under-resourced FTC with limited residual options and a dearth of viable civil penalty options. Turning the federal court recoupment faucet off means that the FTC is constrained by an extremely cumbersome and time-consuming administrative process. And while this is great news for consumer businesses, privacy practitioners will lament the loss of the FTC’s primary consumer redress tool.

Furthermore, still reeling from the Trump Administration’s gutting of resources, the FTC remains overstretched, undermanned, and underfunded. But it’s not without options. Here’s a forecast for how the FTC may respond through rulemaking, which could be useful for in-house counsel navigating these uncertain times.

#### Private suits turn the link.

Waller ’19 [Spencer; February 2019; John Paul Stevens Chair in Competition Law, Director, Institute for Consumer Antitrust Studies, Professor, Loyola University Chicago School of Law; Competition Policy Antitrust Chronicle, “In Praise of Private Antitrust Litigation,” p. 2-9]

There is no textual or historical basis to prioritize either public or private enforcement of antitrust laws. Rather they were intended to work as equal partners.

The Kinter treatise notes the importance of private treble damage remedies:

Although the treble damage provision is now found in the Clayton Act, the original Sherman Act already provided for the mechanism of monetary relief, including costs and attorney’s fees, for injured private parties. Three principal reasons animated the adoption of this device. First and primarily, it was deemed important to compensate persons who were injured by an antitrust violation, with much the same concern as is given to victims of other unlawful conduct. Second, it was hoped that the imposition of substantial monetary penalties would act as a deterrence to anticompetitive activity. Third, providing for private lawsuits would increase the number of potential plaintiffs, thereby offsetting the limited enforcement resources available to the government and giving the opportunity to attack misconduct to the very persons most likely to have information thereof.

#### Funding is normal means AND boosts are coming

Dylan Byers 21, Senior Media Reporter for NBC News; Internally Citing George Washington University Professor and Former FTC Chair William Kovacic; “Is Facebook Untouchable? It's Complicated,” NBC News, 7-1-2021, https://www.nbcnews.com/tech/tech-news/facebook-untouchable-complicated-rcna1323)

The House Judiciary Committee recently advanced six bills that would bolster the government's ability to regulate Big Tech. They range from simple budgeting measures — one would give more funding to the FTC and the Department of Justice for their antitrust enforcement efforts — to profound reforms — one that would stop platform companies from preferencing their products over those of their competitors and another that would make it illegal for companies to eliminate competitors through acquisitions.

This legislative package faces an arduous road ahead. House Majority Leader Steny Hoyer, who sets the House floor schedule, has said none of the six bills are ready for a vote, which suggests they don't have broad bipartisan support. If and when they do make it through the House, they face an even harder battle in the Senate.

"It's hard to imagine that the larger legislative package is accomplished this year," Kovacic said, though he predicted a few of the less-threatening bills — budgeting, for example — are likely to pass on their own.

"The funding for the FTC and DOJ antitrust divisions, it's nearly 100 percent likely that Congress will pass that law," he said. He said another bill, which would block the tech firms from moving court hearings to more favorable states, was also likely to pass.

#### FTC fails.

Vittorio ’20 [Andrea; December 16; Reporter at Bloomberg Law; *Bloomberg Law,* “FTC’s Demand for Tech Company Data Shows ‘Underutilized’ Power,” <https://news.bloombergtax.com/privacy-and-data-security/ftcs-demand-for-tech-company-data-shows-underutilized-power>; KS]

Company Response

The nine tech companies could fight back by seeking to limit how much information must be handed over or by trying to quash the information orders in court, according to Van Loo. The companies have 45 days from the date they received the FTC orders to respond.

NetChoice, a trade association that represents companies including Amazon, Google, and Twitter, called the orders an arbitrary use of the FTC’s study authority.

“The Federal Trade Commission’s 6(b) orders are nothing more than a fishing expedition and a prime example of government overreach,” Carl Szabo, NetChoice’s vice president and general counsel, said in a statement Monday.

Szabo said agency orders have historically been used to study common practices across an industry. But the latest orders target “well-known but widely different businesses,” from online retailer Amazon to ByteDance Ltd.'s popular video streaming service TikTok.

The trade group’s comments echo those of FTC Commissioner Noah Phillips, who was the only one on the five-member agency to vote against issuing the information orders.

Phillips said in a statement Monday that the orders are too broad and intended to give “the appearance of action on a litany of gripes with technology companies.”

#### CFPB fills in.

Parker ’21 [Wilson; April 27; J.D. at the University of Virginia; Cov Financial Services, “Supreme Court Ruling Complicates FTC's Ability to Obtain Consumer Redress,” https://www.covfinancialservices.com/2021/04/supreme-court-ruling-complicates-ftcs-ability-to-obtain-consumer-redress/]

In the short term, this decision may also prompt the Consumer Financial Protection Bureau (“CFPB”) to be more assertive in areas where the two agencies share jurisdiction, such as regulating the debt collection industry. The CFPB has broad power to seek consumer relief. As long as the FTC’s ability to seek consumer relief is complicated by AMG Capital Management, the CFPB may take the lead in more cases where it can use its power to pursue consumer relief directly.

### Internal – AT: Algorithmic Bias

**No resources – Michigan = green.**

John O. **McGinnis**\* **and** Linda **Sun**\*\* **20**. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more **resources** to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, **forgo them altogether**.260 Currently, the FT C’s resources are **spread thin across multiple missions**, to the **detriment of its privacy efforts**. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

\*\*\*Mary Washington Ends\*\*\*

This reallocation of resources is especially timely because the FTC’s privacy responsibilities are expected to grow in the future. The FTC is already on its way to becoming a consumer protection agency primarily focused on privacy.262 In its 2019 budget request to Congress, over half of the agency’s budget was allocated to privacy.263 In addition, lawmakers on both sides of the political spectrum have proposed federal privacy legislation.264 Such legislation would expand the FTC’s jurisdiction, empower it to bring more privacy actions, and increase the demands on its privacy resources.265 Right now, the U.S. is one of the only Western countries that does not have a comprehensive federal privacy law.266 Public pressure is great from both industry and scholars to change that, which would lead to increased privacy action at the federal level.267 Moving the FTC’s antitrust duties to the DOJ would cleanly complete a readjusting of priorities that is already happening organically.

Removing its authority over competition law would also provide the FTC with organizational clarity. Currently, the agency serves dual missions of antitrust and consumer protection. Originally, the FTC only had antitrust jurisdiction: the FTC Act banned “unfair methods of competition in or affecting commerce.” 268 In 1931, the Supreme Court held that this did not include consumer protection.269 In 1938, Congress passed the Wheeler-Lea Act, which amended the FTC Act to cover “unfair or deceptive acts or practices.” 270 This paved the way for the FTC’s modern consumer protection mission.271 Since then, the agency has had to pursue goals that are sometimes in conflict

#### Their evidence lists proposals the FTC does not do.

**Thomas, BuiltIn Senior Writer, 20**.

[Mike, THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future> accessed 1/15/22//a dove]

Klabjan also puts **little stock in extreme scenarios** — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s **much** more concerned with machines — war robots, for instance — being **fed faulty “incentives**” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The **real threat** from AI isn’t **malice**, like in silly Hollywood movies, but **competence** — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to **eliminate data bias**, which has a **corrupting effect on algorithms** and is **currently a fat fly in the AI ointment**. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and **if we just bumble into this unprepared**, it will probably **be the biggest mistake in human history**. It could enable brutal global dictatorship with **unprecedented inequality**, surveillance, **suffering** and maybe **even human extinction**. **But if we steer carefully**, we could end up in a **fantastic future** where **everybody’s better off**—the poor are richer, the rich are richer, **everybody’s healthy and free** to live out their dreams.”

#### No impact.

**Naudé ’21** [Wim; 2021; Economics Professor at University College Cork, Ireland, Visiting Professor in Technology, Innovation, Marketing and Entrepreneurship at RWTH Aachen University, Germany; Economics of Innovation and New Technology, “Artificial intelligence: neither Utopian nor apocalyptic impacts soon,” vol. 30, no. 1]

5.1. An Abacus

A first point is whether or not the term artificial intelligence (AI) (introduced during an optimistic period in 1956) is perhaps a misnomer and should be ditched. As was explained, this narrow or domain-specific AI consists of **deep learning techniques**, using large volumes of data. This is **not intelligence**, even though the answers it can provide can be pretty impressive. It is rather the case that ‘**current and foreseeable smart technologies**have the **intelligence of an abacus**: that is, **zero**’ (Floridi 2018, p. 157). Some have more disparagingly described narrow AI as ‘**glorified statistics**’. A joke about AI making the rounds40 goes like this: ‘When you're fundraising, it's AI. When you're hiring, it's ML. When you're implementing, it's logistic regression '.

AI is however more than just glorified regression or optimization because of the ability of the software to get better by learning from data. Moreover, precisely how deep learning takes place and how predictions come about is an unknown. This black box quality of the results from deep learning could very well lead to the even slower diffusion of AI over time, for at least two reasons: one is due to given the tightening of regulations on data use, such as the GDPR in the EU41 and the European Commission's ethical guidelines for trustworthy AI, which includes the requirement of traceability and auditability of AI decisions (EC 2018). Another reason is the growing concern about the use of deep learning in science because results often cannot be adequately explained or replicated.42

5.2. The singularity can be cancelled

A second point (which is related to the first) is that an AGI is **remote**, placing hopes and speculations about a super-intelligence and Singularity in the realm of **science fiction** rather than **of fact**. The **core problem** is that scientists cannot replicate the human brain or human intelligence and consciousness because they do not fully **understand it** (Meese 2018). Penrose (1989) has (controversially) argued that **quantum physics** may be required to explain human consciousness. Koch (2012) provides a **rigorous criticism** from the point of biology of those claiming the **imminence** of a **singularity** or **super-intelligence**, stating that they do **not appreciate** the **complexity of living systems**. Dyson (2019) believes the future of computing is analogue (the human nervous system operates in analogue) and not digital. Allen and Greaves (2011) describe a ‘complexity brake’ applying to the invention of a super-intelligence, which refers to the fact that ‘As we go deeper and deeper in our understanding of natural systems, we typically find that we require more and more specialized knowledge […] although developments in AI might ultimately end up being the route to the singularity, again the complexity brake slows our rate of progress, and pushes the singularity considerably into the future '.

### Chilling DA

#### Scrutiny now.

National Law Review 12-16 [December 16, 2021; *National Law Review,* “Antitrust Scrutiny Heating Up in Oil and Gas Industries,” <https://www.natlawreview.com/article/antitrust-scrutiny-heating-oil-and-gas-industries>; KS]

President Biden recently wrote a letter to FTC Chair Lina Khan urging the Commission to immediately investigate potential anticompetitive behavior in the oil and gas sector. The President noted that gas prices have been rising, while the costs faced by oil and gas companies themselves have decreased. Concerned that the two largest oil and gas companies in the country are set to double their net income over 2019 while the gap between the price of unfinished gasoline and the price at the pump is increasing, he called on the FTC to “bring all of the Commission’s tools to bear if you uncover any wrongdoing.”

Steps Already Taken

The Biden administration has made a previous attempt to direct the FTC’s focus towards the oil and gas industries. At President Biden’s behest, the Director of the National Economic Council, Brian Deese, wrote to Chair Khan on August 11, citing “divergences between oil prices and the cost of gasoline at the pump” and urging the FTC to investigate. Chair Khan responded with a letter of her own, outlining a three point plan to address the administration’s concerns about the cost of gas. First, the FTC would identify additional legal theories to challenge fuel station mergers that involve dominant players in the market acquiring family-run businesses. Second, the FTC “would tak[e] steps to deter unlawful mergers in the oil and gas industry.” The Chair specifically referred to the imposition of prior approval requirements to deter illegal mergers in sectors including retail gas markets. Third, Chair Khan indicated that she would direct staff to investigate abuses in the franchise market, noting that the sale of gasoline at high prices may benefit chains at the expense of franchisee store operations.

President Biden expressed in his November 17th letter that he appreciated the plans to “strengthen oversight of mergers in the oil and gas sector” but that further inquiry is requi

#### Expectations are sector-specific.

Jérémie Cohen-Setton & Martin Kessler 11, Cohen-Setton is a Research Fellow at the Peterson Institute for International Economics; Kessler has been a research analyst with the Peterson Institute since September 2011 and works with Senior Fellow Arvind Subramanian and Visiting Fellow C. Randall Henning, “The uncertainty hypothesis,” Bruegel, 10-6-2011, https://www.bruegel.org/2011/10/the-uncertainty-hypothesis/

In a recent NBER working paper, Ruediger Bachmann, Eric Sims, and Steffen Elstner found no evidence that changes in uncertainty cause a wait-and-see effect, defined as a large decline in economic activity when uncertainty hits followed later by fast rebounds. The economists used the Philadelphia Fed’s manufacturing survey since 1968 and the German Ifo business sentiment survey since 1980 and calculated uncertainty in various ways. Using as an indicator the divergence between prediction and real conjuncture, they conclude that uncertainty does not cause a wait-and-see impact on production and employment.

Policy and regulatory uncertainty

John Taylor makes the case against active interventionist policies. Stop all the interventions — the short-term discretionary fiscal stimulus packages and the massive quantitative easings and the operation twists of monetary policy. The unpredictability caused by these policies is causing uncertainty and holding the recovery back. Instead put in place more permanent reforms which will create economic recovery and return the economy to the kind of performance we saw in the 1980s and 1990s when rules-based, less interventionist policies were followed.

Robert Barro and Greg Mankiw argue that uncertainties on taxes and regulation reduce the returns of current investments. Mankiw points to the counterexample of the Reagan recovery in 1982, where non-residual fixed investment grew by 27% two years after the trough. As investment leads recoveries, taxes should be shifted to other bases to lower its cost. In a similar vein, Barro suggests establishing a VAT to lower the cost of capital.

Menzie Chinn, however, points that the “jobless recovery” does not seem to be an “investment-less recovery”: non-residential investment has rebounded faster than on average in other recessions (the Reagan recovery should be treated as a special case, precisely because of the particular macro and monetary environment at the time), whatever the metric used (from peak or from trough). The econometric relation between output and business investment is, if anything, more stable than in previous years.

Bruce Bartlett reports that, according to a BLS survey, the number of jobs involved mass lay-offs by companies citing new government regulations as a reason for is a mere 1% of the ones citing “lack of demand”. The number of small businesses reporting the regulatory environment as a problem is higher, but still accounts for less than half of the demand factor. Lawrence Michel, of the think tank EPI, adds that those concerns have always been high and roughly constant for small businesses, but that the lack of demand has suddenly risen as the main hurdle. Challenged by James Pethokoukis of the American Enterprise Institute, Michel further notes that investment in equipment and software during the 2009-2011 recovery has been more dynamic than in any of the four preceding ones.

Greg Ip argues regulations are sector-specific, and if they have an impact, it might be non-perceived at the macroeconomic level. They could also have a cost as part of a trade off (for example, in the case of the financial industry, a higher cost of capital against more financial stability).

#### Biden just took major antitrust action today against meat industry.

Dorning ’22 [Mike; January 3; reporter; Fortune, “Biden’s new plan to fight inflation: take on Big Meat,” <https://fortune.com/2022/01/03/biden-inflation-food-prices-meat-packing/>]

President Joe Biden will announce plans Monday to combat the market power of the giant conglomerates that dominate meat and poultry processing, ratcheting up a months-long campaign that has blamed anti-competitive practices in the industry for contributing to surging food inflation.

Biden will join Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to meet virtually with ranchers and farmers to hear complaints about consolidation in the industry, while a newly launched portal will allow them to report unfair trade practices by meatpackers. The White House will also highlight initiatives it is taking to counter meatpackers’ economic power, including $1 billion in federal aid to assist expansion of independent processors and new competition regulations under consideration.

The latest announcement focuses fresh attention on Biden’s fight with the meat industry and helps cast him as a president willing to take on powerful business interests over consumer prices. Many Democrats are concerned that months of negotiations over Biden’s economic plan have distanced him too much from the most pressing kitchen-table concerns facing Americans.

Inflation has swiftly moved to the top of public concerns as the annual rise in consumer prices hit its highest level in 40 years. Meat prices, which in November were up 16% from a year earlier, have been the biggest contributor to grocery inflation. Meatpacking industry representatives have blamed soaring prices on labor shortages, rising fuel prices and supply-chain constraints.

Biden singled out the meat and poultry processing industries for scrutiny in a July executive order on promoting competition across the economy. His top economic adviser later criticized meatpackers for “pandemic profiteering.” The U.S. Agriculture Department also announced plans in June to consider three new sets of regulations on unfair trade practices in livestock and poultry markets, with officials anticipating the proposal of new rules early this year.

#### All metrics show the US innovation is falling behind.

Kersten ’21 [Alexander; 4/14/21; Director of the Renewing American Innovation Project @ Center for Strategic and International Studies; Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy @ Tufts University; “Why Renewing American Innovation? The “Endless Frontier Act” and Biden’s Bid for Maintaining U.S. Global Competitiveness”; https://www.csis.org/analysis/why-renewing-american-innovation-endless-frontier-act-and-bidens-bid-maintaining-us-global; AS]

The China Challenge

China today poses both a technological and security threat to the United States that no country has in modern history. U.S. companies operating under free market rules struggle to compete against state-backed Chinese firms that can ignore a poor quarter while enjoying one of the largest, most-protected markets in the world. With the support of the central government, key Chinese firms are free to innovate and compete in the global market without financial worries while Chinese scientists can focus on research and development instead of seeking grants for their university or research institution. According to Tulane University professor and former Aspen Institute CEO Walter Isaacson in 2019, China has modeled its approach along the lines of U.S. scientist Vannevar Bush’s 1945 report Science: The Endless Frontier, which, besides being the inspiration behind the name of the proposed legislative package, promoted government funding of basic research together with universities and industry—a priority of the Franklin D. Roosevelt administration. As the Chinese government sets long-term strategic goals like Made in China 2025, which was part of China’s 13th Five-Year Plan of 2016-2020, the United States needs to return to its post-World War II values of equating leadership in science and technology with national security and prosperity.

Today, U.S. companies locked in close competition lack the incentives to maintain in-house capabilities for innovation, like they did in the mid-century era of AT&T’s Bell Labs, DuPont’s central R&D unit, Xerox PARC, and others. Heightened competition, shareholder pressures, and new incentives pushed firms to cut these in-house research units back in the 1980s. Since then, the share of applied research in total corporate R&D expenditures fell from 30 percent in 1985 to below 20 percent in 2015—all well below the peak of almost 40 percent in the 1950s. Of course, the Harvard Business Review in 2014 famously suggested that, despite being the source of great inventions throughout history, China today is a “land of rule-bound rote learners” where breakthroughs are rare. Because of this, some argue the Chinese are not great innovators and China’s state-backed system could itself breed complacency and come back to bite it in the near future. However, even by then, experts warn, the United States will have missed the train on many important technologies and will be struggling to catch up.

Despite Silicon Valley and the millennial generation’s supposed penchant for innovative disruption, U.S. total factor productivity has been slowing since the 1970s. Productivity today is the lowest in more than a century. Innovation, historically a clear driver of U.S. productivity, means the creation of ideas and inventions that are translated into practical value and improve the quality of people’s lives directly or via their ability to grow the economy. Whether measured in terms of triadic patents (patents filed in the United States, Europe, and Japan), most available measures of productivity, or even startup company creation, the United States’ trademark innovative spirit has been gradually dampening for decades. And if not for China’s meteoric rise this century, the United States might still be sleepwalking—optimistically but without a serious plan—instead of waking up to the need for a coherent national strategy.

U.S. Complacency, and How We Got There

Noted George Mason University economist Tyler Cowen and other experts have recognized a growing “complacency” in American life as the indicator of a societal shift from the United States’ early dynamism. From the turn of the twentieth century until roughly the moon landing of 1969, the breakneck pace of groundbreaking technologies that directly affected the quality of life and the structure of U.S. society was simply astounding. Yet, since the first moon landing in 1969, only the internet and its application to more and more parts of our lives can claim to have made any meaningful impact—meaning that physically the world of 1969 is much more like that of 2021 than 1969 was of the early twentieth century. This, of course, is not meant to discredit the great advances in medicine and human genomics made in the last few decades, for example, but to show how the rate of society-changing innovations has not maintained the pace that existed from the mid-nineteenth century until roughly 1969.

In the developed world, this slowdown has unfortunately contributed to wage stagnation, the shrinking of the middle class, and greater political polarization domestically. Coinciding with the waning days of the Soviet Union’s power in the 1980s, the U.S. innovation decline was masked at home. Further, the Soviets of that period no longer posed a technological threat to the United States. Japan on the other hand, posed a great technological threat in the 1980s but was and is a staunch U.S. ally, and not a security threat. Unchallenged abroad and riding the dual-edged optimism of the internet boom of the 1990s and the victory over communism, the United States missed the ways in which it was giving up the advantages that made it such a powerhouse in the mid-twentieth century.

Industry experts have also suggested that the United States put its position up for grabs when it began to outsource important production—which President Biden alluded to during the signing of a February 2021 executive order aimed at reducing supply chain bottlenecks. Starting in the 1970s and 1980s, the United States began to outsource production of semiconductors and displays mostly to Taiwan and South Korea, which today account for almost half of all semiconductor manufacturing capacity in the world. Further, adding in mainland China and Japan shows that a whopping three-quarters of all semiconductor manufacturing capacity comes from East Asia—a sharp departure from 1990, when the United States still provided about 50 percent of all global manufacturing capacity. Removing itself from the production process means the United States misses out on important chances for innovating as well as for developing a strong high-tech manufacturing workforce.

#### Antitrust boosts innovation – helps nascent firms take the spotlight.

Philippe Aghion et al. 21, Professor, Economics, College de France and the London School of Economics; Reda Cherif, Senior Economist, International Monetary Fund; Fuad Hasanov, Senior Economist, International Monetary Fund. Adjunct Professor, Economics, Georgetown University, "Competition, Innovation, And Inclusive Growth," International Monetary Fund, Vol. 2021, Issue 80, 03/19/2021, IMF.

II. The Rise of Market Power

Competition, market power, and inclusive growth in advanced and developing countries

Competition plays a key role in determining market outcomes, and it affects inclusiveness in multiple ways. It not only matters for driving growth but also can affect the distribution of profits among firms and ultimately the distribution of earnings among their workers. It can also affect the bargaining power of workers in the labor market as well as of firms in the supply chain. It can also affect the relative prices of certain goods hurting disproportionately the poor (e.g., food and communication). Competition can also affect income and productivity growth through its effect on the production structure of the economy as well as incentives or disincentives to invest and innovate (e.g., intellectual property). In addition, as discussed in the previous section, competition is one of the key elements needed to support high sustained broad-based growth, an important precursor for inclusive growth.

To measure the level of competition in a market, economists rely on the concept of market power, which is understood as the ability of a firm to influence the market for its product. It is usually measured in terms of deviation from the theoretical case of perfect competition where firms are assumed to be price takers. The intensity of competition, and ability of firm to influence the market, is difficult to measure directly. Instead, the literature relies on indirect measures such as concentration indexes (e.g., Herfindahl index of market shares) or price markups. Market concentration is an intuitive measure; however, it is not necessarily indicative of market power (Syverson 2019). 2 Moreover, in many developing economies a comprehensive census of firms, including their market shares, is difficult to obtain. In recent literature, price markups, the gap between the price charged and an estimate of the marginal cost, are the measure chosen to estimate market power. It is particularly useful f or developing economies as survey information may suffice for the calculations. In practice, it can be proxied by the ratio of sales or revenue to a measure of variable cost, which is closely related to profitability.

Using a large sample of firms from developing economies, IMF (2019a) finds large markups in sub-Saharan Africa compared to other developing economies. Notwithstanding potential measurement issues and bias, it finds that sub-Saharan African economies have greater average markups compared to other developing and emerging economies in most sectors, and the gap is especially big in non-tradable industries (Figure 1). It also finds that average markups in non-tradable sectors in developing countries could be greater than in tradable industries, and in particular manufacturing. Using firm-level data, it shows that greater markups are associated with lower labor share as well as lower investment, productivity growth and exports. These channels all point to an effect that is detrimental to the effort to decrease poverty and inequality.

[Chart omitted]

There is also strong evidence of sizable and increasing market power in advanced economies (Figure 2). There is no corresponding rise in market power in emerging economies, although this does not preclude higher market power in these economies than that in advanced countries (IMF 2019b). De Loecker and Eeckhout (2020) document the rise in market power and profitability in the U.S. over the last decades and relate it to salient macroeconomic trends such as the decline in the labor income share and the decrease in labor market dynamics. Philippon (2019) argues that there exist extraordinary monopoly and oligopoly rents that are particularly detrimental to the interest of the poorest. In particular, he compares the U.S. to the EU, which have similar technologies. The dramatic change in communication costs in France after the entry of one additional operator (Free) in 2011 is a salient example. While costs were lower in the U.S. until 2011, they fell in relative terms by 40 percent within two years in France. Rising costs of communication, which represent a non-negligible share of the consumption basket (about 2 percent in the US average) and is nowadays akin to a necessity, would hurt more the poor. A similar pattern would have an even stronger effect in developing economies.

[Chart omitted]

The direct cost of anti-competitive behavior is high. Many studies estimate this cost by implied price overcharge, typically stemming from identified cartels. A common approach to estimating the price overcharge consists in applying a difference-in-difference technique, that is, by comparing prices in a market before and after an infringement was identified (e.g., a cartel) to a “counterfactual” market in a different location or product market where no infringement was identified.3 The estimated price overcharges in advanced economies are found to be large on average, ranging from 15 to about 50 percent. Ivaldi et al. (2017) extends these estimationsto 20 developing economies, using a database of over 200 major cartel episodes over 1995–2013. They estimate that the harm to the economy in terms of excess profits resulting from price overcharges could reach about 4 percent of GDP, accounting for the probability of undetected cartels. The cost of cartels could extend to overcharges in intermediate goods, ultimately affecting finished products, as well as procurement of public goods, or it could also affect the economy through a reduction in output (World Bank-OECD 2017). Even without cartels, anti-competitive behavior would result in higher prices and lower production.

There is also growing evidence that the lack of competition not only affects more strongly the poorest countries but also hurts the poor more in each country. Higher market power in food, beverages and medicines was shown to be regressive, that is, they hurt more the poorest, as shown using Mexican data (Urzua 2013). Similar results exist in the context of advanced countries (e.g., Creedy and Dixon 1998 and 2000). There is also evidence that prices in sub-Saharan Africa are higher than in other developing regions, controlling for income and other f actors. The extra cost of living in this region is negatively correlated with aggregate measures of competition (IMF 2019a). OECD (2017), using a calibrated model on a selected group of advanced countries, finds that market power could be responsible for a sizable increase in the wealth of the richest 10 percent and a large reduction in the income of the poorest 20 percent.

The decline in the labor share has also been interpreted as a sign of rising market power. Labor share has been decreasing in the U.S. and other advanced economies (IMF 2019b). This decline in labor share could be explained to a large extent as a result of the Information Technology (IT) revolution as argued by Aghion and others (2019). This revolution allowed superstar firms to expand into many sectors of the economy. A s these firms have higher markups and lower labor shares than non-superstar firms, the decline in aggregate labor share and corresponding increase in aggregate markups reflect a “composition effect”. In other words, it is not the result of a within-firm increase in markup or a decline in labor share. Evidence of the predominance of a “between-firm” (or “composition”) effect over a “within-firm” effect is provided by De Locker and Eeckout (2019) and Baqaae and Farhi (2019). IMF (2019b) shows that the “reallocation” effect is pronounced in the U.S. but less so in other advanced countries. The long-term effect of this increasing hegemony of superstar firms has been to discourage innovation and entry by non-superstar firms, thereby leading to a decrease in aggregate productivity growth, broad-based growth, and business dynamism. This increasing hegemony, in turn, has been facilitated by an insufficient regulation of mergers and acquisitions, in other words by a competition policy, which has not adapted to the digital economy.

#### Covid destroyed the industry.

Jankowicz ’20 [Mia; April 27; News Reporter at Insider's London office; *Business Insider,* “Farmers are Destroying their Own Crops After the Coronavirus Ravaged the Food Market — and Say USDA Failed to Help Them Get It to Hungry Americans in Time,” <https://www.businessinsider.com/food-destroyed-farms-amid-covid-19-struggling-families-go-hungry-2020-4>; KS]

Millions of pounds of food is being wasted on US farms after demand collapsed because of the coronavirus pandemic, according to multiple reports.

Farmers are pouring thousands of gallons of milk down the drain, and crushing ripe fruit and vegetables back into the soil with heavy machinery because they have no way to put it on the market for a profit.

The waste is due to a collapse in parts of the service industry forced to close because of the virus. It means buyers like restaurants, hotels, schools, and sports venues no longer need ingredients, which has in turn caused demand to plummet in some cases to half its regular levels, according to The Guardian.

The federal government launched a program to redistribute this food, setting aside $3 billion for the US Department of Agriculture (USDA) to buy it up and send it to struggling Americans.

However, industry leaders and lawmakers have complained that USDA failed to launch the program quick enough, leaving producers with no choice but to waste huge quantities of food, Politico reported.

Surplus fruit and vegetables have been plowed back into the ground in a process known as "re-mulching." This prevents the crops rotting in the field and attracting pests.

Producers in some states have been asked by the cooperative Dairy Farmers of America to dump thousands of gallons of milk which is now un-sellable, according to the Milwaukee Journal Sentinel.

One typical dairy in Wisconsin, the Golden E Dairy has been pouring up to 25,000 gallons of milk down the drain, reported the paper.

Although the co-op has paid for the wastage so far, it's unclear how long this can continue.

At the same time, there is increased demand at food banks as newly furloughed or laid-off workers struggle to feed their families.

One of the country's leading food bank networks, Feeding America, released a report on April 22 which said that the virus could cause a record number of children to go without proper food.

Tom Vilsack, the former secretary of agriculture under the Obama administration, told Politico: "It's not a lack of food, it's that the food is in one place and the demand is somewhere else and they haven't been able to connect the dots."

Back in March, industry leaders and lawmakers called on USDA to step in by buying up the surplus and redistributing it to food banks, according to Politico.

In Florida, Commissioner of Agriculture Nikki Fried, a Democratic representative, led congressional calls to USDA to take action.

But it was not until around a month later, on April 17, that President Donald Trump directed USDA to launch its $19 billion Coronavirus Food Assistance Program.

The program is meant to provide direct support to farmers and devote $3 billion to buying up fresh fruits and vegetables, meat, and dairy products, at a rate of around $300 million a month.

This food will then be redistributed to food banks, faith organizations and other nonprofits.

However, it may have come too late. According to Politico, federal officials think the process of buying up and redistributing the food could take another month, by which time peak season will have passed.

Brittany Lee, a blueberry farmer and executive director of the Blueberry Growers Association, told Politico that the help would come too late for Florida farmers.

Commissioner Fried called the move "too little, too late" in a letter to USDA on April 22, which said that the USDA plan would cover little of Florida's forecast $522 million agriculture losses.

"There are serious concerns over payment caps that cover just a small fraction of losses our producers have already experienced," she said in a letter to USDA.

"For weeks, we have called for immediate federal purchases to help our fresh fruit and vegetable producers mitigate these losses, but the purchases coming now may be too late in the season for Florida farmers to benefit."

Business Insider has approached the USDA for comment. The department told Politico in a statement that it had moved quickly to avert the situation.

#### So has weather, trade, and immigration.

Thatcher ’19 [Mary Kay; July 10; Senior Lead of Federal Government Relations, Syngenta; *CNBC*, “Farm States Slammed by Double Whammy of US-China Trade War and Immigration Woes,” https://www.cnbc.com/2019/07/10/farm-states-slammed-by-us-china-trade-war-and-immigration-woes.html; KS]

Farm Belt states are great for business. The “I” states — Iowa, Illinois, Indiana — along with Nebraska, Kansas, Minnesota, Missouri, California, Texas and others, are powerhouse food producers. U.S. agriculture typically harvests enough for our own consumption and about 20% more for export.

But the farm economy — never a sure thing — is challenged this year like at no other time in recent history, at least since the mid-1980s. Ironically, the problem this time is agriculture’s amazing productivity in the U.S. and other developed nations. Five straight years of bumper crops have resulted in excess supply, depressing commodity prices and eroding the savings and equity on the balance books.

Add to this extreme weather this spring that has produced massive flooding and significantly delayed most planting, which will mean lower yields this fall. Eventually, this may raise commodity prices, but in the short term it creates a “double whammy”: less to sell at lower prices, resulting in drastically reduced income. Which states are hurt most depends on variables particular to each state. California is impacted most by lack of labor, while Wisconsin suffers worst from bankruptcies and dairy losses, for instance. As the largest soybeans-producing states, Iowa and Illinois invariably are hit hardest on multiple fronts by adverse weather patterns and prolonged trade disputes.

Then there are the ongoing trade issues and tariffs with China, Mexico, Canada and Japan, our top trading partners. Farmers should get some relief from the June 30 cease-fire between the U.S. and China that has stopped additional tariffs on Chinese goods indefinitely. But trade is still a concern.

Another complication: China’s pork producers are suffering from an outbreak of African Swine Fever that may cut their production in half. U.S. farmers export soybeans to China as feed, but with significantly lower pork production, China won’t need as much.

Finally, there are critical shortages of farm labor due to Washington’s inability to deal with basic immigration reform. Put it all together and farmers are facing a “perfect storm” that is driving many to financial disaster even with federal aid.

Family farms weather the perfect storm

About 98% of U.S. farms are family owned, so these matters hit home. Net farm income has fallen 50% since 2013, from $140 billion to $70 billion. Working capital has decreased about 75% since 2012, from $165 billion to $38 billion. Farm debt has steadily increased about 30% since the early 1990s now more than $400 billion. Farm bankruptcies are up, as are Chapter 12 filings.

Weather is beyond our control. But our trade and immigration policies are not. What farmers want most is trade, not aid. Trade uncertainties — whether driven by disputes on tariffs, as we are seeing now, or from unpredictable approvals of genetically modified crops in certain foreign countries — affect planting as well as grain marketing decisions. Fair and open global trade in agriculture can’t come soon enough for U.S. farmers, ranchers and agribusinesses.

Ditto immigration reform. The lack of an adequate agricultural labor force has dramatically impacted farmers. There are not enough workers to pick fruits and vegetables, or help milk cows, or keep the livestock packing plant lines running efficiently.

In the crosshairs of public policy

Most farmers and ranchers have been supportive of the president’s trade policies, especially with China. But there can be long-term ramifications from the most recent trade disputes. Faced with steeply higher prices, importing countries often seek other sources of supply. That can cost U.S. farmers important markets developed over decades. Chinese buyers looking to Brazil and Argentina for soybean supplies — causing an 85% year-on-year drop in U.S. farmers’ soy exports to China as of March 2019 — is case in point and hopefully reversible before it’s too late. Trade policy veterans know well: the hardest market to get is the one you had and lost.

On immigration, farmers see themselves as collateral damage to the incessant partisan feuding and deadlock in Congress, where some seem to care more about scoring political points than actually solving problems and looking out for the interests of America’s key industries.

#### No food wars.

Vestby ’18 [Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, <https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/>]

It is perhaps surprising, then, that there is littlescholarlymerit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violentconflict requires people to have both themeans andthewill. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources ofdiscontent are considerablymore complex – linked to political structures, landownership, corruption, the desire for democratic reforms and generaleconomic problems

 – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while theinternationalmedia have a tendency to seek simpleresource-relatedexplanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by morecomplex political relationships.

## 1AR

### Circumvention

#### Courts will enforce the plan faithfully.

Charles S. Dameron 16, Yale Law School, J.D. 2015. "Present at Antitrust’s Creation: Consumer Welfare in the Sherman Act’s State Statutory Forerunners." https://www.yalelawjournal.org/note/present-at-antitrusts-creation-consumer-welfare-in-the-sherman-acts-state-statutory-forerunners

Notwithstanding occasional invocations of the judiciary’s “common law” authority over the Sherman Act, federal courts have, since the Act’s earliest days, expended great energy attempting to divine the legislative purpose behind it.5If the Sherman Act were truly a blanket grant of common law-making authority to federal courts, they would hardly need to undertake such searching inquiries. The Supreme Court’s and lower courts’ close attention to the Sherman Act’s language and legislative history indicates that they have sought to abide by their constitutional role as interpreters of federal statutes.6

It is therefore more precise to say that the judiciary enjoys an especially wide authority to fill statutory gaps when interpreting the Sherman Act due to the Act’s ambiguous language, its constancy over time, and the fact—peculiar in light of many modern regulatory regimes—that Congress did not assign rulemaking authority to an administrative agency. These traits do not imply that federal courts may pursue whatever antitrust policy they find most desirable or wise; courts are obliged to follow the statute’s contours to the extent that they can perceive those contours.7

### AT Three Branches

#### ‘Federal government’ is the three branches.

U.S. Legal ’16 [U.S. Legal; 2016; Organization offering legal assistance and attorney access; U.S. Legal, “United States Federal Government Law and Legal Definition,” <https://definitions.uslegal.com/u/united-states-federal-government/>]

The United States Federal Government is established by the US Constitution. The Federal Government shares sovereignty over the United Sates with the individual governments of the States of US. The Federal government has three branches: i) the legislature, which is the US Congress, ii) Executive, comprised of the President and Vice president of the US and iii) Judiciary. The US Constitution prescribes a system of separation of powers and ‘checks and balances’ for the smooth functioning of all the three branches of the Federal Government. The US Constitution limits the powers of the Federal Government to the powers assigned to it; all powers not expressly assigned to the Federal Government are reserved to the States or to the people.

### AT Success Takes Too Long

#### Link solves itself---the first few suits deter future attempts.

Davis ’17 [Joshua and Robert Lande; 2017; Professor and Director of Center for Law and Ethics at the University of San Francisco; Venerable Professor of Law at the University of Baltimore, M.P.P. and J.D. from Harvard University; Scholar Works, “Restoring the Legitimacy of Private Antitrust Enforcement,” Ch. 6]

62 Silver, supra note 61, at 1403; id. at 1402 – 03 (noting that plaintiffs “rationally expect to be outgunned” and that “a defendant can spend as much as it wants”).

63 See Robert G. Bone, Modeling Frivolous Suits, 145 U. PA. L. REV. 519, 540 (1997) (“By litigating instead of settling the first few frivolous suits, a repeat-player defendant can build a reputation for fighting. Once established, this reputation will signal other frivolous plaintiffs not to expect a settlement, so they will not sue.”). Thus, Professor Bone concludes that “complete information models” (where plaintiffs and defendants both know that a claim is weak) “do not provide a convincing explanation for why frivolous suits are problematic . . . .” Id. at 541.

End of Footnotes 61, 62, and 63:

## T

### 1AR – We Meet

#### Antitrust laws include regulations.

Twin ’20 [Alexandra Twin; December 22; financial reporter, reviewed by Robert C Kelly, Economics PhD from Harvard University; Investopedia, “Guide to Antitrust Laws,” https://www.investopedia.com/terms/a/antitrust.asp]

What Is Antitrust?

Antitrust laws are regulations that encourage competition by limiting the [market power](https://www.investopedia.com/terms/m/market-power.asp) of any particular firm. This often involves ensuring that [mergers and acquisitions](https://www.investopedia.com/terms/m/mergersandacquisitions.asp) don't overly concentrate market power or form [monopolies](https://www.investopedia.com/terms/m/monopoly.asp), as well as breaking up firms that have become monopolies. Antitrust laws also prevent multiple firms from [colluding](https://www.investopedia.com/terms/c/collusion.asp) or forming a [cartel](https://www.investopedia.com/terms/c/cartel.asp) to limit competition through practices such as [price fixing](https://www.investopedia.com/terms/p/pricefixing.asp). Due to the complexity of deciding what practices will limit competition, antitrust law has become a distinct legal specialization.

#### ‘Antitrust laws’ include any unfair competition law.

CFR ’21 [Code of Federal Regulations; current through July 1; originally promulgated in 1983’s “Export Trade Certificates of Review,” 48 FR 10596-01; Westlaw, “§ 325.2 Definitions,” 15 C.F.R. § 325.2]

As used in this part:

(a) Act means title III of Pub.L. 97–290, Export Trade Certificates of Review.

(b) Antitrust laws means the antitrust laws, as the term is defined in the first section of the Clayton Act (15 U.S.C. 12), section 5 of the Federal Trade Commission Act (15 U.S.C. 45) (to the extent that section 5 prohibits unfair methods of competition), and any State antitrust or unfair competition law.

### 1AR – Counter-interp

#### ‘By’ indicates the means.

Prewitt ’2k [James K., Phillip R. Garrison, Robert S. Barney; July 27; Judges on the Missouri Court of Appeals, writing Per Curiam; Westlaw, “Little Portion Franciscan Sisters, Inc. v. Boatright,” 26 S.W.3d 443]

In so concluding, we note that the preposition “by” is defined as “[w]ith the use of; through,” “[t]o the extent of,” or “[t]hrough the agency or action of.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978). The same source states that a synonym for “by” is “through” and that the preposition “by” indicates the agency or means by which something is accomplished. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) defines “by” as “through the means or instrumentality of,” “through the direct agency of,” “through the medium of,” or “through the work or operation of,” and that it is “used as a function word to indicate something that forms an accompanying setting or condition ... or that constitutes a manner ... often with an added sense of means.” For the ballot proposition to have had the meaning espoused by Defendants, the voter would have had to ignore the important word “by.” To do so is to ignore the plain and ordinary reading of the words used.

## Ag DA

### Antitrust Thumps – 1AR

#### Biden just took major antitrust action today against meat industry.

Dorning ’22 [Mike; January 3; reporter; Fortune, “Biden’s new plan to fight inflation: take on Big Meat,” <https://fortune.com/2022/01/03/biden-inflation-food-prices-meat-packing/>]

President Joe Biden will announce plans Monday to combat the market power of the giant conglomerates that dominate meat and poultry processing, ratcheting up a months-long campaign that has blamed anti-competitive practices in the industry for contributing to surging food inflation.

Biden will join Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to meet virtually with ranchers and farmers to hear complaints about consolidation in the industry, while a newly launched portal will allow them to report unfair trade practices by meatpackers. The White House will also highlight initiatives it is taking to counter meatpackers’ economic power, including $1 billion in federal aid to assist expansion of independent processors and new competition regulations under consideration.

The latest announcement focuses fresh attention on Biden’s fight with the meat industry and helps cast him as a president willing to take on powerful business interests over consumer prices. Many Democrats are concerned that months of negotiations over Biden’s economic plan have distanced him too much from the most pressing kitchen-table concerns facing Americans.

Inflation has swiftly moved to the top of public concerns as the annual rise in consumer prices hit its highest level in 40 years. Meat prices, which in November were up 16% from a year earlier, have been the biggest contributor to grocery inflation. Meatpacking industry representatives have blamed soaring prices on labor shortages, rising fuel prices and supply-chain constraints.

Biden singled out the meat and poultry processing industries for scrutiny in a July executive order on promoting competition across the economy. His top economic adviser later criticized meatpackers for “pandemic profiteering.” The U.S. Agriculture Department also announced plans in June to consider three new sets of regulations on unfair trade practices in livestock and poultry markets, with officials anticipating the proposal of new rules early this year.

#### Absent legislation, mergers will be blocked.

Swartz ’22 [Jon; January 1; reporter, citing antitrust attorney Valarie Williams; MarketWatch, “Big Tech heads for ‘a year of thousands of tiny tech papercuts,’ but what antitrust efforts could make them bleed?” <https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776>]

Agencies are more aggressively scrutinizing tech-related deals, antitrust attorney Valarie Williams told MarketWatch. Whether investigations block mergers, they “can be disruptive and stop mergers if not discourage them,” she said.

“Legislation or not, that will not affect at all DoJ and FTC in antitrust enforcement based on existing law,” Williams said. “The pendulum has definitely swung after years of inactivity and readily-approved mergers.”

#### Antitrust enforcement of Big Tech will be unprecedented in 2022.

Swartz ’22 [Jon; January 1; reporter; MarketWatch, “Big Tech heads for ‘a year of thousands of tiny tech papercuts,’ but what antitrust efforts could make them bleed?” <https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776>]

Antitrust enforcement of Big Tech is expected to take place on a scale never before seen in 2022, following years of escalating rhetoric from Washington.

#### Scrutiny now.

Reuters 11-17 [November 17, 2021; *Reuters,* “Biden Asks FTC Redouble Probe Possible Illegal Conduct by Oil Gas Companies,” <https://www.reuters.com/business/energy/biden-asks-ftc-redouble-probe-possible-illegal-conduct-by-oil-gas-companies-2021-11-17/>; KS]

WASHINGTON, Nov 17 (Reuters) - U.S. President Joe Biden on Wednesday said there was mounting evidence of anti-consumer behavior by oil and gas companies that is keeping fuel prices elevated, asking the Federal Trade Commission to dig deeper into possible "illegal conduct" in the market.

The White House is pressing on several fronts to try to lower fuel costs, even as tight global oil supply drives gasoline and heating oil prices higher. Retail gasoline prices recently touched seven-year highs as consumer demand has recovered while oil supply remains below pre-pandemic peaks.

Biden in August asked the FTC to investigate possible illegal conduct causing the spike in gas prices, which are contributing to surging inflation. On Wednesday he told FTC Chair Lina Khan in a letter that further action was needed.

"The Federal Trade Commission has authority to consider whether illegal conduct is costing families at the pump. I believe you should do so immediately," he wrote.

An FTC spokesperson said they were also concerned about the issues raised in the White House letter and that the consumer agency was looking into the situation, a spokesperson said.

#### They have stopped mergers.

CPI 10-21 [October 21; Competition Policy International; “US Antitrust Regulator Slows Down Oil & Gas Mergers,” <https://www.competitionpolicyinternational.com/us-antitrust-regulator-slows-down-oil-gas-mergers/>; KS]

According to regulatory filings, US antitrust regulators have extended the approval process for at least five oil and gas mergers and acquisitions in the last three months. Reuters reported this may be due to President Joe Biden’s administration scrutinizing deals in a bid to tackle soaring energy prices.

The slowdown comes amid growing pressure on policymakers to respond to consumer angst over skyrocketing retail gasoline prices, as US crude futures hit multi-year highs. The White House has been calling US oil and gas producers to ask how they can help lower prices, Reuters reported last week.

The move is also emblematic of a new push by the Federal Trade Commission (FTC) to protect consumers, workers, the environment and society at large. Under its new chair Lina Khan, the antitrust regulator has taken a tough stance on deals ranging from technology to healthcare.

Such scrutiny is rare in the oil and gas sector, where deals typically sail past regulators, more than a dozen industry sources, including lawyers and bankers advising on energy deals, said in interviews.

This is because these companies sell their output to a global market, and regional consolidation has no impact on energy prices dictated by supply and demand worldwide.

Maureen Ohlhausen, chair of antitrust & competition law at Baker Botts, who served as acting FTC chair from January 2017 until April 2018 under the previous Trump administration, called the scrutiny unprecedented.

“Even though previous Democratic FTC commissioners wanted active enforcement, the industry was told what the standards were, deals got reviewed and things moved along. This is really different,” Ohlhausen said.

### Ag Industry Thumpers – 1AR

#### Ag industry thumped:

#### 1 – Covid.

Economist ’20 [September 20; *The Economist*, “America’s Farmers Face Multiplying Pressures,” <https://www.economist.com/united-states/2020/09/20/americas-farmers-face-multiplying-pressures>; KS]

Last, this spring, as farmers reckoned with the fallout from floods, low prices and tariffs, covid-19 began to spread. Demand for food and drink products plummeted as restaurants, hotels and schools closed. Some farmers had to dump thousands of gallons of milk they could not sell; others smashed eggs or buried fresh vegetables. Support groups like the Farmer Angel Network had to stop meeting in person, and are struggling to recreate online the same sense of shared humanity.

In March, when Congress passed the CARES Act, America’s mammoth covid-19 relief package, bankruptcies slowed, telehealth services were expanded and some farmers felt a temporary reprieve. But many of the bill’s protections expired at the end of July and Congress has yet to pass a second stimulus. Without government help, Farm Aid fears that there may be a slew of foreclosures.

There is some good news. More people in rural communities are recognising the struggles agricultural workers face, and are creating a bespoke safety-net to help them. Mr Roecker says he gets calls from farmers across the upper Midwest who want to start their own version of the Farmer Angel Network. Ms Rademaker and Carle Hospital offer training in “mental-health first aid” to people who work closely with farmers, such as veterinarians and local bankers, so they can identify early signs of mental illness or substance abuse.

Yet even when the coronavirus recedes, problems such as climate change, consolidation and trade friction that contribute to farm stress will remain. And America’s farmers, like the rest of the country, are ageing. It can be debilitating to worry about bequeathing to children farms that have been in the family for generations, and the debt that comes with them. “I thought I was going to lose the farm that my grandfather started,” Mr Roecker says, reflecting on his darker moments. “It plays with your mind like you wouldn’t believe.”

#### 2 – Weather and trade.

Economist ’20 [September 20; *The Economist*, “America’s Farmers Face Multiplying Pressures,” <https://www.economist.com/united-states/2020/09/20/americas-farmers-face-multiplying-pressures>; KS]

Things seem to have worsened recently. Calls to Farm Aid, which runs a helpline, surged by 109% year-on-year in 2018. By June this year, calls were up by another 30% on average. It is not just the increase that is worrying. Ms Harvie reckons that 61% of calls in 2020 have been from farmers in crisis, meaning they need emergency legal, financial or mental-health help. Before 2018, she says, crisis calls made up only about a third of the total. The increased frequency of natural disasters caused by climate change, recent financial hardship and the covid-19 pandemic have increased the troubles besetting farmers.

Start with climate change. Farmers across the greater Midwest have seen myriad extreme weather events affect crop yields in the past few years: drought in the Dakotas, wildfires across the Great Plains and “false springs” in Wisconsin (where, for example, apples and cherries will ripen in warming weather only to freeze again). In August, more than 10m acres of maize and soyabeans were damaged when a “derecho”—a series of thunderstorms with hurricane-force winds—tore through Iowa. Flooding is perhaps the most common blight. The federal government declared an agricultural disaster in Illinois last year after heavy rains across the state. Chris Kucharik, an agronomist at the University of Wisconsin in Madison, says a lot of land has not had a chance to dry out for years and cannot now be planted.

Second, farmers often tell mental-health workers that financial troubles are their biggest worries. On the surface, things don’t seem so bad. The United States Department of Agriculture (USDA) forecasts that net farm income will increase by $19bn to $102.7bn in 2020. But cash receipts from the sale of livestock and crops look likely to fall to their lowest levels in more than a decade, says John Newton, chief economist at the American Farm Bureau Federation, the country’s largest organisation of farmers and ranchers. That is largely because commodity prices are depressed. The reported growth in farm income is thanks to increased government aid. Remove federal payments, Mr Newton reckons, and net farm income would be relatively paltry, at $66bn, $10bn below the ten-year average.

Farming is also consolidating fast. The number of licensed dairy farms fell by 15% between 2017 and 2019. Wisconsin, home to many of them, leads the nation in farm bankruptcies. Small, family-owned farms feel pressure to expand their operations to sell higher volumes of milk to offset low prices. But scaling up can cost millions, which farmers have to borrow. No wonder the USDA forecasts that inflation-adjusted farm debt in 2020 will be at its highest level since 1981.

Trade policy, too, is adding to the stress on farms. The Trump administration’s trade war with China dramatically curbed soyabean exports. Amy Rademaker, a rural-health expert at Carle Hospital in Urbana, Illinois says she has heard farmers fret more about trade in the past two years than ever before.

### AT: Impact

#### FINISHING 2AC CARD. No food wars.

Vestby ’18 [Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, <https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/>]

It is perhaps surprising, then, that there is littlescholarlymerit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violentconflict requires people to have both themeans andthewill. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources ofdiscontent are considerablymore complex – linked to political structures, landownership, corruption, the desire for democratic reforms and generaleconomic problems

#### STARTING

 – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while theinternationalmedia have a tendency to seek simpleresource-relatedexplanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by morecomplex political relationships.

#### The countries most likely to draw in great powers have the best resilience.

Cliffe ’16 [Sarah; 3-29-2016; Director of the Center on International Cooperation at New York University; “Food Security, Nutrition, and Peace,” Center on International Cooperation at New York Universityhttp://cic.nyu.edu/news\_commentary/food-security-nutrition-and-peace]

However, current research does not yet indicate a clear link between climate change, food insecurity and conflict, except perhaps where rapidly deteriorating water availability cuts across existing tensions and weak institutions. But a series of interlinked problems – changing global patterns of consumption of energy and scarce resources, increasing demands for food imports (which draw on land, water, and energy inputs) can create pressure on fragile situations.

Food security – and food prices – are a highly political issue, being a very immediate and visible source of popular welfare or popular uncertainty. But their link to conflict (and the wider links between climate change and conflict) is indirect rather than direct.

What makes some countries more resilient than others?

Many countries face food price or natural resource shocks without falling into conflict. Essentially, the two important factors in determining their resilience are:

First, whether food insecurity is combined with other stresses – issues such as unemployment, but most fundamentally issues such as political exclusion or human rights abuses. We sometimes read nowadays that the 2006-2009 drought was a factor in the Syrian conflict, by driving rural-urban migration that caused societal stresses. It may of course have been one factor amongst many but it would be too simplistic to suggest that it was the primary driver of the Syrian conflict.

Second, whether countries have strong enough institutions to fulfill a social compact with their citizens, providing help quickly to citizens affected by food insecurity, with or without international assistance. During the 2007-2008 food crisis, developing countries with low institutional strength experienced more food price protests than those with higher institutional strengths, and more than half these protests turned violent. This for example, is the difference in the events in Haiti versus those in Mexico or the Philippines where far greater institutional strength existed to deal with the food price shocks and protests did not spur deteriorating national security or widespread violence.