# Round 3 Doc

## 1AC---Round 3

### Anticompetitive---1AC

#### Contention one is Anti-competitiveness.

#### Antitrust avoidance causes excessive immunity and inconsistency---collapses consumer protection.

Karen Roche 12. J.D. Candidate, May 2013, Loyola Law School Los Angeles; B.A., May 2010, University of San Diego. Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines, 45 Loy. L.A. L. Rev. 1295 (2012). Available at: https://digitalcommons.lmu.edu/llr/vol45/iss4/6

III. CRITIQUE

Because the Court has failed to recognize a conflict between the goals of the antitrust laws on the one hand and the First Amendment and federalism on the other, the Court has not used a principled method of creating the boundaries of the Noerr or state action immunities. The sham exception to the Noerr doctrine is far too narrow and is ineffective as a limit. The lack of a misrepresentation exception creates additional problems within the doctrine because it undermines the democratic process. Additionally, the foreseeability standard within the state action doctrine requires almost nothing in terms of a clear state policy before it immunizes the anticompetitive conduct of a municipality or a private actor. Municipalities are left to act in their own best interests since they are exempted from the active supervision requirement. As a result, both the Noerr and state action doctrines are far too broad, and consequently, consumers are harmed because they do not receive the protection of antitrust laws.

A. The Court Misinterpreted the Sherman Act by Using the Canon of Constitutional Avoidance

The Noerr Court’s interpretation of the Sherman Act, by which the conflict between the First Amendment and antitrust laws was avoided, is inaccurate in light of the Act’s legislative history. The Court held that there was no basis in the legislative history of the Sherman Act to regulate political activity rather than business activity.162 However, “part of the ‘public outcry’ generally seen as leading to the passage of the Sherman Act involved the widely held view that the nineteenth-century economic giants . . . secured and maintained their monopolies through unethical economic and political practices.” 163 In one of the speeches Senator Sherman made in defense of his bill, he included the political influence of the trusts as a reason to take legislative action.164 Further, the common law, which was expressly incorporated into the Sherman Act, condemned monopolies obtained by deceptive or coercive petitioning of the legislature.165 Thus, it seems clear that the Sherman Act’s drafters did intend the Act to apply in the political arena.166 Further, protection of free speech and the development of First Amendment jurisprudence did not gather momentum until the 1930s.167 At the time Congress enacted the Sherman Act, the Supreme Court had not even applied the First Amendment right to petition.168 However, by the time Noerr was decided in 1961, First Amendment jurisprudence had been developed and strengthened, so it was recognized that the government was prohibited from interfering with the political activities of its citizens.169 Thus, at that time, “[t]he political process, by which information is conveyed and desires expressed, [was] considered too important to be restricted by concerns for . . . economic liberty.” 170 Therefore, while the Noerr Court held that there was no basis in the history of the Sherman Act for applying antitrust laws to political activity, it seems more likely that the Court was simply reacting to the prevailing norms of its time. The Court’s intention likely was to give utmost deference to citizens in petitioning and speech activity. However, instead of creating an exception to the Sherman Act out of deference to the First Amendment, the Court incorrectly stated that the Sherman Act was not meant to regulate this area.

B. The Noerr Court’s Failure to Recognize a Conflict Between Antitrust Law and the First Amendment in Has Resulted in an Excessively Broad Immunity

Although it was a simple solution for the Court to construe the Sherman Act to avoid any conflict with the First Amendment, the goals of antitrust law and the goals of the First Amendment do frequently conflict.171 The First Amendment protects the citizens’ request for governmental action,172 but when those requests or the result of the requests create anticompetitive effects, they naturally conflict with antitrust laws.173 Although, under the Supremacy Clause, the Constitution must prevail when a conflict arises, the Supreme Court made Noerr immunity unnecessarily complicated by not recognizing that a conflict exists when it created the doctrine. 174

---FOOTNOTE 174 STARTS, MIDPARAGRAPH---

174. The Supremacy Clause provides that the Constitution is the supreme law of the land. U.S. CONST. art. VI, cl. 2. Thus, any conflict between constitutional law and antitrust law must be decided in favor of the Constitution. However, as the doctrine currently exists, the Court is not just giving deference to the Constitution since the Court said that antitrust law was not meant to regulate in this area. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961). If the Court explicitly recognizes the conflict between the First Amendment and antitrust law, even though the First Amendment must prevail, the Court can still narrow Noerr while respecting the tension between and the hierarchy of these principles.

---FOOTNOTE 174 ENDS, PARAGRAPH CONTINUES---

Instead of creating an exception to antitrust law, where immunity is carved out in deference to the First Amendment, the Court said that antitrust law did not apply at all.175

---FOOTNOTE 175 STARTS, MIDPARAGRAPH---

175. See McGowan & Lemley, supra note 27, at 300 (“The Court is clear that it does not want to encroach on the First Amendment rights identified in Noerr. . . . But the Court has not used First Amendment principles in defining the scope of the doctrine.”).

---FOOTNOTE 175 ENDS, PARAGRAPH CONTINUES---

Although it seems that the result would be the same, by taking the First Amendment issue out of the equation altogether, the Court failed to create any boundaries to the doctrine.176

---FOOTNOTE 176 STARTS, MIDPARAGRAPH---

176. Id. (The “doctrine [has] developed solely by the desire to avoid a problem—trampling upon First Amendment rights—without reference to a theory that tells us when that problem arises or why.”).

---FOOTNOTE 176 ENDS, PARAGRAPH CONTINUES---

If there is no conflict and the Sherman Act simply does not apply, it is much harder for the courts to know when to apply Noerr than it would be if they could use the First Amendment as a guideline. The Supreme Court’s failure has resulted in the development of an unclear doctrine, which is too broad and which the lower courts are still applying inconsistently fifty years after it was created.177

#### Causes anticompetitive conduct---boundary uncertainty collapses consumer welfare.

Maureen K. Ohlhausen et al. 06, Director, Office of Policy Planning. James C. Cooper, Deputy Director, Office of Policy Planning. Gregory P. Luib, Assistant Director, Office of Policy Planning. Christopher M. Grengs, Attorney Advisor, Office of Policy Planning. Alden F. Abbott, Associate Director, Bureau of Competition. Thomas Krattenmaker, Office of Policy and Coordination, Bureau of Competition. Theodore A. Gebhard, Office of Policy and Coordination, Bureau of Competition. Donald S. Clark, Secretary. “Enforcement Perspectives on the Noerr-Pennington Doctrine”. An FTC Staff Report 2006. https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf

Clearly, the Noerr doctrine is meant to protect the ability of governments acting in their sovereign capacity to hinder or supplant competition and the ability of citizens to request such government action. Equally clearly, the doctrine recognizes that not all activities directed at government are genuine attempts to request a sovereign government action. What is not clear, however, are the exact boundaries of Noerr’s protection for such activities, and neither the Supreme Court case law nor federal appellate decisions provide a firm guide. In the absence of clear court guidance, this Report attempts to interpret the doctrine to fully protect the values underlying the right to petition while also protecting, where possible, the competition values animating antitrust enforcement with respect to the three varieties of conduct addressed herein. The Report reflects the viewpoint of FTC staff, who has grappled with these issues when faced with anticompetitive conduct in the form of communications with the government. Given that limits on competition impose substantial costs on consumers, staff believes it is vital to consumer welfare to avoid setting the boundaries of Noerr protection beyond the limits compelled by the First Amendment or effective government decision-making concerns. It would be pointless to permit anticompetitive behavior to thrive and inflict increasing harm on consumers, if such behavior does not advance the important values Noerr is meant to safeguard.

A generous level of access to government has numerous benefits and is a strength of the U.S. political system. Although our government could not function properly without open access, it is also true that the abuse of governmental processes can impose a substantial financial burden on competitors, much of which may be incurred regardless of the outcome of the process. One prime example of the dual nature of access to government is litigation. Private lawsuits provide firms with an important means of protecting their legitimate interests, both commercial and otherwise. However, the substantial costs associated with litigation may, at times, create strong incentives for firms to invoke the process – without regard for its ultimate outcome – as a means of burdening competitors, or raising the costs of entry, rather than as a means of vindicating legal rights. Firms can also use repetitive administrative filings to inflict similar harm. Likewise, significant intentional misrepresentations or omissions of fact, if left unchecked, can subvert governmental processes, resulting in well-intentioned but ill-informed rules or regulations that grant firms monopoly power or otherwise harm consumers.

Interpretations of the Noerr doctrine that would shield abuse of the process and misrepresentations or omissions from antitrust enforcement stray from the underlying objectives of Noerr and are likely to impose costs on consumers without protecting genuine actions that are truly directed at obtaining a favorable government decision.

#### The plan solves---protects consumers from price spikes.

Karen Roche 12. J.D. Candidate, May 2013, Loyola Law School Los Angeles; B.A., May 2010, University of San Diego. Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines, 45 Loy. L.A. L. Rev. 1295 (2012). Available at: https://digitalcommons.lmu.edu/llr/vol45/iss4/6

V. CONCLUSION

Courts and scholars today recognize that the First Amendment right to petition is the basis for the Noerr-Pennington doctrine and that federalism is the root of the state action doctrine.359 However, these two doctrines have evolved far beyond what the First Amendment and federalism require. This departure can be traced to the Court’s holdings that petitioning and state action were “essentially dissimilar” from what antitrust legislation was designed to regulate. Contrary to the Court’s decisions, antitrust law is and should be concerned with regulating petitioning and state action.360 The doctrines in their current states are immunizing anticompetitive conduct that is very harmful to the consumer and that neither the First Amendment nor the principles of federalism protect. Consumers are left without the protection of antitrust law and end up paying far more than they should for goods and services. While these important constitutional protections deserve deference, the consumer is being harmed in the name of that deference by doctrines that do not align with what these principles require. Thus, the Court should narrow the reach of Noerr and Parker. By acknowledging that these doctrines concern constitutional protections and abandoning the notion that the Sherman Act simply does not apply in these contexts, the Court can use the First Amendment and federalism to define the outer limits of Noerr and Parker. This will afford more protection to the consumer and can be done without sacrificing the individual’s right to petition or detracting from a state’s sovereignty.

#### Independently, lack of clarity collapse competition.

James D. Hurwitz 85. J.D., University of California (Berkeley) Law School, 1972; LL.M., University of London School of Economics and Political Science, 1973; Senior Staff Attorney, Federal Trade Commission. “Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr”.

The Noerr doctrine rests primarily on three cases decided by the Supreme Court from 1961 through 1972.2 Since 1972, however, the Supreme Court has left to the lower courts the task of refining the doctrine.3 Although the doctrine's central principles are well established, its boundaries are not. This uncertainty at the margin is a matter of considerable practical importance. With the avalanche of regulation in the past two decades, businesses have developed an increasingly sophisticated awareness not only of how governmental decisions influence competition, but also of how competitors may influence government. Even though the trend in some industries is toward deregulation, government remains such an important actor in so many markets that virtually any expansion, contraction, or other shift in its role has the potential to create "winners" and "losers." The firms that can manipulate these shifts most adroitly enjoy a distinct competitive advantage.

Recognition of the asymmetrical impact that governmental decisions may have on firms and markets is reflected in the substantial-and rapidly accelerating-volume of lower court litigation seeking to define the limits of Noerr immunity.4 Like the outpouring of Noerr litigation, the writings of commentators also reflect concern with the abuse of governmental processes to achieve competitive advantage. Judge Bork, for example, who generally considers other forms of predation unlikely, nonetheless warns: "Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition."'5

In essence, the Noerr doctrine sets the ground rules by which courts grant or deny antitrust immunity to firms for their solicitations of governmental action. This article examines how courts have applied these ground rules, and suggests a more systematic, analytical approach for addressing conflicts between first amendment and competition policy values.

Before embarking on an analysis of the Noerr doctrine's contours, this article considers, from perspectives of strategy and competition policy, the significance of efforts to influence governmental actions. To this end, Part II examines how abuse of governmental processes may harm both competitors and the competitive process: (1) by making existing rivals suffer costs that the "abuser" does not bear; (2) by erecting or elevating entry and mobility barriers to potential or expanded competition; and (3) by facilitating collusion and other anticompetitive behavior. This assessment concludes that abuse of governmental processes may constitute a powerful, relatively safe, and often inexpensive strategic maneuver. Such conduct, therefore, raises serious competition policy concerns, especially if it is immune to antitrust challenge.

#### Consolidation undermines growth---promoting competition solves.

Fiona M. Scott Morton 20. Theodore Nierenberg Professor of Economics at the Yale University School of Management. “Reforming U.S. antitrust enforcement and competition policy,” https://equitablegrowth.org/reforming-u-s-antitrust-enforcement-and-competition-policy/.

Evidence that antitrust laws are falling short is plentiful. Many cartels go undiscovered, and tacit collusion is probably even more prevalent because it is harder for antitrust enforcers to prosecute and deter.9 Anticompetitive horizontal mergers (between rivals) appear to be underdeterred.10 A variety of clever strategies used by incumbents to exclude entrants, either by purchasing them when they are nascent or using tactics to confine them to a less threatening niche or forcing them to exit have been successfully deployed in recent years, often when antitrust enforcement is late or absent.11

Each of these sources of concern can be critiqued, but together they make a compelling case. Some of the evidence may have benign explanations in part, such as the growing importance of fixed costs, for example, when creating software or pharmaceuticals that leads naturally to higher markups, or the increasing benefit of being on the same platform with other users (known as “network effects” in the case of a social media site). Firms in industries with high fixed costs or large network externalities may exhibit high profits and productivity and low labor shares, and may earn high profits because they had a good idea early and executed well, thereby getting adoption from many consumers.12 Nonetheless, the overall picture is clear that market power has been growing in the United States for decades. Moreover, even where the explanation for growing market power is benign, we must ensure that companies do not use anticompetitive tactics to protect their position.

Firms with market power need not compete aggressively to sell their products, so they tend to raise prices, reduce quality, and/or innovate less. Market power can also contribute to slowed economic growth by, for example, suppressing productivity increases.13 Theoretical and empirical economic studies convincingly show that innovation is harmed by anticompetitive conduct.14

This is why antitrust enforcement is such a terrific policy tool to strengthen competition—it does not come with an efficiency downside, as do most policies that redistribute income. Policies that enhance competition are unambiguously beneficial for efficiency, as well as inclusive prosperity, with minor qualifications.15 Other policies for addressing inequality, in particular, such as labor market and tax policies, may create disincentives or allocative efficiency losses that must be weighed against their distributional benefits. Policies to enhance competition, by contrast, offer what is close to a free lunch.16

#### COVID creates an economic brink---recovery is strong now because of effective monetary policy, but we’ve hit the zero-lower bound.

Christopher Rugaber 21. Associated Press. “Federal Reserve keeps key interest rate near zero, signals COVID-19 economic risks receding.” https://www.chicagotribune.com/business/ct-biz-fed-interest-rates-economy-20210428-bumyc3ynpza6ri4ygsntmdsmya-story.html.

WASHINGTON — The Federal Reserve is keeping its ultra-low interest rate policies in place, a sign that it wants to see more evidence of a strengthening economic recovery before it would consider easing its support.

In a statement Wednesday, the Fed expressed a brighter outlook, saying the economy has improved along with the job market. And while the policymakers noted that inflation has risen, they ascribed the increase to temporary factors.

The Fed also signaled its belief that the pandemic’s threat to the economy has diminished, a significant point given Chair Jerome Powell’s long-stated view that the recovery depends on the virus being brought under control. Last month, the Fed had cautioned that the virus posed “considerable risks to the economic outlook.” On Wednesday, it said only that “risks to the economic outlook remain” because of the pandemic.

The central bank left its benchmark short-term rate near zero, where it’s been since the pandemic erupted nearly a year ago, to help keep loan rates down to encourage borrowing and spending. It also said in a statement after its latest policy meeting that it would keep buying $120 billion in bonds each month to try to keep longer-term borrowing rates low.

The U.S. economy has been posting unexpectedly strong gains in recent weeks, with barometers of hiring, spending and manufacturing all surging. Most economists say they detect the early stages of what could be a robust and sustained recovery, with coronavirus case counts declining, vaccinations rising and Americans spending their stimulus-boosted savings.

#### Eroding financial resilience causes war---that overcomes traditional barriers to conflict.

Jomo Kwame Sundaram & Vladimir Popov 19. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could easily spin out of control and ‘morph’ into military conflict, and worse, world war.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

#### Those wars draw-in great powers---that outweighs.

Lawrence H. Summers 17. US Secretary of the Treasury (1999-2001) and Director of the US National Economic Council (2009-2010), former president of Harvard University, where he is currently University Professor. “Will the Center Hold?” <https://www.project-syndicate.org/onpoint/recession-or-financial-crisis-political-fallout-by-lawrence-h--summers-2017-12?a_la=english&a_d=5a37edac78b6c709b8d260dd&a_m=&a_a=click&a_s=&a_p=%2Fsection%2Feconomics&a_li=recession-or-financial-crisis-political-fallout-by-lawrence-h--summers-2017-12&a_pa=section-commentaries&a_ps>=.

The risk from a purely economic point of view is that the traditional strategy for battling recession – a reduction of 500 basis points in the federal funds rate – will be unavailable this year, given the zero lower bound on interest rates. Nor is it clear that the will or the room for fiscal expansion will exist.

This means that the next recession, like the last, may well be protracted and deep, with severe global consequences. And the political capacity for a global response, like that on display at the London G-20 Summit in 2009, appears to be absent as well. Just compare the global visions of US President Barack Obama and UK Prime Minister Gordon Brown back then with those of Trump and Prime Minister Theresa May today.

I shudder to think what a serious recession will mean for politics and policy. It is hard to imagine avoiding a resurgence of protectionism, populism, and scapegoating. In such a scenario, as with another financial crisis, the center will not hold.

But the greatest risk in the next few years, I believe, is neither a market meltdown nor a recession. It is instead a political doom loop in which voters’ conclusion that government does not work effectively for them becomes a self-fulfilling prophecy. Candidates elected on platforms of resentment delegitimize the governments they lead, fueling further resentment and even more problematic new leaders. Cynicism pervades.

How else can one explain how the candidacy of Roy Moore for a US Senate seat? Moore, who was twice dismissed for cause from his post on the Alabama Supreme Court, and who is credibly charged with sexually assaulting teenage girls when he was in his 30s, could enter the US Senate as many of his colleagues look the other way.

If a country’s citizens lose confidence in their government’s ability to improve their lives, the government has an incentive to rally popular support by focusing attention on threats that only it can address. That is why in societies pervaded by anger and uncertainty about the future, the temptation to stigmatize minority groups increases. And it is why there is a tendency for officials to magnify foreign threats.

We are seeing this phenomenon all over the world. Russian President Vladimir Putin, Turkish President Recep Tayyip Erdoğan, and Chinese President Xi Jinping have all made nationalism a central part of their governing strategy. So, too, has Trump, who has explicitly rejected the international community in favor of the idea that there is only a ceaseless struggle among nation-states for competitive advantage.

When the world’s preeminent power, having upheld the idea of international community for nearly 75 years, rejects it in favor of ad hoc deal making, others have no choice but to follow suit. Countries that can no longer rely on the US feel pressure to provide for their own security. America’s adversaries inevitably will seek to fill the voids left behind as the US retrenches.

### Separation of Powers---1AC

#### Contention two is Separation of Powers.

#### Antitrust’s political avoidance crushes statutory and constitutional construction---limiting is key to prevent avoidance creep and clarify the First Amendment.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

We live in a time when concerns about influence over the American political process by powerful private interests have reached an apogee, both on the left and on the right. Among the laws originally intended to fight excessive private influence over republican institutions were the antitrust laws of the 1890–1914 period, whose sponsors were concerned with monopoly, particularly its influence over legislatures and politicians. While no one would claim that the antitrust laws were meant to be comprehensive anticorruption laws, there can be little question that they were passed with concerns about the political influence of powerful firms and industry cartels.

Since the 1960s, however, the scrutiny of corrupt and deceptive political practices inherent to antitrust law has been sharply limited by the Noerr-Pennington doctrine,1 which provides immunity to antitrust liability for conduct that can be characterized as political or legal advocacy.2

The Noerr case was strained when it was decided, and it has not aged well. As an interpretation of the antitrust laws, it ignored congressional concern with political mischief undertaken by conspiracy or monopoly. Its legitimacy has always rested on avoidance of the First Amendment, and while Noerr itself may have legitimately reflected such avoidance, the subsequent growth of a Noerr immunity has blown past any First Amendment–driven defense of its existence. For that reason, some have suggested a reformulation of the doctrine.3 The better answer is that, lacking constitutional or statutory foundation, Noerr should be overruled.

The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.”4 It therefore protects efforts to influence political debate as well as legitimate petitioning in legislative, judicial, or administrative processes.5 The First Amendment does not, however, create a right to bribe government officials, deceive agencies, file false statements, or abuse government process through repeated filings designed only to injure a competitor. Nonetheless, each of these activities has, in some courts at least, been granted immunity under the overgrown Noerr immunity.6 For these reasons, it is an extraconstitutional outlier ripe for reexamination.

The case for overruling Noerr is buttressed by the fact that, since its decision, Noerr’s theoretical foundations have become “wobbly” and “moth-eaten.”7 Written before the dawn of public choice theory or contemporary understanding of interest group influence, Noerr relies on an exceptionally stylized model of politics that understates the potential for corruption and the denial of majority will.8

After several decades, moreover, the judge-made immunity has begun to creep far beyond its original justifications—a well-known problem for doctrines anchored in avoidance (so-called “avoidance creep”).9 Constitutional avoidance, as Charlotte Garden argues, yields decisions that deliberately interpret the statute in a manner at odds with congressional intent. Subsequent decisions building on that interpretation can easily leave behind both congressional intent and the original justifications for the avoidance.10 The result is a free-floating doctrine, as with Noerr, that becomes untethered to both statutory goals and constitutional principle.

Overruling Noerr would not make political petitioning illegal. It would, instead, require defendants to rely on the First Amendment itself (and not Noerr) when seeking to defend what would otherwise be conduct that is illegal under the antitrust laws. Doctrinally, this is to force courts to address whether conduct in question is actually an antitrust violation and, if so, whether it is protected by the First Amendment or not, drawing on an established jurisprudence for some of the problems presented in the Noerr context. For example, while the First Amendment protects false statements in some contexts,11 it has never protected perjury or the making of false statements to government agencies.12 It should take no great leap of insight to conclude that the First Amendment might be the superior vehicle for adjudging a defendant’s First Amendment interests. 13

---FOOTNOTE 13 STARTS, PARAGRAPH ENDED---

13. Another, perhaps minor, advantage of overruling Noerr would be the better development of a petitioning jurisprudence. Whether various putative forms of petitioning government are actually protected by the First Amendment is unclear; the existence of a Noerr immunity has served to further obscure this concept. See Maggie McKinley, Lobbying and the Petition Clause, 68 Stan. L. Rev. 1131 (2016).

---FOOTNOTE 13 ENDS, NEXT PARAGRAPH STATS---

Noerr could be overruled by the Supreme Court in an appropriate case. It could also be overruled by Congress. The legislature, of course, is not in a position to overrule the aspects of Noerr immunity that are anchored in the First Amendment.14 But Congress could do what this article calls for: namely, return the immunities granted political speech and petitioning to their constitutional limits while reaffirming the purposes of the antitrust laws.

#### Spills over---antitrust sets a framework---precedent can’t be distinguished.

Randy D. Gordon 08. B.A., M.A., Ph.D., Kansas; J.D., Washburn; LL.M., Columbia; Ph.D., Edinburgh. Mr. Gordon is a partner with the firm of Gardere Wynne Sewell LLP, an adjunct faculty member at Southern Methodist University, and part of the Member Consultative Group for the American Law Institute’s Restatement Third, The U.S. Law of International Commercial Arbitration. “A Question of Fairness: Should Noerr-Pennington Immunity Extend to Conduct in International Commercial Arbitration?” https://www.researchgate.net/publication/326211646\_A\_Question\_of\_Fairness\_Should\_Noerr-Pennington\_Immunity\_Extend\_to\_Conduct\_in\_International\_Commercial\_Arbitration

Second, because the Noerr-Pennington doctrine is now commonly framed in First Amendment terms, its application has spread beyond antitrust claims—and in more than one dimension.27

---FOOTNOTE 27 STARTS, MIDPARAGRAPH---

27 See Sosa v. DIRECTV, Inc., 437 F.3d 923, 931 (9th Cir. 2006) (“[W]e conclude that the Noerr-Pennington doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.”); Baltimore Scrap Corp. v. David J. Joseph Co., 237 F.3d. 394, 399 (2001) (holding that NoerrPennington immunity applies to adjudicatory processes through the First Amendment because “the rights of petition and association trump any anticompetitive effects that might occur from asking the government for redress . . . and that [a]ny other rule would allow the specter of satellite litigation to restrict the primary right of citizens to seek justice from the judicial system”) (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, (1972)); White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000) (holding that because NoerrPennington “is based on and implements the First Amendment right to petition,” it is not limited to the antitrust context; rather, it “applies equally in all contexts”).

---FOOTNOTE 27 ENDS, PARAGRAPH CONTINUES---

But the United States Supreme Court has not squarely held this to be the case, although, as we will see, it has inferentially done so, at least to the satisfaction of the lower courts. In BE & K Const. Co. v. N.L.R.B., the Court faced the by-then familiar “issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act.”28 Ultimately, the Court did not need to decide whether fully to extend Noerr to a non-antitrust statute, but—as Justice Scalia stated in a concurring opinion—the majority opinion sufficiently cleared that road:

Although the Court scrupulously avoids deciding the question (which is not presented in this case), I agree with Justice BREYER, that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process.29

The underlying reasoning of the majority opinion was that—consistent with the general notion that the freedoms of speech and press entail that they must be given “breathing space”—it would be anathema to First Amendment values to declare unlawful an “entire class of reasonably based but unsuccessful lawsuits.”30

This expansive reading of Noerr is consistent with what many courts both before and after BE & K have held. As one Texas court put it, “[t]he courts that have addressed whether the doctrine applies in cases other than those based on anti-trust violations recognize that while the doctrine originally arose in connection with anti-trust cases, it is fundamentally based on First Amendment principles . . . . Thus, the doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiff.” 31

---FOOTNOTE 31 STARTS, MIDPARAGRAPH---

31 RRR Farms, Ltd. v. Am. Horse Prot. Assoc., 957 S.W.2d 121, 129 (Tex. App.— Houston [14th Dist.] 1991) (holding that Noerr-Pennington immunity applies to a claim of tortious interference with prospective business advantage brought by breeders of Tennessee Walking Horses based on the a horse association’s lobbying and litigation designed to do away with certain procedures and devices used in the training and showing of Tennessee Walking Horses).

---FOOTNOTE 31 ENDS, PARAGRAPH CONTINUES---

Not surprisingly, then, Noerr now applies to (1) non-antitrust federal statutory claims32

---FOOTNOTE 32 STARTS, MIDPARAGRAPH---

32 Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 956 (S.D. Cal. 1996) (the doctrine bars “any claim, federal or state, common law or statutory, that has as its gravamen constitutionally protected petitioning activity”).

---FOOTNOTE 31 ENDS, PARAGRAPH CONTINUES---

(2) state as well as federal claims,33

---FOOTNOTE 33 STARTS, MIDPARAGRAPH---

33 South Dakota v. Kan. City S. Indus., Inc., 880 F.2d 40, 50-53 (8th Cir. 1989) (recognizing that Noerr-Pennington doctrine may be invoked to immunize petitioning activity from civil liability outside the antitrust context); Video Int’l Prod., Inc. v. Warner Amex Cable Commc’n., 858 F.2d 1075, 1077-78, 1084 (5th Cir. 1988) (applying Noerr-Pennington to claims for tortious interference and violation of 42 U.S.C. § 1983 and opining that “[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust”); Stern v. U.S. Gypsum, Inc., 547 F.2d 1329, 1342-46 (7th Cir. 1977) (applying Noerr-Pennington to 42 U.S.C. § 1985(1)); In re Circuit Breaker Litig., 984 F. Supp. 1267, 1282-83 (C.D. Cal. 1997) (“[T]o the extent that Defendants’ claims for intentional interference are based on conduct protected by the Noerr-Pennington doctrine, such claims fail because the conduct cannot be found wrongful under a state tort law.”); Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1522 (D. Colo. 1993) (recognizing Noerr-Pennington doctrine applies in suits other than those based on antitrust violations); National Indus. Sand Ass’n v. Gibson, 897 S.W.2d 769, 774 (Tex. 1995) (recognizing applicability of Noerr-Pennington doctrine to conspiracy claim); RRR Farms, 957 S.W.2d at 129 (finding Noerr-Pennington doctrine applicable to claims for malicious prosecution, tortious interference, abuse of process, and prima facie tort); Diaz v. Sw. Wheel, Inc., 736 S.W.2d 770, 774 (Tex.App.—Corpus Christi 1987, writ denied) (finding summary judgment for trade association proper where association allegedly attempted to influence government agency not to recall or ban product; further finding that the act was not illegal and therefore could not give rise to conspiracy claim).

---FOOTNOTE 33 ENDS, PARAGRAPH CONTINUES---

(3) pre-litigation activities,34 (4) reports to law enforcement,35 (5) some settlement agreements,36

---FOOTNOTE 36 STARTS, MIDPARAGRAPH---

36 A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239 (3d Cir. 2001), cert. denied, 534 U.S. 1081 (2002) (in extending Noerr to settlement agreement, court stated that “[W]e see no reason to distinguish between settlement agreements and other aspects of litigation between private actors and the government which give rise to an antitrust immunity”).

---FOOTNOTE 36 ENDS, PARAGRAPH CONTINUES---

and (6) refusals to settle.37

#### Avoidance creep collapses court legitimacy.

Charlotte Garden 20. Co-Associate Dean for Research & Faculty Development and Associate Professor of Law, Seattle University School of Law. “Avoidance Creep”. University of Pennsylvania Law Review. Vol. 168: 331/ https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9686&context=penn\_law\_review

Conversely, there are at least two additional reasons that militate against the Court’s use of constitutional avoidance in these cases. The first is that the use of constitutional avoidance—and especially the use of aggressive forms of avoidance, where the Court applies a clear statement rule or resolves an insubstantial constitutional question—can appear strategic or results-oriented. Scholars, including Richard Hasen, have criticized the Court’s selective use or nonuse of avoidance in other cases on precisely this ground.277 This Article’s account of avoidance creep highlights this risk: even a principled use of avoidance could be indirectly subject to this criticism if it is used by later courts in unexpected or illegitimate ways. For example, a reader inclined towards cynicism might observe that although avoidance creep in the dues/fees context looks different than avoidance creep in the union picketing context, they do have one thing in common: both versions ultimately work to unions’ disadvantage. Perhaps this is because “judges don’t like labor unions.”278 But even if that isn’t the reason, courts risk at least the appearance of partiality.

#### Legitimacy is key to global democratic peace.

Magsamen et al. 18 Kelly Magsamen is the vice president for National Security and International Policy at the Center for American Progress. Max Bergmann and Michael Fuchs are senior fellows at the Center. Trevor Sutton is a fellow at the Center. Securing a Democratic World The Case for a Democratic Values-Based U.S. Foreign Policy https://www.americanprogress.org/issues/security/reports/2018/09/05/457451/securing-democratic-world/

Policy recommendations

Revitalizing global democracy is an immense and complex task that will take many years. But in the short term, the threat presented by opportunist authoritarian regimes urgently requires a rapid response. That is why America’s democracy rebalance needs both an immediate defensive line of effort to protect democratic values at home and around the world from creeping authoritarianism and a sustained long-term effort to expand the global democratic community and address the drivers of democratic retrenchment.

Strengthen democracy at home

American foreign policy starts at home with the strength of our own democratic model. None of the initiatives proposed in this report is likely to succeed if the United States does not embrace its own democratic values and norms and lead by example. The next administration will need to simultaneously re-establish international credibility and strengthen the democratic compact with its own citizens. For the United States to compete effectively in the global battle of ideas, it must continue to perfect its own democracy and leverage its own comparative strengths: rule of law, strong institutions, the ability to self-correct as a nation, and the innovation and perseverance of the American people. While domestic policy is not the focus of this report, the authors felt it was essential to draw the connection between the health of American democracy and the strategic impact that the United States can drive globally in the context of rising competition.

Restore democratic values and norms

The next administration will need to emphasize its adherence to democratic norms, including reaffirming and embracing the role of a free press, respecting the independence of the judiciary and law enforcement, valuing its civil servants, rejecting racial and religious antagonism, and separating the interests of the public from the private interests of those in power. A series of strong and clear measures in this direction in the early days of the next administration will be a necessary predicate to restoring American credibility abroad.

#### Democracy solves great power war.

Larry Diamond 19. PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5 The world pulled out of that downward spiral—but it took new, more purposeful American leadership. The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of selfdoubting democracies. These are the stakes. Expanding democracy—with its liberal norms and constitutional commitments—is a crucial foundation for world peace and security. Knock that away, and our most basic hopes and assumptions will be imperiled. The problem is not just that the ground is slipping. It is that we are perched on a global precipice. That ledge has been gradually giving way for a decade. If the erosion continues, we may well reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since the end of World War II. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.

#### Avoidance collapses separation of power---undermines congressional intent and ability to execute laws---directly addressing the constitutional question is best.

William K. Kelley 01. Associate Professor of Law, University of Notre Dame. “Avoiding Constitutional Questions as a Three-Branch Problem”. 86 Cornell L. Rev. 831 (2001) Available at: http://scholarship.law.cornell.edu/clr/vol86/iss4/3

Traditional thinking about the avoidance canon has considered only the relationship between the Court and Congress; on that conventional account, constitutional litigation is a two-branch problem involving a confrontation between only Congress and the Judiciary. This Article offers a new critique of the avoidance canon-one that considers the role of the Executive, as well as that of Congress, in relation to the Court. The avoidance canon implicates the structural relationships among all three branches9 of the federal government. This Article argues that the canon seriously intrudes upon the roles of both Congress and the Executive in the constitutional scheme.

Indeed, it is the role of the Executive which the avoidance canon most seriously threatens. As a general matter, litigation over the constitutionality of a law enacted by Congress will most often entail the presence of the Executive-either in the form of the Attorney General speaking on behalf of the President 10 or some administrative agency answerable (at some level) to the President. When the Court refuses to credit the Executive's reading of a statute in the name of avoiding the resolution of a serious constitutional question, it threatens to displace the President in his discharge of his constitutional duty to "take Care that the Laws be faithfully executed.""

Not only does the avoidance canon threaten the role of the Executive, it also fails to serve the deferential ends that it sets for itself vis-avis Congress. Rather than serving the norm of legislative supremacy—a laudable goal in the abstract-statutory interpretations adopted in order to avoid deciding serious constitutional questions often end up bearing no resemblance to anything that the legislature foresaw or intended. 12 Thus, the avoidance canon ironically results in the Court's impinging on Congress's supreme role in the legislative sphere, in the name of not doing so.

We see, then, that the avoidance canon's operation can create two distinct kinds of conflicts. With respect to the Executive, the avoidance canon threatens actual and direct conflict because it disregards the Executive's power and duty to see to the faithful execution of the laws, including the Constitution. In contrast, the conflict between Court and Congress that the avoidance canon was designed to avert-the inherent confrontation that arises whenever the Court undertakes even to decide a constitutional question-is hypothetical and indirect. My proposal is simply that the canon be abandoned-that courts should interpret statutes without the background norm that constitutionally troublesome readings are impermissible. Courts would no longer be in the position of refusing to permit law executors to implement the law as they see fit because their preferred course might be (not is) unconstitutional, even though that preferred course might well be perfectly consistent with the law as established by Congress.

On the contrary, the Executive's reading of a statute will stand or fall on its own merits-on whether it is consistent with traditional standards of statutory construction and comports with the Constitution-without also having to survive what is effectively a court-imposed, heightened standard for what the Constitution itself requires. To the degree that the Executive seeks to execute the laws through statutory interpretations that are actually unconstitutional, inter-branch comity and the constitutional structure of separated powers would not be harmed by the Court's saying so.

#### Avoidance crushes Chevron---makes execution of the law and public law litigation impossible.

William K. Kelley 01. Associate Professor of Law, University of Notre Dame. “Avoiding Constitutional Questions as a Three-Branch Problem”. 86 Cornell L. Rev. 831 (2001) Available at: http://scholarship.law.cornell.edu/clr/vol86/iss4/3

I now turn to an argument that adds a new dimension to previous critiques of the avoidance canon. Previous analyses of the avoidance canon have failed to consider the role of the Executive in the constitutional structure generally and in constitutional litigation in particular. In circumstances when the Executive is a participant in the litigation (which, in one form or another, is most of the time) 220 the avoidance canon does much more than create the hypothetical tear in the fabric of the separation of powers-a potential conflict between Court and Congress-when the Court gives a statute a strained or implausible reading. Rather, the avoidance canon commonly creates a here-and now conflict between Court and Executive. 22' That conflict results when the Court insists on giving effect to its view over the Executive's, even when the Executive has offered the better reading of the law and when it has independently adjudged that interpretation to be constitutional in the exercise of its Article II powers.

This Part shall analyze the context in which the avoidance canon's intrusion into Article II values is most clear-in cases in which the Executive has exercised law-elaboration authority delegated from Congress, which would ordinarily be entitled to judicial deference pursuant to the rule of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.222 If Congress has left statutory ambiguity, Chevron recognizes that it is the Executive's role authoritatively to give content to the statute.223 The avoidance canon constrains that power, however, by limiting it to circumstances that do not raise serious constitutional doubts. Short of an actual constitutional violation, however, the avoidance canon's operation in this context simply is to displace the Executive's judgment as to how to execute the law Congress passed.

Treating the avoidance canon's operation in the Chevron context as illustrative of its intrusion into Article II, this Part then turns to a more general consideration of the role of the Executive in public law litigation. This Part argues that the avoidance canon intrudes upon the Executive's authority and responsibility to see to the execution of the laws, including both statutes and the Constitution. In applying the avoidance canon to executive action, the Court is rejecting the Executive's explicit legal judgment about the meaning of both the statute and the Constitution, not because the statute is unconstitutional but because it is not clearly constitutional. Such treatment of a coordinate branch not only shows a lack of inter-branch comity, it positively turns Marbury v. Madison224 on its head. The avoidance canon has these effects despite the fact that neither the Constitution nor the laws of the United States require its application. Thus does the avoidance canon-which the Court adopted and has adhered to out of a stated desire to maintain judicial modesty-threaten separation of powers values.

The Court has never taken note of these effects of the avoidance canon. As a rule of judicial prudence and policy, though, it is difficult to see how the Court can continue to justify the avoidance canon without some attempt to account for the role of the Executive in public law litigation.

A. The Avoidance Canon, Article II, and Chevron

The context in which it is easiest to see the avoidance canon's direct conflict with Article II values is when the Executive-whether an agency or the President-adopts a statutory construction as part of the exercise of delegated power from Congress. That familiar context triggers the rule of Chevron,225 a case that is acknowledged to be the most significant administrative law case in a generation or more.2 6 Chevron established the now-familiar analytic framework by which a court reviewing agency action first determines whether Congress has expressed itself clearly on the question at issue. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress."'2 2 7 In circumstances when "Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." 228

The Court has justified Chevron on two primary grounds, both of which are relevant to this argument. First, the Court has said that deference to agency interpretations of unclear statutes is justified because filling in the gaps is essentially a matter of policy, and "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."2 2 That is to say, in the absence of clear direction from Congress, the policy choices inherent in determining how statutory regimes will be implemented are quintessentially executive in nature.

The Court's second justification for Chevron is closely related to the first. The Court has grounded deference in situations of ambiguity on congressional delegation. As the Court recently stated, "[d]eference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."230 If Congress has not spoken clearly about how it wishes the law to be administered, it falls by default to the Executive-ordinarily in the form of an administrative agency-to make the policy choices necessary to giving concrete content to the law. As Professor Pierce has put it, Chevron says to Congress, if "you decline to make a policy decision through the legislative process, we will deem your failure to so act as ceding the power to make that policy to the President."231 It is perfectly consistent with the Constitution for the President to exercise that power, because Article II devolves upon him not only the duty but also the power to execute the laws. That is the theory, at least, of Chevron.232

The Court has applied Chevron broadly to a variety of statutory schemes involving a plethora of executive agencies. Indeed, it has rarely pulled back from its devotion to Chevron, though, as we shall now see, one such occasion is when the agency's construction raises serious constitutional doubts.

In Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council233 the Court again faced an NLRB policy that implicated constitutional values.234 The case involved union distribution of handbills at a shopping mall urging consumers not to frequent the mall because one of the mall's contractors paid substandard wages.2 35 The mall owner filed an unfair labor practice complaint with the NLRB on the ground that the handbilling violated Section 8(b) (4) of the National Labor Relations Act because it urged a boycott of the mall, with which the union had no dispute, rather than the contractor with which it did.236 The Board ultimately concluded that the handbilling did violate the labor laws and that under the applicable law the First Amendment did not stand in the way of holding the union's leafleting unlavful3 3 The case made its way to the Supreme Court, with the Solicitor General ultimately urging the Court on behalf of the Board to uphold the Board's order and arguing that its construction of the applicable labor laws did not violate the First Amendment.2-s

The Court agreed that under normal Chevron principles it would defer to the Board's reasonable construction of the labor laws. 23 9 But it went on to note that "[a ] nother rule of statutory construction ... is pertinent here'"-namely, the avoidance canon.24 0 After describing the avoidance canon and its roots, 241 the Court simply stated that it believed "that this case calls for the invocation" of the avoidance canon, "for the Board's construction of the statute, as applied in this case, poses serious questions of the validity of § 8(b) (4) under the First Amendment."242 Concluding that the statute "is open to a construction that obviates deciding"243 that First Amendment question, the Court rejected the Board's reading and chose an alternative construction. 29 4

Two points about the analysis in Edward J. DeBartolo Corp. bear emphasis at this point. First, the Court did not claim that it must answer the statutory question at step one of the Chevron analysis; in other words, it did not conclude that the statute was unambiguously contrary to the Board's view.2 45 And second, the Court did not conclude that the Board's view actually violated the First Amendment, but only that the First Amendment questions were substantial.24 6 In fact, the analysis was quite like that in Catholic Bishop, in which the Court required evidence that Congress affirmatively intended to cover the situation at hand rather than the normal Chevron inquiry of determining whether Congress has foreclosed any agency discretion in the matter.247

The end result, then, is that the Court concluded that the avoidance canon simply trumps Chevron. 248 Unfortunately, however, the opinion in Edward J. DeBartolo Corp. contains no explanation for why the Court reached that conclusion.249 As Professor Merrill has noted, moreover, "Chevron itself supplies no rationale for such a holding."2 O Indeed, on the rationale of Chevron it would fall to the Executive as an exercise of delegated power to determine how to implement the law within statutory and constitutional bounds. Nonetheless, the Court simply first acknowledged that Chevron would ordinarily govern and then announced that the avoidance canon would instead be the applicable interpretive rule.251

There is an unavoidable tension between the Court's invocation of the avoidance canon in Edwardj DeBartolo Corp. and Article II values. The Labor Board, charged by Congress to execute the laws, concluded with the support of the Justice Department that its view of the scope of the labor laws was consistent with both the governing statutes and the Constitution. 252 The Court, on the other hand, simply disregarded that view of how the law should be executed, not because any statute or the Constitution affirmatively ruled out the Executive's preferred course, but only because the Court deemed it desirable not to decide a constitutional question. When the Executive exercises power pursuant to a delegation, it stands in the shoes of Congress. 25 3 If the agency speaks unambiguously in implementing a valid delegation, the Court must assess the agency's action as such. Chevron and Marbury suggest that the Court can disturb the Executive's explicit determination in these circumstances only if it conflicts with Congress's clear directions or the Constitution. 254

The defects in the operation of the avoidance canon are particularly clear in the Chevron context, perhaps because the Executive has a congressional delegation of power behind its statutory interpretation. The Edward j. DeBartolo Corp. rule, in other words, pits the Court not only against the Executive, but also against the congressional allocation of law-elaboration authority to the Executive.2 5 While the Chevron context is an important illustration of the avoidance canon's intrusion into Article II, those cases are only a part of the larger universe of public law litigation involving the Executive in which the avoidance canon harms the separation of powers.

B. The Role of the Executive in Public Law Litigation

Although historically there were exceptions,2 5 6 the norm in modern federal public law litigation is that the Executive-in theory, the President himself, a department whose head stands in the President's shoes, or an administrative agency executing the law pursuant to congressional design-is a party to every constitutional case, and thus to every case in which the avoidance canon comes into play.25 7 The Supreme Court has made clear that, under the Constitution, litigation on behalf of the United States is at the core of Executive power and "may be discharged only by persons who are 'Officers of the United States.'"2 5 8 As part of the executive branch, the Attorney General "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." 25 9 Congress has recognized these prerogatives of the Executive by requiring that the Attorney General, on behalf of the United States, be notified whenever litigation brings into question the constitutionality of an act of Congress and permitted to intervene to defend the statute's constitutionality.260

Both as a matter of constitutional structure and statute, then, it is rare for the Court to face a decision on a constitutional issue involving a federal statute without the government in some form being in court as a party.261 Moreover, the Attorney General-a quintessentially executive officer who serves at the pleasure of the President 262-is empowered, indeed generally obligated, to provide legal representation to any agency or governmental party to litigation. 263 In such litigation, the client agency itself has both legal and programmatic interests to vindicate; the Attorney General has similar interests to vindicate; and the President's administration has general legal policy interests that can sometimes be central to its political and policy agenda.2 64 Public law litigation, including virtually any litigation that may lead to the invocation of the avoidance canon, virtually always implicates the interests of the Executive.2 65 Those interests include discretionary judgments, informed by the Executive's views of sound policy, about how the law-within the limits set by Congress-will be implemented and enforced. They also include judgments about how to exercise delegated power from Congress, including rulemaking and enforcement decisions. With respect to both, the President has a positive power and duty to "take Care, that the Laws be faithfully executed."2c6 This means that, in determining whether and how to execute the laws, the Executive must make a determination that its action complies with (or in Article II terms, "faithfully execute[s]") 2 67 the Constitution.

The conduct of litigation by the Executive-which it carries out as part of that take care power-is in turn part of the interplay that makes up the separation of powers. As part of the execution of the law, the Executive must decide whether to litigate268 and what legal positions the Administration will advance. Those decision often carry significant implications for the balance of powers between not only it and the Court, but also with Congress. The last three presidential administrations have engaged in important public law litigation that has drawn considerable criticism and defensive responses from both Court and Congress. For example, consider the Reagan Administration's 1984 decision not to defend the constitutionality of certain provisions of the Competition in Contracting Act, which it claimed violated Article II by vesting executive power in the Comptroller General, an official removable by Congress.2 69 Putting aside the merits of the dispute for present purposes, 270 what bears noting is the response in Congress and in the courts to the Executive's litigation position. Members of Congress held hearings to express their displeasure; the Justice Department then retreated from forcing a political confrontation by ordering the statute to be enforced pending resolution of litigation; and Congress then responded in kind, passing legislation to correct the constitutional defect identified by the President. 271 In the courts, the Ninth Circuit expressed outrage at the audacity of the Executive's presuming to interpret and apply the Constitution in the course of executing the law,2 72 and the issue escaped ultimate review by the Supreme Court once Congress amended the law. 273

#### Chevron deference solves emissions.

Noah Feldman 18, J.D. from Yale Law School, Professor at Law at Harvard Law School, Ph.D. in Oriental Studies from Oxford University, 7-19-2018, "Tipping the Scales," https://www.nybooks.com/articles/2018/07/19/supreme-court-tipping-scales/

Environmental regulation is the final area in which an activist conservative Court could have a substantial effect. The source of the Court’s power here lies in the relationship between environmental legislation and regulation. In general, Congress has chosen to deal with the environment by passing very general laws and delegating the authority to implement them to regulatory agencies like the Environmental Protection Agency.

An activist conservative Court could make life difficult for a Democratic EPA by blocking regulation directly, declaring it “arbitrary and capricious” under the Administrative Procedure Act. The courts are only supposed to use this tool to block actions that are genuinely irrational or that exceed the agency’s legal authority; but the Court could deploy it much more aggressively than has been done in the past.

In practice, environmentalists could try to get around such a judicial barrier by lobbying Congress to pass laws directing that a specific regulation be adopted, rather than delegating so much authority to the EPA. If public opinion were strongly enough in favor of increased environmental protection, a Democratic Congress and president could probably get some regulation adopted despite judicial resistance.

A conservative Court could also impede environmental reform by second-guessing agencies’ interpretations of federal law. According to what is known as the “Chevron doctrine,” when federal law is ambiguous, the Court will defer to an agency’s interpretation of the law provided it is reasonable. This doctrine is intended to give substantial power to agencies, binding the hands of judges who might otherwise disagree with the agencies’ policies.

Today Chevron is under attack, most prominently from Gorsuch, who has written disparagingly of the idea that courts would have anything less than full control over the meaning of federal statutes. This is bad news for environmental regulation—and that is almost certainly part of the point. A Court that does not defer to an agency’s interpretation of federal law can substitute its own policy judgment for that of the agency. If that agency is the EPA, and its judgment is being used to expand environmental protection, then a conservative Court that overturned Chevron or weakened its rule of deference would stand ready to reverse the agency’s course.

#### Emissions reductions limit climate change to below 2 degrees---effective Paris implementations are key.

Ross J. Salawitch 17, Professor, Department of Atmospheric & Oceanic Science and Department of Chemistry and Biochemistry, University of Maryland, with Timothy P. Canty, Austin P. Hope, Walter R. Tribett, Brian F. Bennett, *Paris Climate Agreement: Beacon of Hope*, 2017, pp. 87-93

[ΔT was changed to “temperature change”]

One clear message that emerges from Figs. 2.15 and 2.16 is that to achieve the goal of the Paris Climate Agreement, emissions of GHGs must fall significantly below those used to drive RCP 8.5. The range of ΔT2100 shown in Fig. 2.16b is 1.6–4.7 °C. Climate catastrophe (rapid rise of sea level, large shifts in patterns of drought and flooding, loss of habitat, etc.) will almost certainly occur by end of this century if the emissions of GHGs, particularly CO2, follow those used to drive RCP 8.5.32 The book Six Degrees: Our Future on a Hotter Planet (Lynas 2008) provides an accessible discourse of the consequences of global warming, organized into 1 °C increments of future ΔT.

In the rest of this chapter, policy relevant projections of ΔT are shown, both from the EM-GC framework and CMIP5 GCMs. Figures 2.17 shows the statistical distribution of ΔT2060 from our EM-GC calculations. The EM-GC based projections are weighted by 1/χ2 (i.e., the better the fit to the climate record, the more heavily a particular projection is weighted). The height of each histogram represents the probability that a particular range of ΔT2060, defined by the width of each line segment, will occur. In other words, the most probable value of ΔT in year 2060, for the EM-GC projection that uses RCP 4.5, is 1.2–1.3 °C above pre-industrial, and there is slightly less than 20 % probability ΔT will actually fall within this range. In contrast, the CMIP5 GCMs project ΔT in 2060 will most probably be 2.0–2.2 °C warmer than pre-industrial, with a ~12 % probability ΔT will actually fall within this range. A finer spacing for ΔT is used for the EM-GC projection, since we are able to conduct many simulations in this model framework. Figure 2.18 is similar to Fig. 2.17, except the projection is for year 2100. The collection of histograms shown for any particular model (i.e., either CMIP5 GCMs or EM-GC) on a specific figure is termed the probability distribution function (PDF) for the projection of the rise in GMST (i.e., ΔT).

The PDFs shown in Figs. 2.17 and 2.18 reveal stark differences in projections of ΔT based on the EM-GC framework and the CMIP5 GCMs. In all cases, ΔT [temperature change] from the GCMs far exceed projections using our relatively simple approach that is tightly coupled to observed ΔT, OHC, and various natural factors that influence climate. These differences are quantified in Table 2.1, which summarizes the cumulative probability that a specific Paris goal can be achieved. The cumulative probabilities shown in Table 2.1 are based on summing the height of each histogram that lies to the left of a specific temperature, in Figs. 2.17 and 2.18.

Time series of ΔT found using the CMIP5 GCM and EM-GC approaches are illustrated in Figs. 2.19 and 2.20, which show projections based on RCP 4.5 and RCP 8.5. The colors represent the probability of a particular future value of ΔT being achieved, for projections computed in the EM-GC framework weighted by 1/ χ2 . Essentially, the red (warm), white (mid-point), and blue (cool) colors represent the visualization of a succession of histograms like those shown in Figs. 2.17 and 2.18. The GCM CMIP5 projections of ΔT (minimum, maximum, and multi-model mean) for RCP 4.5 and RCP 8.5 are shown by the three grey lines. These lines, identical to those shown in Fig. 2.3a (RCP 4.5) and Fig. 2.3b (RCP 8.5), are based on our analysis of GCM output preserved on the CMIP5 archive. The green trapezoid, which originates from Fig. 11.25b of IPCC (2013), makes a final and rather important appearance on these figures. Also, the Paris target (1.5 °C) and upper limit (2 °C) are marked on the right vertical axis of both figures.

There are resounding policy implications inherent in Figs. 2.17, 2.18, 2.19, and 2.20. First, most importantly, and beyond debate of any reasonable quantitative analysis of climate, if GHG emissions follow anything close to RCP 8.5, there is no chance of achieving either the goal or upper limit of the Paris climate agreement (Fig. 2.20). Even though there is a small amount of overlap between the Paris targets and our EM-GC projections for year 2100 in Fig. 2.20, this is a false hope. In the highly unlikely event this realization were to actually happen, it would just be a matter of time before ΔT [temperature change] broke through the 2 °C barrier, with all of the attendant negative consequences (Lynas 2008). Plus, of course, 1.5–2.0 °C warming (i.e., the lead up to breaking the 2 °C barrier) could have rather severe consequences. This outcome is all but guaranteed if GHG abundances follow that of RCP 8.5.

The second policy implication is that projections of ΔT found using the EM-GC framework indicate that, if emissions of GHGs can be limited to those of RCP 4.5, then by end-century there is:

(a) a 75 % probability the Paris target of 1.5 °C warming above pre-industrial will be achieved

(b) a greater than 95 % probability the Paris upper limit of 2 °C warming will be achieved

As will be shown in Chap. 3, the cumulative effect of the commitments from nations to restrict future emissions of GHGs, upon which the Paris Climate Agreement is based, have the world on course to achieve GHG emissions that fall just below those of RCP 4.5, provided: (1) both conditional and unconditional commitments are followed; (2) reductions in GHG emissions needed to achieve the Paris agreement, which generally terminate in 2030, are continually improved out to at least 2060.

The policy implication articulated above differs considerably from the consensus in the climate modeling community that emission of GHGs must follow RCP 2.6 to achieve even the 2 °C upper limit of Paris (Rogelj et al. 2016). We caution those quick to dismiss the simplicity of our approach to consider the emerging view, discussed in Chap. 11 of IPCC (2013) and quantified in their Figs. 11.25 and TS.14, as well as our Figs. 2.3 and 2.13, that the CMIP5 GCMs warm much quicker than has been observed during the past three decades. In support of our approach, we emphasize that our projections of ΔT are bounded nearly exactly by the green trapezoid of IPCC (2013), which reflects the judgement of at least one group of experts as to how ΔT [temperature change] will evolve over the next two decades. Given our present understanding of Earth’s climate system, we contend the Paris Climate Agreement is a beacon of hope because it places the world on a course of having a reasonable probability of avoiding climate catastrophe.

#### Unchecked climate change causes extinction.

Jeff Master 21. Ph.D. is a former hurricane hunter and scientist for the National Oceanic and Atmospheric Administration (NOAA), as well as the co-founder of Weather Underground. He writes about extreme weather and climate change for Yale Climate Connections. “How easily the climate crisis can become global chaos” The Hill. 09-01-21. https://thehill.com/opinion/energy-environment/570284-how-easily-the-climate-crisis-can-become-global-chaos?amp

After months of one extreme weather event after another, it's hard to imagine how climate impacts could get any worse. Unfortunately, it could. Imagine a year - **not far in the future** - just a couple years from now, where it all goes wrong: A strong El Niño event warms the equatorial Pacific, bringing Earth's hottest January on record. Extreme drought grips Australia, the world's No. 3 exporter of wheat, bringing its most intense drought in history. A 58 **percent decline in wheat production** results, as occurred after their 2002 drought. **Global food prices spike.** In April, record rainfall hits Canada, the world's No. 2 wheat exporter. Canada's wheat harvest falls 14 percent, as occurred after extreme rains in 2010. Unrelenting torrential rains hit the central U.S., delaying spring planting of crops and bringing near-record flooding on the Mississippi and Missouri rivers. Fortunately, because of infrastructure bills passed in 2021 and 2022, which gave funds for flood preparedness, the damage is billions of dollars less than from the great floods of 2011 and 1993. As summer arrives, the jet stream gets "stuck" in the type of resonant pattern linked to human-caused climate change that has become more frequent in recent years. The stuck jet stream brings cool air, relentless rain-bearing low-pressure systems and record rains to the central United States. Production of corn falls 4 percent and wheat 25 percent, as occurred in 2017 after a similarly wet year. In the western U.S. and Canada, the stuck jet stream brings a **record-strength dome of high pressure**, exacerbating their intense drought and bringing another year of **hellacious wildfires and choking smoke** that leads to thousands of premature air pollution deaths. Severe drought, typical of an El Niño year, hits India and Southeast Asia, causing failure of the monsoon rains. In India, "Day Zero" arrives for an additional 100 million people, as taps run dry from years of excessive groundwater pumping and a wasteful water supply system. Rice yields fall 23 percent in India, the world's No. 1 rice exporter, as occurred in 2002. In the fall, another bonkers Atlantic hurricane season unfolds as record-warm waters in the Caribbean fuel five major hurricanes, bucking the tendency of El Niño to suppress hurricanes. In mid-October, a hurricane - a carbon copy of 2021's Hurricane Ida, except occurring during peak harvest season - trashes three of America's 15 largest ports, which lie along the Lower Mississippi River and handle 60 percent of all U.S. grain exports to the world. Barge traffic on the Mississippi is crippled for months, during the peak export period for U.S. grain. The extreme weather **onslaught causes food prices** to spike to quadruple the levels of 2000. **Food riots break out** in urban areas across the Middle East, North Africa and Latin America. The Euro weakens and the main European stock markets lose 10 percent of their value; U.S. stock markets fall 5 percent. **Civil war erupts** in Nigeria, **famine kills nearly a million** people in Bangladesh and Africa, and Mali becomes a failed state. **Military tensions heighten** between Russia and NATO; **nuclear-armed India and Pakistan fight** a border skirmish over water rights. Even more dramatic stock market falls ensue, and the **global economy tumbles into a deep recession.** This worst-case scenario year - though unlikely to occur exactly this way - illustrates one of the greatest threats of climate change: **extreme droughts and floods** hitting multiple major grain-producing "breadbaskets" simultaneously. The scenario is similar to one outlined by insurance giant Lloyds of London in a "Food System Shock" report issued in 2015. Lloyds gave uncomfortably high odds of such an event occurring - well over 0.5 percent per year, or more than an 18 percent chance over a 40-year period. Given the unprecedented weather extremes that have rocked the world recently, the odds of a devastating food system shock are probably **much higher**. What's more, these odds are steadily **increasing as humans burn fossil fuels and pump more heat-trapping greenhouse gases into the air.** A warming planet provides more **energy to power stronger storms**, and more energy to intensify droughts, heatwaves and wildfires when storms are not present. Earth's **oceans are heating at an accelerating rate,** storing energy equivalent to an astonishing three to six Hiroshima-sized atom bombs per second. That extra heat energy allows more water vapor to evaporate and power stronger and wetter storms - like Hurricane Ida, and the catastrophic storms that hit Europe and China in July, costing over $25 billion each. Earth's extra heat energy also intensifies droughts and heatwaves, like the one that brought Canada's all-time heat record in June: 121 degrees Fahrenheit in Lytton, British Columbia, a day before a wildfire burned the town down. Global warming also intensified the 2010 Russian drought, which caused a doubling in global wheat prices, helping fuel the Arab Spring protests that led to the deadly uprisings in seven nations and the overthrow of multiple governments. If business-as-usual is allowed to continue, **a civilization-threatening climate catastrophe will occur.** Mother Nature's primal fury of 2021 is just a preview of what is coming. Global temperatures are currently about 1.2 degrees Celsius (2.2 degrees Fahrenheit) warmer than pre-industrial levels, and this year may well be the coolest year of the rest of our lives. Catastrophic extreme weather events will **grow exponentially worse** with 3 degrees Celsius of warming - **the course we are currently on.**

#### Agencies are key to adapt to high tech developments.

Jonathan Masur 07. Bigelow Fellow and Lecturer in Law, University of Chicago Law School. “Judicial Deference and the Credibility of Agency Commitments.” *Vanderbilt Law Review* 60: 1021.

Moreover, courts and commentators have long realized that agencies possess comparative institutional advantages over Congress that surpass the mere application of expertise. By shifting policymaking responsibility outside of the legislative branch, Congress is also able to avail itself of the greater agility of administrative agencies in responding to changed circumstances or adapting to new policy concerns. Legislation is costly and time-consuming to enact, and Congress cannot always rapidly change course when confronted with novel problems or the imminent obsolescence of old solutions.15 Agencies are more willing and able than Congress to tweak their policy agendas. Especially in the high-technology areas, this alacrity is invaluable to agencies’ ability to act in the public interest. In order to act effectively, then, agencies must possess flexibility not only in the substantive sense described above, but also in the temporal sense: they must be free to alter policies over time and adapt to changes in relevant technologies and markets.16 Much like substantive flexibility (deference, really), temporal flexibility (which I will refer to simply as “flexibility”) is the lifeblood of successful agency operation. Even minor changes in technology or markets can obsolete pre-existing regulatory regimes, and it likely would be prohibitively costly for Congress to respond to every minor circumstance by amending an agency’s authorizing legislation.17 Agencies need the authority to adjust policies in order to maintain their currency and efficacy,18 and unwise judicial doctrines that deny agencies all significant policy flexibility would undoubtedly lead to regulatory stagnation.19

#### Effective regulation is critical to US AI dominance that manages China’s rise---ensures public support.

Paul Scharre 19. Senior fellow and director of the Technology and National Security Program at the Center for a New American Security (CNAS), "How Congress can help ensure US leadership in artificial intelligence". TheHill. 1-16-2019. https://thehill.com/opinion/technology/425309-how-congress-can-help-ensure-us-leadership-in-artificial-intelligence

The age of artificial intelligence is upon us. AI is no longer a future technology but a present one. The AI revolution is highly global, with nations such as China playing a leading role in AI innovation. The 116th Congress has a valuable part in ensuring continued American competitiveness in AI innovation, especially human capital development and smart, sensible regulation. The U.S. lacks a comprehensive national AI strategy. By contrast, over a dozen other nations and international organizations have published AI strategies. For example, the European Union has released its AI strategy with a focus on investing in its innovation ecosystem, developing talent, building a common data space in compliance with data principles, and developing ethics to create trust. According to the EU Commission, “the ambition is then to bring Europe’s ethical approach to the global stage.” China, meanwhile, has emerged as a peer competitor to the United States in AI and has announced its intention to lead the world in AI by 2030, which poses a myriad of economic, human rights and security concerns. The United States lags on creating a national plan and will need to build a comprehensive AI strategy to maintain technological leadership and responsibly harness the opportunities AI presents. Congress can contribute to U.S. AI leadership by building the human capital necessary to develop AI and by exploring options for smart, sensible regulation to make sure AI systems are safe and beneficial to the American public. In 2018, the U.S. government made progress in AI, but much remains to be done. The Department of Defense (DOD) has made positive strides through the Defense Advanced Research Projects Agency’s (DARPA) significant AI research and development (R&D) investments and by establishing the Joint Artificial Intelligence Center (JAIC), which will coordinate and advance defense-related AI activities. The White House hosted an AI summit last year and repeatedly has emphasized AI as an R&D priority. Congress, too, took steps to bolster national AI efforts by provisioning for a National Security Commission on Artificial Intelligence in the fiscal year 2019 National Defense Authorization Act. These efforts are valuable, but fall short of the comprehensive national approach that other nations are bringing to ensure national competitiveness in AI. Congress can address several key areas: Increasing funding for AI initiatives; Improving STEM education and high-skilled immigration policies to ensure the United States can grow and attract top talent; and Passing smart, sensible regulation to ensure AI innovation is not hindered by a public backlash against harmful uses. Congress played a similar role passing key legislation in other technology areas, such as last year’s bipartisan National Quantum Initiative Act. The private and public sectors need to collaborate to maintain U.S. leadership in AI. While the government cannot, and should not, supplant the private sector for all R&D efforts, the government can play an essential part in funding areas where there are not sufficient private-sector incentives — such as basic research and AI safety, a critical, underfunded area. Congress should increase government AI R&D spending and fully fund critical initiatives such as the DOD’s Joint AI Center. Congress also can take steps to ensure the United States builds and maintains a talent base sufficient for AI leadership. While the White House STEM education plan is a good first step, the United States will need to draw upon internal and external sources of talent to satisfy the demand for high-tech workers. Ninety percent of employer requests for H-1B visa applications are for jobs that require high-level STEM knowledge, a product of the acute shortfall in the U.S. labor market. Enabling high-skilled immigration comes with an a bonus for the American economy — according to a joint report by the American Enterprise Institute and the Partnership For A New American Economy, “An additional 100 foreign-born workers in STEM fields with advanced degrees from U.S. universities is associated with an additional 262 jobs among US natives.” Immigrants found one-quarter of startups in the United States. Congress should work in a bipartisan manner to reform high-tech immigration practices and expand the domestic talent base by promoting STEM education. As AI technology is introduced into the U.S. economy, from social media bots to self-driving cars, the United States will need a sensible approach to regulating applications of AI technology to avoid undue harm and public resistance to adoption. Already, aspects of a backlash have been seen in the case of attacks on self-driving cars. Eighty-two percent of Americans believe AI needs careful management to address a wide variety of concerns. Smart, sensible regulation of AI applications is needed to ensure that uses are socially beneficial. In the absence of federal government leadership to date, some states and private actors are stepping up. California recently passed a “Bot Disclosure” law requiring that bots disclose that they are not human, an important and necessary step given recent advances in AI-generated text and synthetic voice capabilities. Microsoft has called for regulation of facial recognition technology. By engaging on these and other issues, such as algorithmic accountability for social media, Congress can play a critical role in ensuring that AI applications are socially beneficial and the U.S. public supports further development.

#### Chinese tech supremacy causes nuclear war.

Kroenig ’18 [Matthew; 11/12/18; Deputy Director for Strategy @ Scowcroft Center for Strategy and Security, Associate Professor of Government and Foreign Service @ Georgetown University; “Will disruptive technology cause nuclear war?”; https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/]

Recently, analysts have argued that emerging technologies with military applications may undermine nuclear stability (see here, here, and here), but the logic of these arguments is debatable and overlooks a more straightforward reason why new technology might cause nuclear conflict: by upending the existing balance of power among nuclear-armed states. This latter concern is more probable and dangerous and demands an immediate policy response.

For more than 70 years, the world has avoided major power conflict, and many attribute this era of peace to nuclear weapons. In situations of mutually assured destruction (MAD), neither side has an incentive to start a conflict because doing so will only result in its own annihilation. The key to this model of deterrence is the maintenance of secure second-strike capabilities—the ability to absorb an enemy nuclear attack and respond with a devastating counterattack.

Recently analysts have begun to worry, however, that new strategic military technologies may make it possible for a state to conduct a successful first strike on an enemy. For example, Chinese colleagues have complained to me in Track II dialogues that the United States may decide to launch a sophisticated cyberattack against Chinese nuclear command and control, essentially turning off China’s nuclear forces. Then, Washington will follow up with a massive strike with conventional cruise and hypersonic missiles to destroy China’s nuclear weapons. Finally, if any Chinese forces happen to survive, the United States can simply mop up China’s ragged retaliatory strike with advanced missile defenses. China will be disarmed and US nuclear weapons will still be sitting on the shelf, untouched.

If the United States, or any other state acquires such a first-strike capability, then the logic of MAD would be undermined. Washington may be tempted to launch a nuclear first strike. Or China may choose instead to use its nuclear weapons early in a conflict before they can be wiped out—the so-called “use ‘em or lose ‘em” problem.

According to this logic, therefore, the appropriate policy response would be to ban outright or control any new weapon systems that might threaten second-strike capabilities.

This way of thinking about new technology and stability, however, is open to question. Would any US president truly decide to launch a massive, bolt-out-of-the-blue nuclear attack because he or she thought s/he could get away with it? And why does it make sense for the country in the inferior position, in this case China, to intentionally start a nuclear war that it will almost certainly lose? More important, this conceptualization of how new technology affects stability is too narrow, focused exclusively on how new military technologies might be used against nuclear forces directly.

Rather, we should think more broadly about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full display in its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

#### Prohibition under antitrust is key---ambiguity and misinterpretation frustrate interpretation.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

Leaving the First Amendment aside, what was the proper construction of the Sherman Act? Imagine the same case without government as the target of the campaign. It seems implausible that the Sherman Act would grant automatic immunity in a case in which an industry conspires to exclude a competitor by manipulating a body with the power to determine the conditions of competition. An effort to hamstring a rival by rigging a process to set exclusionary standards mirrors the conduct condemned in cases like Allied Tube v. Indian Head, Inc. and Broadcom Corp. v. Qualcomm Inc. It is the kind of thing meant for a rule of reason analysis: as Justice Brandeis wrote in Chicago Board of Trade, the question would be whether the conduct is such that it “promotes competition, or whether it is such as may suppress or even destroy competition ... .” Perhaps the railroads would have argued the weight limits were competition-enhancing in some way; it seems more likely that they were a bad-faith effort to exclude their competitors.

Though Noerr did involve bodies of government, it did not involve a standard-setting body. That could lead some to believe that the campaigns, even if deceptive, are still not the kind of thing that the Sherman Act or other antitrust laws were intended to have jurisdiction over. Yet even the most cursory tour of the history of the Sherman, Clayton, and Federal Trade Commission Acts reveals that this view of Congress’s aims in passing the antitrust laws is grossly mistaken.

The famous editorial cartoons of the Standard Oil Octopus depict its tentacles encircling legislatures. Among the abuses of which companies like Standard Oil and, later, J.P. Morgan’s New Haven railroad were accused was the bribing of public officials to disadvantage smaller competitors or to wrongly grant monopoly status. The legislative history is replete with evidence of such concerns. As Robert Faulkner writes, “there is nothing on the face of the [Sherman] Act to suggest that the Fifty-first Congress wanted to exempt concerted, unethical and anti-competitive activity.” He adds that it would be strange to do so “on the ironic premise that the Act permits a business combination to destroy or do grievous harm to a competitor by applying large sums of money to deceive elected officials.”

The best reading of the Sherman and Clayton Acts is that the framers had an overarching concern about monopoly influence over democratic institutions, but also a more specific concern with the obtaining or maintaining of monopoly through corrupt means, especially through bribery or fraud. For that reason, whether in pursuit of monopolization or the restraint of trade, corruption and fraud on the government ought to be understood as one form of prohibited conduct.

If that is so, it leads to the conclusion that Noerr must be understood as an exercise in constitutional avoidance, a conclusion many other scholars have also reached; or alternatively, that the deception wasn’t quite bad enough to amount to fraud on the legislature. That ambiguity is what makes the case frustrating, for despite Justice Black’s bold writing, the Noerr opinion, by inventing an immunity instead of resolving the question, took the easy way out.

### Plan---1AC

#### The United States federal government should determine that its antitrust laws prohibit private sector anticompetitive corrupt and deceptive political practices not protected by the Constitution.

# 2AC Round 3

## T Subsets

#### Counter-interp---expand the scope includes banning any practice.

Paolo Buccirossi et al. 09. LEAR. Lorenzo Ciari, Lear and EUI. Tomaso Duso, Humboldt University Berlin and WZB. Giancarlo Spagnolo, University of Rome Tor Vergata, SITE, EIEF, CEPR. Cristiana Vitale, LEAR. “Measuring the deterrence properties of competition policy: the Competition Policy Indexes”. https://www.ssoar.info/ssoar/bitstream/handle/document/25822/ssoar-2009-buccirossi\_et\_al-measuring\_the\_deterrence\_properties\_of.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2009-buccirossi\_et\_al-measuring\_the\_deterrence\_properties\_of.pdf

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004.47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

---FOOTNOTE 48 STARTS---

48 The information collected concerns the geographical scope of competition law, the remedies it allows, the type of private enforcement available to the damaged parties, the merger notification and assessment procedure, and the type of abuses of dominance and restrictive trade practices prohibited.

---FOOTNOTE 48 ENDS---

#### “Core” before “antitrust” means which laws not how we structure them.

Thomas Horton 10. Professor of Law and Heidepriem Trial Advocacy Fellow, University of South Dakota School of Law. “Rediscovering Antitrust's Lost Values.” The University of New Hampshire Law Review. https://scholars.unh.edu/cgi/viewcontent.cgi?article=1305&context=unh\_lr

Part II of this Article discusses Congress’s historical balancing and blending of fundamental political, social, moral, and economic values to create a constitutional-like set of flexible laws that can be adapted to unforeseen and changing economic and political circumstances.22 Part II.A. briefly reviews some of the extensive scholarship addressing Congress’s balancing of values and objectives in its core antitrust laws including the Sherman, Clayton, and FTC Acts. Parts II.B. and C. explore the less-studied balancing of political, social, moral, and economic values and objectives in more recent antitrust legislation.23 Part II.B. specifically examines the legislative debates undergirding the passage of the HSR Act. 24 Part II.C. then turns to the debates and discourse that led to the passage of the NCRA in 1984 and the subsequent National Cooperative Production Amendments of 1993 and 2004. 25

#### “Substantial” modifies how we change it---means our change just has to be important

Supreme Court of Virginia 17. “Ulka DESAI, Executrix of the Estate of Lakshmi Desai, and as the Successor Trustee of the Revocable Trust Agreement of Lakshmi Desai as Amended v. A. R. DESIGN GROUP, INC.”Record No. 160814. https://caselaw.findlaw.com/va-supreme-court/1862832.html

Code § 43-5 provides that a memorandum “shall be sufficient if substantially in form and effect as follows.” Code § 43-15 expressly provides that the lien will not be invalidated if the memorandum reasonably identifies the property by the description given and it “conforms substantially to the requirements of §§ 43-5, 43-8 and 43-10, respectively, and is not wilfully false.” We have held that the word “inaccurate,” as used in Code § 43-15, is defined as “ ‘not accurate:  as ․ containing a mistake or error:  incorrect, erroneous.’ ” Reliable Constructors v. CFJ Props., 263 Va. 279, 281-82, 559 S.E.2d 681, 682 (2002) (quoting Webster's Third New International Dictionary 1139 (1993)). We have not defined what constitutes “substantially in form and effect” or “substantial conformity” in this context. The word “substantial” simply means “something of moment:  an important or material matter, thing, or part.” Webster's Third, at 2280.2 We hold that a defect in a memorandum of mechanic's lien is substantial if it would prejudice a party or if it would thwart one of the purposes underlying the statute.3

#### Topic literature and ground---what is covered is the debate.

Anu Bradford et al. 18. Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton, Chris Megaw & Nathaniel Sokol, Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets, JOURNAL OF EMPIRICAL LEGAL STUDIES, VOL. 16, P. 411, 2019 (2018). Available at: https://scholarship.law.columbia.edu/faculty\_scholarship/2514

2. Limits in the Scope of Competition Laws

Countries commonly carve out certain industries or enterprise types from the scope of their competition law. Our data shows that between 1950 and 2010, roughly twothirds of jurisdictions (68%) had at least one exemption in their laws in a given year.17 These exemptions are not only prevalent but also significant, both in terms of their economic and political impact. Often, they tell an important story about the political economy underlying a law, indicating which companies or industries enjoy special privileges or protection by their governments. It is plausible, even likely, that countries use exemptions as a way to shield certain industries or enterprise types from competition law and hence give them an edge over their competitors in the marketplace. Alternatively, an exemption may reflect the government’s view that certain enterprise types should instead be subjected to sector-specific regulations, by which its idiosyncratic characteristics can be better addressed. Our dataset offers the opportunity to systematically examine the types of industries and firms that governments treat differently by exempting them from competition scrutiny, and study how those exemptions differ across time and jurisdiction.

## T Courts

#### Counter-interp---Courts or Congress can enlarge the scope of antitrust prohibitions.

Donald F. Turner 90. Professor of Law, Georgetown University Law Center. "The Virtues and Problems of Antitrust Law," Antitrust Bulletin 35, no. 2 (Summer 1990): 297-310.

However, unsound interpretations of antitrust laws have adverse economic effects. Court-formulated rules have varied from time to time over the years since antitrust statutes were passed, and the scope of antitrust prohibitions were either enlarged or reduced. While there are extensive disputes as to what the precedents' defects have been and are, it is generally recognized that antitrust law has had and still has some undesirable features that the courts or Congress should correct.

#### 2. Precision---it’s a measured variable. Steers predictable research.

Anu Bradford and Adam Chilton 19. Anu Bradford, Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton, Assistant Professor of Law and Walter Mander Research Scholar. “Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets.” Codebook for Version 1. “Comparative Competition Law Expert Survey”. “CCL\_ExpertSurvey\_Data\_Ver1.dta”. Journal of Empirical Legal Studies 16(2): 411-443.

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| --- | --- |
| Variable Name: | Role of Courts |
| Variable Label: | expert\_courts |
| Description: | This variable provides the mean response to the question: In practice, do the courts generate new law by changing the scope of the antitrust statutes in [name of country selected for the survey]? Please answer on a scale from 1 (no role) to 5 (extensive role).  Coding Rules:  1 - Courts Play No Role  Example: courts are not involved in antitrust matters.  2 - Courts Play a Limited Role  Example: courts merely apply antitrust laws in individual cases without changing the scope of antitrust law.  3 - Courts Play a Role  Example: courts have the power to change the scope of antitrust statutes but rarely do so.  4 - Courts Play a Large Role  Example: courts have the power to change the scope of antitrust statutes and sometimes do so.  5 - Courts Play an Extensive Role  Example: courts have the power to change the scope of antitrust law and frequently do so. |

## States CP

#### States get preempted.

Eric J. Riedel 16. J.D. Candidate, 2017, University of California, Berkeley, School of Law. “Patent Infringement Demand Letters Does Noerr-Pennington or the First Amendment Preempt State-Law Liability for Misleading Statements?” Berkeley Technology Law Journal, Vol. 31, No. 2, Annual Review (2016). https://www.jstor.org/stable/pdf/26377767.pdf?refreqid=excelsior%3Ac9df5aaf69239985d625970f2158c49f

Only the state of Vermont has used consumer protection law to bring a claim against MPHJ for its licensing practices.5 This dearth of litigation is likely a consequence of **Federal Circuit precedent stating that the** Petition Clause of the First Amendment **preempts** any state-law liability based on an assertion of one’s patent rights, a standard **derived from the Supreme Court’s Noerr-Pennington doctrine, which originated in the context of antitrust**.6 The Federal Circuit grants an exception only where the assertion is a “sham,” meaning that the infringement claim is both objectively baseless and subjectively made in bad faith.7 The Federal Circuit’s standard is problematic, and **unlikely to survive Supreme Court scrutiny**, if applied to state-law liability for claims based on statements tangential to a claim of patent infringement. Although the Federal Circuit has not decided such a case, the Northern District of Illinois addressed the question in In re Innovatio IP Ventures,8 holding that the Petition Clause preempted state- law claims based on misrepresentations in the demand letter because those representations did not affect the outcome of the infringement claim.9

## Antitrust PIC

#### Only the plan solves.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

III. Reasons to overrule Noerr

The problem of Noerr’s expansion is hardly unrecognized by commentators. Even Robert Bork’s Antitrust Paradox, not generally understood as a manual for vigorous antitrust enforcement, suggested that Noerr had gone too far in its licensing of anticompetitive conduct. There have, over the years, been several prominent calls for courts to adjust or narrow the Noerr doctrine, including a study by the FTC in 2006, but the calls for substantive reform have had influence only at the margins.

If it can be accepted that Noerr has gone beyond any defensible basis in the First Amendment, there are three good reasons to overrule it. The first and most obvious is the duty of the courts to apply the Sherman Act and similar laws as Congress intended. The text of the statute does not contain exceptions for seeking monopolization or restraint of trade through governmental means. And as suggested earlier, the legislative history of the antitrust laws does not suggest a Congress that wanted to exempt bribery, deception, or other abuses from antitrust scrutiny. Noerr has therefore prevented government from confronting some of the problems that the antitrust laws were meant to solve.

The second reason to overrule Noerr is to ensure greater consistency in the courts. As it stands, some courts consider First Amendment limits when deciding Noerr cases, but others feel free to treat Noerr as a free-floating doctrine that can be extended regardless of its basis in the First Amendment. The current approach is a recipe for inconsistency and circuit splits.

When facing a case involving alleged political activity, a court would break the analysis into its constituent parts, so that it becomes obvious whether any given ruling is statutory or constitutional. One would first ask whether the conduct in question represents an activity that Congress meant to prohibit in Section 1 or 2 of the Sherman Act, Section 3 or 7 of the Clayton Act, or Section 5 of the FTC Act. Once that is done, the court can then consider whether the conduct is nonetheless protected by the First Amendment, relying on established First Amendment doctrine. Doing this would not allow courts to mix the issues and consequently avoid analysis of either.

The third reason is related: maintaining the coherence of the respective constitutional and statutory doctrines. Because Noerr does not clearly call for either, it creates a pronounced danger of doctrinal creep. To the extent that protected speech or petitioning under the First Amendment is implicated, the First Amendment’s own jurisprudence is best suited to provide an answer. To the degree that hard statutory questions are presented—just when is anticompetitive bribery a violation of the FTC Act?—such questions should be answered, as opposed to brushed away with a citation to Noerr.

An alternative to overruling Noerr is to demand that courts consider the First Amendment in the course of applying Noerr immunity. This is better than the current state of affairs but has the problem of being too convoluted. Take the bribery case described earlier. It would require the court, in the midst of an antitrust analysis, to consider the scope of any constitutional right to bribery, potentially to create a bribery exception (or to expand the sham exception) and then return to the antitrust point. It is simpler, as is the normal style, to assess whether the conduct in question violates the law and, if so, whether it is nonetheless protected by the First Amendment and then, if so, whether the government’s interests outweigh the speech interests.

#### Perm do the counterplan---antitrust is actor independent.

Law Insider. “[Antitrust Law](https://www.lawinsider.com/dictionary/antitrust-law) definition”. https://www.lawinsider.com/dictionary/antitrust-law

[Antitrust Law](https://www.lawinsider.com/dictionary/antitrust-law) means the Sherman Act, as amended, the Clayton Act, as amended, and all other federal, state and foreign statutes, rules, regulations, orders, decrees, administrative and judicial doctrines, and other laws that are designed or intended to prohibit, restrict or regulate competition or actions having the purpose or effect of monopolization or restraint of trade.

## Multilat CP

#### No link---Antitrust laws rarely apply extraterritorially AND when they do its cooperative!

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

4. The U.S. Agencies require relief sufficient to eliminate identified anticompetitive harm that has the requisite connection to U.S. commerce and consumers, even if this means reaching assets or conduct in a foreign jurisdiction.7 For example, in the merger context, a company may be required to divest a manufacturing plant outside of the U.S. in order to help preserve competition in the U.S. At the same time, Section 5.1.5 of the International Guidelines sets out a balanced standard for the Agencies’ reliance on extraterritorial remedies that “limits overly broad extraterritorial reach, while recognizing and allowing for effective enforcement.” 8 To this end, the International Guidelines provide that: The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts. An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency’s international comity analysis.9 5. This statement sets out a number of important guiding principles. First, the Agencies always look first to resolve anticompetitive concerns through domestic remedies. 6. Second, the Agencies will seek an extraterritorial remedy only when: (1) the extraterritorial remedy is needed to address harm or threatened harm to U.S. commerce and consumers, and (2) such a remedy is consistent with the Agency’s comity analysis. Thus, the Agencies’ general practice is to seek an effective remedy that is restricted to the United States, which the Agencies believe is the best approach. Only when a domestic remedy cannot effectively redress the harm or threatened harm to U.S. commerce or consumers will the Agencies consider broader remedies that have extraterritorial effect. 7. The International Guidelines explain that comity can be a consideration in the Agencies’ remedy determinations. Comity “reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’”10 The U.S. Supreme Court has held that no conflict exists for purposes of international comity analysis if a person subject to regulation by two nations can comply with the laws of both.11 In addition, even where there is no direct conflict, “the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law.” 12 Comity has not been a significant factor in the Agencies’ remedy determinations involving more than one sovereign because of the high degree of international convergence in competition law and policy. Convergence has reduced the number of direct conflicts, including on remedies. 8. Third, the Agencies seek to avoid conflicts with remedies contemplated by their foreign counterparts, notably through cooperation. The International Guidelines specifically provide that the Agencies “may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies.”13 Cooperation “can improve substantive analyses and ensure that investigations and remedies are as consistent and predictable as possible, which improves outcomes, and reduces uncertainty and expense to firms doing business across borders.”14 Divergent remedies have the potential to impair firms’ abilities to compete globally and can undermine competition enforcement efforts. In many cases, particularly those involving extraterritorial remedies, cooperation and coordination are important to an effective outcome and improve understanding of each of the cooperating authorities’ needs and proposed decisions. 15 Information exchange among enforcers investigating the same conduct enables the Agencies to understand each other’s decisions in a case and any impact on U.S. commerce. 16 Cooperation has also facilitated informal and practical approaches to limiting duplication, including by one authority’s closing of its investigation without remedies after taking another authority’s remedy into account. 17 9. Consequently, if an extraterritorial remedy is contemplated in a particular case, these principles, as provided in the International Guidelines, allow the Agencies to ensure that the remedy is appropriately tailored to address the identified competitive harm to U.S. commerce and consumers without unnecessarily conflicting with the laws, policies, or remedies of foreign jurisdictions. 10. Specific examples of Agency cooperation on remedies are discussed at Part VI.

#### Decades of unilateral application thump.

Virginia del Aguila 05. “Establishing Global Competition Standards: Achievable Mission or Utopia?” Centro de Estudios Economicos de Regulacion. Universidad Argentina de la Empresa. Working Paper N 20. April 2005. <https://www.uade.edu.ar/DocsDownload/Publicaciones/4_228_1634_WPS020_2005.pdf>

The competition authorities in the US have had **little compunction** about enforcing their antitrust laws against overseas companies. In this sense, they have in some occasions demanded that commercial documents located abroad should be handed over, and the **Courts have even issued final orders** requiring that foreign companies should **change their commercial practices or restructure their industry**41. Nonetheless, it should be noted that the 1994 International Antitrust Enforcement Assistance Act (IAEAA)42 is intended to improve the ability of the US enforcement agencies to obtain evidence located abroad by providing for reciprocal agreements to be entered between the US and other countries to facilitate the exchange of information, including confidential information. Notwithstanding, due to the fact that certain antitrust offences are criminal under US law and, thus, it is possible for individuals to be sentenced to terms of imprisonment, for the moment only an agreement between the US and Australia was concluded under the IAEAA.

## Con Con CP

#### 7---Counterplan causes a runaway convention---collapses democracy

Riestenberg 18 Jay Riestenberg, Deputy Communications Director @ Common Cause U.S. Constitution Threatened as Article V Convention Movement Nears Success https://www.commoncause.org/resource/u-s-constitution-threatened-as-article-v-convention-movement-nears-success/

A well-funded, highly coordinated national effort is underway to call a constitutional convention, under Article V of the U.S. Constitution, for the first time in history. The result of such a convention could be a complete overhaul of the Constitution and supporters of the convention are dangerously close to succeeding. With special interest groups gaining more momentum, conservative advocates are just six states short of reaching the constitutionally-required 34-state goal. They are targeting Republican-controlled legislatures in 2018 and are within striking distance. The unknowns surrounding a constitutional convention pose an unacceptable risk, particularly in the current polarized political climate. Given how close calling a new convention is, it’s time to spotlight that risk and sound an alarm for the preservation of our Constitution. Too few Americans are even aware that a constitutional convention can be called, let alone that there would be no checks on its scope and further that the process to call one is well underway and being underwritten by some of the nation’s richest individuals. Calls for a convention are coming from right and left, with more money, a stronger campaign structure, and national coordination on the right. A number of major conservative organizations and donors, including Mercer family and Koch-funded groups such as the American Legislative Exchange Council (ALEC), have renewed and intensified efforts to thrust this issue into the spotlight after years of inactivity. This memo that outlines the different campaigns calling for an Article V convention and why it is just a dangerous idea. These calls for a constitutional convention represent the most serious threat to our democracy flying almost completely under the radar.

## Memo CP

#### Agency action exacerbates this.

Alexander Paul Okuliar et al. 21. Morrison & Foerster LLP. "FTC Lays Groundwork For Rulemakings: Are New Substantive Competition Rules Coming?". No Publication. 3-25-2021. https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1067906/ftc-lays-groundwork-for-rulemakings-are-new-substantive-competition-rules-coming

The FTC's foray into rulemaking could lead to a period of uncertainty and legal challenges in those areas touched by a new agency rule. There is likely to be significant debate over the scope of the FTC's authority, the particulars of the rulemaking process, the substance of any proposed rules, and, when tested in court, the extent of Chevron deference to which the agency is entitled. Substantive FTC competition rules could also create potential divergence in enforcement policy or activity between the DOJ and FTC brought about by the new rules.

## FTC Tradeoff

#### The FTC is going after Noerr conduct now.

C&M 18. “New Full Slate of FTC Commissioners Will Face Unique Challenges and Opportunities” Crowell & Moring. 04-30-18. https://www.crowell.com/NewsEvents/AlertsNewsletters/Antitrust-Law-Alert/New-Full-Slate-of-FTC-Commissioners-Will-Face-Unique-Challenges-and-Opportunities

State Action and Regulations Affecting Competition. The FTC’s suits (ending in success at the Supreme Court) in NC Dental and Phoebe Putney challenged state-sanctioned limitations on competition. Additionally, outgoing Acting Chair Ohlhausen made “Economic Liberty” and combating state occupational licensing requirements a key feature of her tenure. The FTC is likely to continue to pursue policy advocacy and antitrust enforcement in cases where state regulations significantly restrain competition. State Certificate of Public Advance (COPA) laws have recently stymied FTC efforts to stop allegedly anticompetitive hospitals mergers, so look for the FTC to devote resources to studying the effects of these laws and trying to prevent more states from passing such laws and from approving hospital mergers under them. We also expect to see even greater interest in examining anticompetitive conduct by nominally “state” boards made up of private industry participants, and perhaps **stepped-up efforts to erode the Noerr-Pennington (First Amendment) protections for anticompetitive petitioning** activity directed at courts and governments that impede markets.

#### The FTC is already overwhelmed with antitrust cases.

PYMNTS 7/28/21. “FTC Sees Most Merger Filings In 2 Decades, Chair Says.” https://www.pymnts.com/antitrust/2021/ftc-sees-most-merger-filings-2-decades/

The Federal Trade Commission (FTC) is dealing with a rise in mergers that has amounted to the highest number of filings in 20 years, Bloomberg reported.

“Although the FTC is working to review many of these deals, the sheer volume of transactions is significantly straining commission resources,” FTC Chair Lina Khan said, per Bloomberg. “I am deeply concerned that the current merger boom will further exacerbate deep asymmetries of power across our economy, further enabling abuses.”

Companies have thus far announced $2.8 trillion in deals in the first seven months of this year, Bloomberg reported, which amounts to 2021 likely being the most active ever.

The reason for the influx is the high level of corporate confidence and the free spending of private equity firms, which has been happening over several industries, including technology, media, healthcare, transportation and others, according to Bloomberg.

Over the first three quarters of the current fiscal year, antitrust agencies have processed more than 2,400 merger filings Khan said, per Bloomberg.

But she said the wave of mergers hasn’t been the only issue. There are two other big problems facing the FTC, including a recent Supreme Court decision making it harder to recover money for victims of scams or deceptive practices, and the general boost in fraud during the pandemic, which has been made even worse by digital platforms, Bloomberg reported.

Khan, nominated by President Joe Biden for her role at the FTC, was officially approved June 15 in a 69-28 Senate vote.

“The overwhelming support in the Senate for Lina Khan’s nomination to serve on the Federal Trade Commission is a big win for fair competition in our country,” FTC Commissioner Rohit Chopra said in a statement at the time. “There is a growing consensus that the FTC must turn the page on the failed policies spanning multiple administrations.”

Khan has been known for being a critic of the tech industry and has worked on anti-competition issues before. She wrote a paper when she was a student that looked into how antitrust legislation didn’t negatively affect Amazon.

#### Zero link uniqueness---aggressive antitrust enforcement is back.

E. Steele Clayton, IV, 8/10/21 – Bass, Berry & Sims PLC, “Be Prepared: Aggressive Antitrust Enforcement Is Back.” https://www.jdsupra.com/legalnews/be-prepared-aggressive-antitrust-8939761/

This summer has seen a flurry of bold antitrust announcements from the Biden administration. By issuing a sweeping executive order calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has signaled that federal antitrust policy is entering a new era.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range of industry practices. In this environment, effective antitrust counseling and compliance programs are more important than ever.

#### Authorities already juggle competing goals.

Michelle Meagher 21. A competition lawyer and Senior Policy Fellow at the University College London Centre for Law, Economics and Society. This paper has been prepared for the ABA Spring Meeting 2021 session on the consumer welfare standard. “Adaptive Antitrust.” 03-24-21. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3816662

(7) How will authorities juggle competing goals? – The application of an “excessive power” legal standard is not a question purely of “juggling” or “balancing”. Instead, authorities must **synthesise the evidence from a range of sources, as they already do.** And courts will be required to do the same, **as they already must.**

#### FTC overstretch inevitable BUT the plan fiats they legislative backing and court victory---key to legitimacy and funding.

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

But the current FTC leadership seems to have overlooked the agency’s history. As such, it has already promised to produce different policy outcomes and noted that the Section 5 Policy Guidelines were shortsighted. As a result, the current FTC has decided, with the support of the other two Democratic Commissioners, to rescind the Policy Guidelines.

It is unknown whether the current FTC will try to adopt different guidelines or whether it will start opening more cases under Section 5 of the FTC Act. Furthermore, it is less clear whether the new FTC leadership currently counts with the sufficient and aligned Neo-Brandeisian human talent to bring solid cases that are not based on the consumer welfare standard or to litigate before judges that support the Neo-Brandeisian vision of antitrust.

What seems clear is that the new agency’s leader might find it hard to bring all Commissioners to an agreement with respect to what the agency can do with Section 5 of the FTC Act, and this situation, in and of itself, puts the agency in peril.

The FTC’s Rulemaking Authority

Another important policy change that may be detrimental to the FTC is its expressed willingness to expand the agency’s rulemaking authority under, e.g., Section 18 of the FTC Act. It is well known that in addition to its authority to investigate law violations by individuals and businesses, the FTC also has federal rulemaking authority to issue industry-wide regulations.

However, the agency’s rulemaking authority has been self-limited since the 80s in an effort to ensure the institution doesn’t overuse its capacity to adopt industry-wide regulations and raise concerns with those policy makers that are against the legislature deferring its core mandate to an independent agency that doesn’t represent the people.

Traditionally the legislature has the constitutional mandate to create laws affecting different sectors of the economy. Whereas it is legally accepted to design independent agencies with constrained mandates to adopt regulations, such powers are not necessarily understood to construe independent agencies as substitutes for the legislature’s powers. It is a basic tenet of administrative law, that agencies are constrained by the enabling statute that gives them authority to promulgate regulations in the first place.

Against this background, it seems risky for the new leadership to engage in broad rulemaking endeavors that might raise concerns from an institution legitimacy perspective. In the long term, it is predictable that many policymakers might not be supportive of an agency that implements its rulemaking authority in its broadest sense. As a result, some degree of political backlash against the agency might not help the agency’s lifecycle, especially if the agency is not granted with specific legislative guidance in the form of new legislation.

The Future of the FTC

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

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

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

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

## Trade DA

#### COVID thumps protectionism.

Lee 20 (Yen Nee Lee is a correspondent for CNBC.com based in Singapore, covering a range of business topics from around the region, including trade, finance. Coronavirus pandemic will cause a 'much bigger wave' of protectionism, says trade expert. <https://www.cnbc.com/2020/04/10/coronavirus-expect-a-lot-more-protectionism-says-trade-expert.html> //shree)

Governments around the world will turn increasingly protectionist in the near term as they try to limit the economic damage from the coronavirus pandemic, a trade expert said on Thursday.

COVID-19 has already spread to more than 180 countries and territories and caused some countries to restrict exports of medical supplies — that's a decision that could spill into other areas such as food products, said Deborah Elms, executive director at consultancy Asian Trade Centre.

"There is a much bigger wave of protectionism in the near term that we should expect, that is not just in medical supplies ... but it will also start to affect food," she told CNBC's "Capital Connection."

"As countries get nervous about food stocks and food supply, food security, they're going to stop allowing the export or restrict the import of food products," she added. Global economic activity, including trade, is at risk of grinding to a halt as countries implement social distancing and quarantine measures of varying degrees to fend off the spread of the coronavirus disease, formally referred to as COVID-19.

The World Trade Organization on Wednesday said global trade — which was already slowing in 2019 due to the U.S.-China tariff fight — is projected to plummet by 13% to 32% this year. A recovery is expected in 2021, but that depends on the duration of the outbreak and the effectiveness of policies to combat the virus impact, according to the WTO.

#### There’s no extraterritorial conflict.

Brendan Sweeney 07. BCom, LLB (Melbourne); PhD (Monash); Barrister and Solicitor of the Supreme Court of Victoria; Senior Lecturer, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University. "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?" [2007] MelbJlIntLaw 2; (2007) 8(1) Melbourne Journal of International Law 35. http://www.austlii.edu.au/au/journals/MelbJIL/2007/2.html#fn1

In the past 15 years, the level of hostility has **reduced considerably** due to a number of factors.[325] First, a growing number of **states now recognise that anti-competitive activities** — most notably hard core cartels, which until recently made up most of the international cases — **are bad for their own economies**.[326] This growing recognition has produced a rush of **new competition regimes**. It has also **fostered a spirit of cooperation**, resulting in a number of collaborative initiatives, including positive comity.[327] Second, a number of states have indicated that they are prepared to **apply their competition laws extraterritorially**; this has tended to **mute complaints by those states against US extraterritorialism.** Third, US antitrust authorities and, more recently but to a lesser degree, US courts, have become more sensitive to the legitimate concerns of other states.[328] The consequence is that competition law extraterritorialism is no longer necessarily just a matter of aggressive unilateralism. **It can, and often does, operate in a cooperative environment; it is no longer just a US phenomenon.**

#### No trade impact.

Joel **Einstein 17**. Australian National University. 01-17-17. “Economic Interdependence and Conflict – The Case of the US and China.” E-International Relations. <http://www.e-ir.info/2017/01/17/economic-interdependence-and-conflict-the-case-of-the-us-and-china/>

In 1913, Norman Angell declared that the use of military force was now economically futile as international finance and trade had become so interconnected that harming the enemy’s property would equate to harming your own.[1] A year later Europe’s economically interconnected states were embroiled in what would later become known as the First World War. Almost a century later Steven Pinker made a similar claim. Pinker argues, “Though the relationship between America and China is far from warm, we are unlikely to declare war on them or vice versa. Morality aside, they make too much of our stuff and we owe them too much money.”[2] His argument rests upon the liberal assumption that high levels of trade and investment between two states, in this case the US and China, will make war unlikely, if not impossible. It is this assumption that this essay seeks to evaluate. This essay is divided into three sections. The first briefly outlines the theory that economic interdependence results in a reduced likelihood of conflict, breaking the theory down into smaller components that can be examined. In the second section, this essay suggests that the premise ‘more trade equals less conflict’ is simplistic. It does not take into account many of the variables that can influence the strength of economic interdependence’s conflict reducing attributes. Within this section, the essay considers: the extent to which conflict cuts off trade, theories arguing that how and what a state trades matters, Copeland’s theory of trade expectations and the differences between status quo and revisionist states. The final section deals with the realist perspective, concentrating on arguments pertaining to the primacy of strategic interests and arguments that economic interdependence will increase the likelihood of conflict owing to a reduction of deterrence credibility. Each section will be related back to the US-China relationship with a view to assessing Pinker’s claim. The essay will conclude that economic interdependence does reduce the likelihood of conflict but is insufficient on its own to completely prevent it. To calculate the likelihood of conflict correctly one would need to factor in the nature of the economic interdependence alongside the strength of the strategic interests at stake. Economic Interdependence and Conflict The theory that increased economic interdependence reduces conflict rests on three observations: trade benefits states in a manner that decision-makers value; conflict will reduce or completely cut-off trade; and that decision-makers will take the previous two observations into account before choosing to go to war. Based on these observations, one should expect that the higher the benefit of trade, the higher the cost of a potential conflict. After a certain point, the value of trade may become so high that the state in question has become economically dependent on another. Proponents of this theory argue that if two states have reached this point of mutual dependence (interdependence), their decision-makers will value the continuation of trade relations higher than any potential gains to be made through war.[3] It is on this argument that Pinker rests his statement that the economic relationship between the US and China precludes war. One can see evidence of this when analysing US views on China as trade rises. A 2014 Chicago Council on Global Affairs survey indicates that only a minority of Americans see China as a critical threat, compared to a majority in the mid-1990s. This number is even higher when analysing Americans who directly benefit from trade with China.[4] As compelling as this argument may be, high levels of economic interdependence have not always resulted in peace. The decades preceding WW1 saw an unprecedented growth in international trade, communication, and interconnectivity but needless to say, war broke out.[5] This instance alone is not enough to disprove Pinker’s logic. War may become very unlikely but began nonetheless.[6] Let us take two hypothetical scenarios, one in which the chances of war is 80% and the other in which trade has reduced the likelihood of war to 10%. Just knowing that war did indeed take place does not tell us which scenario was in play. Similarly, the fact that WW1 took place gives us no information about whether economic interdependence made war unlikely or not. In fact, evidence even exists to suggest that economic linkages prevented a war from breaking out during the sequence of crises that led up to WW1.[7] However, the fact that a war as detrimental as WW1 could break out despite a supposed reduction of the likelihood of conflict gives us an impetus to examine whether this reduction does take place. Additionally, if this is the case, what variables can weaken this pacifying effect? Does Conflict Cut off Trade? Economic interdependence theory makes the assumption that conflict will reduce or cut-off trade. This assumption appears to be logical, as one would expect that the moment two states are officially adversaries, fear of relative gains would ensure that policy makers want to completely cut-off trade. However, there are many historical examples of trade between warring states carrying on during wartime, including strategic goods that directly affect the ability of the enemy to carry out the war.[8] For example, in the Anglo-Dutch Wars, British insurance companies continued to insure enemy ships and paid to replace ships that were being destroyed by their own army.[9] Even during WW2, there are numerous examples of American firms continuing to trade strategic goods with Nazi Germany.[10] Barbieri and Levy argue that these examples and their own statistical analysis suggest that the outbreak of war does not radically reduce trade between enemies, and when it does, it often quickly returns to pre-war levels after the war has concluded.[11] In response to this result, Anderton and Carter conducted an interrupted time-series study on the effect war has on trade in which they analysed 14 major power wars and 13 non-major power wars. Seven of the non-major power wars negatively impacted trade (although only four of these reductions were significant), but in the major war category, all results bar one showed a reduction of trade during wartime and a quick return to pre-war levels at its conclusion.[12] Accompanying this contradictory finding one must take into account that even if war does not radically reduce trade, if a state believes that it does then potential opportunity cost would still figure in their calculations. Variables that Impact the Pacifying Effect of Economic Interdependence The purpose of this section is to demonstrate that the pacifying effect of economic interdependence is not constant. It achieves this via a discussion of the effect of changes in a number of variables pertaining to how and what a state trades. Once it is established that changes in such variables may alter the effect of economic interdependence on the likelihood of conflict, Pinker’s statement (that the level of trade between the US and China makes conflict unlikely) can be considered to be an over-simplification. One variable is the relative levels of economic dependence. Some argue that asymmetry of trade can increase the chances of conflict if the trade is more important to one state than it is to the other; their resolve would not be reduced by the same degree. The less dependent state would be far more willing than its adversary to initiate a conflict.[13] An example is the possibility of the prevalent idea in China that ‘Japan needs China more than China needs Japan’ leading to China becoming more assertive in Senkaku/Diaoyu islands dispute.[14] It is important to recognize that all trade is asymmetric in one fashion or another. It is radical asymmetry that one has to fear, which at the moment does not appear to be the case in the China-Japan or US-China case. Another variable is the specifics of what is being traded. A study by Dorussen suggests that the pacifying effect of trade is less evident if the trade consists of raw materials and agriculture but stronger if the trade consists of manufactured goods. Even within the category of manufactured goods there are differences in effect. Mass consumer goods yield the strongest pacifying results whilst high-technology sectors such as electronics and highly capital-intensive sectors such as transport and metal industries tend to have a relatively weak effect.[15] If it is a sector with alternative trade avenues then embargos and boycotts as a result of conflict will have far less effect.[16] The rule is that the more inelastic the import demand, the higher the opportunity cost and the smaller the probability of conflict.[17] According to these studies, trade still generally reduces the likelihood of conflict however it is by no means homogeneous in its effects. Additionally, the opportunity costs are not the same for importers and exporters. Dorussen’s study suggests that increased trade in oil tends to make the exporters more hostile and the importers friendlier in relations to their foreign policy.[18] Taking this framework into account, in 2014 China’s top five exports to the US (computers, broadcasting equipment, telephones and office machine parts) all fell under the category of electronics,[19] whilst the US’s top five exports to China (air and/or spacecraft, soybeans, cars, integrated circuits and scrap copper) were all either high-capital intensive sectors or raw materials and agriculture.[20] According to Dorussen’s study, these exports should not yield the strongest possible conflict reducing results, which could impact the validity of Pinker’s statement. Copeland presents another variable, namely expectations of trade. Copeland argues that if a highly dependent state expects future trade to be high, decision makers will behave as many liberals predict and treat war as a less appealing option. However if there are low expectations of future trade, then a highly dependent state will attach a low or even negative value to continued peaceful relations and war would become more likely.[21] As an example, he points out that despite high levels of trade in 1914 German leaders believed that rival great powers would attempt to undermine this trade in the future, so a war to secure control over raw materials was in the interests of German long-term security.[22] Via this framework, if the US began to believe that in future years they would be less dependent on China’s economy, or if it became apparent that a US-China trade war was about to take place, there would be a sharp rise in the probability of conflict. The final variable this essay will discuss relates to the differences between status quo and revisionist states. Most empirical analyses of economic interdependence tend to group together states as different as the United States, Pakistan, Australia, Germany and China and assume that variations in their behaviour would be the same.[23] Papayoanou on the other hand, argues that when analysing the effects of economic interdependence it is useful to differentiate the effects on great power states and states with revisionist aspirations.[24] If a status quo power has strong economic ties with revisionist state there will be interest groups who advocate engagement and who believe that confrontational stances will threaten the political foundation of economic links. This will constrain the response of the status quo state.[25] One can see evidence of such an interest group in the US, a group Friedberg describes as the Shanghai coalition, who he argues advocate engagement with China at the expense of balancing.[26] A study by Fordham and Kleinberg backs up this argument as they find that US business elites who benefit from trade with China tend to see little benefit in limiting the growth of Chinese power.[27] A 21st Century revisionist power is far less likely to be a democracy, and therefore, interest groups will influence the leadership far less. This means an authoritarian revisionist power will be working under fewer constraints and will be able to take a more aggressive stance.[28] This appears to be the case in China where rather than having domestic constraints on taking an aggressive stance against Japan, one of their biggest trading partners, grassroots nationalism has made explicit cooperation a domestically risky option.[29] There are many indicators to suggest that China is a revisionist power willing to wage war. Lemke and Werner argue that an extraordinary growth of military expenditures’ reveals when a state is dissatisfied with the status quo.[30] Data provided by the Stockholm International Peace Research Institute certainly indicates that China qualifies as its military expenditure has nominally increased by 1270% between 1995 and 2015.[31] Additionally, the military modernization appears to be aimed at capabilities to contest US primacy in East Asia.[32] Much like German strategists recognized that Britain was operating under significant domestic constraints, China could realize the same of the US.[33] This is not to say that Chinese decision-makers would be cavalier about making a decision that would be to the detriment its economy. A crash in the Chinese economy due to the loss of exports to the US could potentially undermine the legitimacy of the Chinese Communist party and endanger the regime. However, the view that China is a revisionist power indicates that good trade relations alone will not result in a low probability of conflict. Realist Arguments Pertaining to Dominance of Strategic Interests Having established that if the pacifying effect of trade does exist, it can rise or fall depending on changes in a series of variables this essay proceeds to deal with realist theories arguing that trade has a negligible or even negative effect on the likelihood of conflict. Buzan argues that noneconomic factors contribute far more to major phenomena than liberal theorists usually cite to support their theory.[34] There is evidence of the primacy of strategic interests in Masterson’s 2012 study on the relationship between China’s economic interdependence and political relations with its neighbours. The study concluded that as economic interdependence with neighbouring states increased the likelihood of conflict did indeed decrease, but that the impact was minimal when compared to the impact of relative power capabilities. In other words, political and military issues dominated interstate relations. Growth in power disparities were associated with decreases in dyadic political relations that were greater than the increase caused by economic interdependence.[35] If the pacifying effect of trade can rise and fall so can the provocative effect of strategic interests. It is important to distinguish between the existence of a strategic interest and a situation of unbearable strategic vulnerability. China and the US have many opposing strategic interests, but neither is in a strategically vulnerable position. For example, China shares many borders, but none present the same threat of invasion that Tsarist Russia did to Imperial Germany as none of the current maritime tensions between China, Japan, and the US equate to a matter of national survival.[36] This is crucial as some believe that for a crisis to escalate to a major war an actor who is isolated and believes that history is conspiring against them is needed. Only this actor would take an existential risk to try and offset their strategic vulnerability.[37] Imperial Germany fit this description, but neither China nor the US does. This is largely due to the geography of the region. The tension between the US, China and Japan are over maritime regions. Maritime issues still relate to national interests but, as Krause points out, “Land armies are still the only forces that can conquer and hold territory.”[38] Taking this into account one can argue that the benefits of US-China trade are, for each state, currently greater than the benefits of pursing strategic benefits via force, but this situation will only remain as long as the situation does not become one of unbearable strategic vulnerability. Realist Arguments Pertaining to the Undermining of Deterrence Having established that scenarios exist where strategic interests and vulnerabilities have a greater effect on the likelihood of war than economic interdependence, this essay will now evaluate arguments that economic interdependence can increase the likelihood of conflict through the undermining of deterrence. The argument proceeds as follows: if economic interdependence constrains the ability or willingness of a state to use its military, security is lowered as the state now has a weakened ability to engage in deterrence and defensive alliances. Deterrence relies on the ability of a state to make credible threats and defensive alliances rely on credible promises to protect one’s allies.[39] Credibility is defined as the product of the operational capability to follow through with a threat and the communication of resolve to use force.[40] What is at risk here is that if economic interconnectivity interferes with the communication of resolve to use force then states may end up with a way that neither side expected or wanted. Some argue that it was such a failure to communicate resolve that resulted in the beginning of WW1. Indeed, Jolly claims that: “The Austrians had believed that vigorous actions against Serbia and a promise of German support would deter Russia: the Russians had believed that a show of strength against Austria would both check the Austrians and deter Germany. In both cases, the bluff had been called and the three countries were faced with the military consequences of their actions.”[41] The risk in the US-China case would be that the interest groups described earlier would prevent the US from effectively communicating its resolve to use force if China were to cross a redline. The flaw in this argument lies in the fact that whilst interest groups might push back against public statements outlining redlines; the US has many less overt options available to it to communicate resolve. Modern technology and the forms of interconnectivity have resulted in many more lines of communication between China and the US than adversaries had access to in 1914. Private meetings, electronic communication and numerous other methods of communication have the capability to be candid without being visible to interest groups. It is for this reason that this essay discounts the theory that Sino-American economic interdependence results in a reduction of deterrence and therefore increases the likelihood of conflict. Conclusion This essay has shown that the strength of the pacifying effect of economic interdependence is subject to change depending on a series of dynamic variables. It has also demonstrated that the strength of the conflict provoking effects of strategic interests can change depending on whether the strategic interest amounts to a situation of unbearable strategic vulnerability. It has discounted the theory that interdependence leads to a higher chance of conflict through an erosion of credibility. To sum up, trade does seem to reduce the likelihood of conflict but should not be seen as a deterministic factor as strategic interests, and vulnerabilities also have a large effect. There is no hard rule as to what will be the driving factor as the nature of economic interdependence and of strategic factors impact their relative values. Accordingly, Pinker’s statement that the trade between the US and China makes war exceptionally unlikely is simplistic and misleading because it fails to account for a wide array of variables that can radically change the likelihood of a Sino-American war. An intellectually honest thesis would insist upon a comprehensive approach in which the level of economic activity is simply one of many variables that is required.

## Infrastructure DA

#### Biden has no PC, his agenda is shot, other issues overwhelm, and Afghanistan outweighs.

Rick Klein et al 9/29. Staff Writer at ABC News. “Biden takes credibility hit at critical time for agenda: The Note.” <https://abcnews.go.com/Politics/biden-takes-credibility-hit-critical-time-agenda-note/story?id=80285075>.

So much of the standoff over the Biden agenda is about Democrats' trust and lack thereof -- among and between progressives and moderates, leaders and rank-and-file members, outside groups and inside caucuses and between virtually everyone and the White House. That makes this an inconvenient time for President Joe Biden's credibility to come into question. Top military advisers' testimony in the Senate Tuesday, with more to come in the House Wednesday, appears to contradict the president's previous assertions about the kind of advice he got before ordering the troop withdrawal from Afghanistan. The White House is pushing back on any notion that the president hasn't been truthful about what he last month called a "split" in the advice he was getting. And Biden aides would like to separate Afghanistan from the domestic agenda entirely. A new ABC News/Ipsos poll published Wednesday shows how hard that might be, though. Biden's approval rating is down across a range of issues compared to a month ago. People are unhappy about his handling of the COVID-19 pandemic, immigration, the economy, gun violence, crime and, yes, even infrastructure. The sagging numbers come after months of stability and relative popularity for the president. The figures started to drop right around the disastrous Afghanistan exit, and so far, they haven't shown signs of recovering. With huge deadlines looming, it's notable not just how many Democrats are implicitly defying the White House, but how many are doing so while suggesting they know what Biden's agenda is better than he is. Sen. Bernie Sanders' urging of House progressives to sink the bipartisan infrastructure bill unless the far larger social-spending package also moves along is a case in point. Republican opposition to Biden has long been unquestioned, but Democrats' commitment to him now very much is.

#### Won’t pass---progressive aren’t budging.

Mike Lillis & Scott Wong 9/28. Staff Writers at The Hill. “Left warns Pelosi they'll take down Biden infrastructure bill.” <https://thehill.com/homenews/house/574314-left-warns-pelosi-theyll-take-down-biden-infrastructure-bill>.

Liberals on Tuesday fired a shot across the bow at Democratic leaders by warning that a bipartisan infrastructure bill cannot pass the House as long as Senate centrists remain noncommittal on the larger social benefits package at the heart of President Biden's agenda. The threat is the latest challenge facing Speaker Nancy Pelosi (D-Calif.) and other party leaders, who have scheduled a Thursday vote on the Senate-passed $1.2 trillion public works proposal. The timeline reflects Pelosi's promise to moderate House Democrats, who have sought to divorce the bipartisan infrastructure bill from the larger and more divisive "family" benefits package. But in a sign that the infrastructure bill would be doomed Thursday, progressives are sticking with their long-held insistence that Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) first commit to supporting the larger package before the liberals vote in favor of the more popular bipartisan measure. And they say they have the numbers to sink it. "If she were to call the bill, it will fail," Rep. Jan Schakowsky (D-Ill.), a close ally of Pelosi, said while leaving a closed-door House Democratic Caucus meeting. "Not because the [Congressional] Progressive Caucus, people like me, aren't willing to vote for it. But ... we had an agreement that we were going to get these two pieces [together]."

#### And republicans.

Jessica Wehrman, 9-27-2021, "House Democrats look for a sign from the Senate on budget bill," Roll Call, https://www.rollcall.com/2021/09/27/pelosi-gambles-infrastructure-votes-will-be-there-by-thursday/

The infrastructure bill passed the Senate last month with 19 of the chamber’s 50 Republicans, including Minority Leader Mitch McConnell, R-Ky., supporting it. But House Republican leaders are whipping against the measure because of its connection to the reconciliation package.

There are roughly 12 to 15 House Republicans who say they will vote for the infrastructure bill regardless of when the House takes up the reconciliation package, according to a source familiar with the GOP supporters' vote counting operation. If the infrastructure bill were to be delinked from Democrats advancing the reconciliation package, that support would grow, the source said.

But that level of Republican support is not likely enough to offset progressive Democrats who plan to oppose the infrastructure bill without passage of the reconciliation package. More than a dozen progressives publicly reiterated their commitment to that stance on Monday.

‘A deal is a deal’

Despite leadership’s confidence about getting their members in line before Thursday’s vote, their path to doing so is unclear.

Several progressive Democrats left the caucus meeting saying they still want the reconciliation package passed before they are willing to vote for the infrastructure bill.

“A deal is a deal,” Omar said, reiterating progressives’ view that both pieces of Biden’s domestic agenda need to advance together.

#### Biden isn’t leaning on congress to get infrastructure done

Heather Caygle, 9-27-2021, "Pelosi steers Dems toward infrastructure vote, without spending bill in tow," POLITICO, https://www.politico.com/news/2021/09/27/pelosi-house-democrats-infrastructure-514359

Pelosi and Schumer spoke to Biden via phone before the House caucus meeting Monday evening. Several senior Democrats are also hoping Biden will more forcefully weigh in on the infrastructure vote Thursday, publicly declaring that the bill needs to be passed by the House on that day.

So far the president has not done so directly, instead speaking about the overall urgency of his agenda during a brief interaction with reporters Monday. Without specifying a deadline, he said "we got three things to do: the debt ceiling, the continuing resolution, and the two pieces of legislation. If we do that, the country is going to be in great shape.”

#### Senate antitrust bill thumps.

Benjamin Din, 8-12-2021, "Senators set stage for antitrust fight," POLITICO, https://www.politico.com/newsletters/morning-tech/2021/08/12/senators-set-stage-for-antitrust-fight-797122

SENATE SHARPENS ITS ANTITRUST FOCUS — The Senate is moving on its antitrust response, following the House Judiciary Committee’s approval of its own antitrust package. But senators are taking a more targeted approach that could make their bill easier to actually get to Biden’s desk.

Sen. Richard Blumenthal (D-Conn.) on Wednesday introduced the Open App Markets Act, as Leah reported for Pros. The new bill would target Apple and Google's "gatekeeper power" over the smartphone market, forcing the tech giants to allow developers to use alternative app stores and to tell consumers about where they can purchase software for a cheaper price online. Sens. Marsha Blackburn (R-Tenn.) and Klobuchar, who chairs the Senate Judiciary antitrust subcommittee, are cosponsors of the legislation.

— Not quite a companion bill: The Senate bill does have some overlap with a House bill introduced by Rep. David Cicilline (D-R.I.), who chairs the House Judiciary antitrust panel. However, Cicilline’s legislation is broader, applying to everything from app stores to advertising to logistics, and would ban companies from prioritizing their own products over their competitors’.

Companion legislation from the House is currently in the works. Senators are still working on companions for the House’s proposals, but those bills aren’t expected until later in the fall.

#### PC not key---Manchin won’t listen to Biden.

Nick Arama, 9-12-2021, "Manchin Bombards the Networks to Send a Message to Joe Biden: You're Not Getting What You Want," redstate, https://redstate.com/nick-arama/2021/09/12/manchin-bombards-the-networks-to-send-a-message-to-joe-biden-youre-not-getting-what-you-want-n441898

Manchin also made clear that his priority was the infrastructure plan, and that that was the bill that needed urgency. He said he was going to support moving on the bipartisan infrastructure bill first and by itself, that he wasn’t going to go along with the effort by progressives to tie that to the $3.5 trillion plan. That essentially would kill the Democrats’ effort, if they don’t have his support on that.

So right now, it looks like, despite Biden’s pushing, Manchin is going to continue to lock it up. Meanwhile, the progressives could end up killing the infrastructure bill in order to try — and fail — to get their pie in the sky wish list of far-left agenda items to maximize Democratic control.

#### The grid is strong now---energy efficiency, new tech, and cycle generation.

Krysti Shallenberger 17, Utility Dive associate editor, 1-5-2017, "Predictions 2017: 8 sector insiders on what's next for power markets and regulation," Utility Dive, http://www.utilitydive.com/news/predictions-2017-8-sector-insiders-on-whats-next-for-power-markets-and-re/433358/

The traditional drivers of infrastructure additions were load growth and connecting distant generation sources to population centers. However, that has changed. Load growth is negligible in many areas. (At PJM we forecast peak load growth of less than half of one percent per year.) At the same time, more efficient technology, specifically energy efficiency and new natural gas combined cycle generation closer to load centers, has changed power flow patterns, which reduces the need for additional large-scale transmission expansion projects. The reduction in larger scale projects has allowed focus to be shifted to resolving aging infrastructure concerns on lower-voltage facilities. More efficient technologies, the capacity performance construct and upgrades to the system have made the grid increasingly robust and resilient. Last summer, for example, was the first time PJM met a peak demand of more than 150,000 megawatts without invoking emergency procedures and while net exporting power.

#### No grid impact---it’s overhyped.

Freedberg 14 (Sydney J, “Cyberwar: What People Keep Missing About The Threat,” Jan 6, <http://breakingdefense.com/2014/01/cyberwar-what-people-keep-missing-about-the-threat/>, CMR)

**Cites:**

--Peter W. Singer – former director of the Center for 21st Century Security and Intelligence and a senior fellow in the Foreign Policy program

--Allan A. Friedman – Research Scientist at the Cyber Security Policy Research Institute at George Washington University's School of Engineering

**Singer and Friedman** also **do a valuable service** in **beating back the hype** **about “Cyber Pearl Harbors”** **and “Cyber 9/11s” or the US suffering countless millions of “attacks.”** **Those alarmist statistics lump together everything from a virus easily stopped by** someone’s **firewall** to credit card theft **to the loss of secret schematics for the F-35** stealth fighter. **Those “attacks” vary from trivial, to significant losses** for one particular business, to actual matters of national security, **but none of them does as much damage as a good old-fashioned bomb**, they argue. **Even if hackers shut down the** national **electrical grid for weeks** on end, bad as that would be, **it wouldn’t be as bad as a single nuclear explosion**. “**It’s** a lot **like ‘Shark Week**,’” Singer said about the overhyped dangers. “**Squirrels have taken down the power grid more times than the zero times hackers have**.” There’s lots of talk about how the attacker always has the advantage in cyberspace, he told an audience at Brookings this afternoon, but “**a true cyber offense, an effective one**, a Stuxnet style [attack] **is** something **quite difficult**.”

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## T Courts

#### Case law “expands the scope”

Jung Won Han et al. 18. Jung Won Han is an investigator at the Korea Fair Trade Commission (KFTC) and PhD candidate at the Department of Applied Economics of the Vrije Universiteit Brussel (VUB). Caroline Buts is professor at the same Department. Tony Joris is Jean Monnet professor of European Union Law at the Faculty of Law and Criminology (VUB). We thank Professor Philip Sutherland and the participants at the International Symposium on Imperfect Forms of Collusion, organised by Stellenbosch University and Justus-LiebigUniversitfit Giessen on 12 and 13 January 2018, for their useful comments. "On the Scope of Antitrust Law in South Korea, the EU and the US," European Competition and Regulatory Law Review (CoRe) 2, no. 2 (2018): 74-91.

2. United States

The Sherman Act was drafted long before the EU founding Treaties. To keep up with new types of 'agreements', the US has gradually expanded its scope through case law. Older violations6 9 of Article 1 of the Sherman Act dealt with explicit agreements between competitors.70 At that time, the main task consisted of examining whether agreements were legal.

#### Prohibition means ‘severely hinder’---it’s actor neutral.

Washington Court of Appeals 19 (KORSMO-judge. Opinion in State v. Kimball, No. 35441-5-III (Wash. Ct. App. Apr. 2, 2019). Google scholar caselaw. Date accessed 7/13/21).

His argument runs counter to the meaning of the word "prohibit." It means "1. To forbid by law. 2. To prevent, preclude, or severely hinder." BLACK'S LAW DICTIONARY 1405 (10th ed. 2014). As "severely hinder" suggests, a "prohibition" need not be an all or nothing proposition.

#### Resolved means to deliberate.

Merriam-Webster 9. Merriam Webster 2009. http://www.merriam-webster.com/dictionary/resolved

# Main Entry: 1re·solve # Pronunciation: \ri-ˈzälv, -ˈzȯlv also -ˈzäv or -ˈzȯv\ # Function: verb # Inflected Form(s): re·solved; re·solv·ing 1 : to become separated into component parts; also : to become reduced by dissolving or analysis 2 : to form a resolution : determine 3 : consult, deliberate

## Multilat CP

#### 2. It’s DOJ policy to not apply them extraterritorially and to cooperate.

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

12. The Department’s Merger Remedies Guide (“DOJ Merger Remedies Guide”) addresses merger remedies that may reach assets or conduct outside the United States. Similar to Section 5.1.5 of the International Guidelines, the DOJ Merger Remedies Guide also explains that the Department strives, “to the extent possible,” to ensure that its “remedies do not conflict unnecessarily with the remedies of other jurisdictions.”19 The Guide states, “In many cases, the [Department] may be able to work collaboratively with other antitrust agencies to craft remedies that are effective across jurisdictions.”20

#### 3. Cooperation is the norm, but rarely applied extraterritorially either way.

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

5. The Agencies’ Cooperation with Foreign Jurisdictions on Remedies 18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.35 Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.36 The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.37 6. U.S. Case Examples 19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers. 6.1. Merger Cases 20. In most mergers, the Agencies can obtain an effective remedy for U.S. competition and consumers without extraterritorial divestitures or other relief. This is the case even when an Agency coordinates with other jurisdictions in investigating a transaction that raises concerns in both domestic markets and markets outside the U.S. Even in these instances, however, coordination between jurisdictions can be helpful. For example, the FTC benefited from coordinating with antitrust authorities in Canada, the EU, and Mexico during the investigation of Emerson Electric Co.’s acquisition of Pentair plc, even though the potential harm to U.S. markets was resolved exclusively through the divestiture of a U.S. switchbox facility.38 Similarly, in the General Electric-Alstom SA merger, effective relief for U.S. markets required divestiture of only U.S. based assets; however, coordination between the Department and the EC in connection with the Department’s investigation “facilitated [the Department’s] investigation and helped formulate remedies that [preserved] competition in the United States and internationally.”39 A coordinated remedy resulted in the Department and the EC announcing separate settlements that eliminated harm to consumers in their respective jurisdictions. 40 There are many more cases in which the Agencies have coordinated with their foreign counterparts on mergers that affect multiple jurisdictions.41 21. Although a merger may affect competition in several jurisdictions, the Agencies focus on preserving competition in the domestic markets that may be harmed by the proposed acquisition. On some occasions, relief secured by foreign jurisdictions means that no remedy, domestic or extraterritorial, is necessary to protect domestic competition. Though our experience in deferring to another authority’s remedy is limited, we have relied on informal deference and remain interested in doing so, under the right conditions. A notable example was in connection with Cisco’s acquisition of Tandberg in 2010. The Department declined to challenge the merger in part due to certain commitments that Cisco made to the European Commission (EC) to facilitate interoperability in products related to a type of videoconferencing called telepresence. Waivers of confidentiality by the parties and industry participants allowed the Department and the EC to cooperate closely in their parallel reviews of the transaction, resulting in an efficient outcome for the enforcers and the merging parties.42 22. Nevertheless, certain merger investigations resolved by consent decree have required the divestiture of assets located outside the United States to preserve competition within the United States. For example, the FTC consent decree resolving concerns regarding the merger of cement manufacturers Holcim Ltd. and Lafarge SA required, in part, divestiture of a Canadian cement plant and related U.S. terminals along with two Canadian terminals related to a U.S. cement plant. The FTC explained that the divested assets “remedy competitive concerns in northern U.S. markets [and are] part of a larger group of Holcim assets located in Canada that Holcim and Lafarge have agreed to divest to address competitive concerns raised by the [Canadian Competition Bureau (“CCB”)]. Commission staff worked closely with staff from the CCB to reach outcomes that benefit consumers in the United States.” 43 An extraterritorial remedy was also required to resolve Department’s investigation of the Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. merger. The consent decree in that matter similarly required divestiture of a facility outside of the United States, the Grupo Modelo brewery in Mexico, and a perpetual and exclusive U.S. trademark license to the seven brands of beer that Modelo then offered in the United States, as well as three brands not yet offered in the United States, but currently sold by Modelo in Mexico. This remedy allowed the acquirer “to meet current and future demand for Modelo Brand Beer in the United States,” which resolved concerns that the merger would harm competition in twenty-six local U.S. markets. 44 6.2. Civil Non-Merger 23. Extraterritorial remedies are less common when the underlying antitrust violation involves non-merger conduct. Indeed, none of the Department’s recent civil-non merger remedies has applied outside the United States.45 The FTC consent order with Invibio Inc. and its parent Victrix plc represents one example of a conduct remedy with a carefully tailored extraterritorial component. The FTC’s complaint related to Invibio’s worldwide sales of high performance polymer (PEEK) that was used to manufacture medical devices manufactured or sold in the U.S.46 The FTC consent imposed obligations applicable to certain extraterritorial sales, but explicitly excluded sales of PEEK used solely in products not manufactured or sold in the U.S.47 24. In the limited number of civil non-merger cases in which the Agencies find that the licensing of intellectual property is necessary to remedy allegedly anticompetitive conduct, the Agencies generally rely on a domestic-only licensing remedy because the license can be tailored to permit use of the intellectual property only in the domestic markets affected by the conduct. However, in rare cases, when a broader license may be necessary to provide effective relief, the Antitrust Agencies seek a remedy that is no broader than necessary.48 To the extent that multiple enforcers are reviewing similar conduct that may implicate remedies involving intellectual property, comity considerations and cooperation may come into play. 7. Conclusion 25. In their mission to protect competition in the United States, the U.S. Antitrust Agencies aim to tailor antitrust remedies to the identified competitive harm to U.S. commerce and consumers. Although agency remedies may reach conduct or assets outside the United States in order to preserve competition from a merger or to remedy anticompetitive conduct that affects U.S. commerce and consumers, the Agencies seek to avoid remedies with extraterritorial effect where possible. The Agencies’ International Guidelines set out a well-balanced standard for doing so, allowing for effective enforcement while limiting overly broad extraterritorial reach. Carefully tailoring remedies pursuant to the principles set forth in the International Guidelines helps the Agencies to avoid potential duplication and conflicting remedies. The Agencies believe that this approach is worthy of consideration by other authorities addressing these issues.

#### EU---Differences in enforcement and judiciary ensure divergence .

James Keyte 18. Director of the Fordham Competition Law Institute, an adjunct professor of Comparative Antitrust Law at Fordham Law School, and an Editor of ANTITRUST, Fall 2018. “Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge.” <https://www.antitrustinstitute.org/wp-content/uploads/2018/12/fall18-keyte.pdf>

Setting the Stage

To start, there are simple differences that are not likely to change any time soon. Article 102 is both more specific and broader than Section 2 of the Sherman Act, and the enforce- ment and judicial systems also are quite distinct. Unlike in the U.S., in the EU’s administrative law system, the Commis- sion is the investigator, prosecutor, and decision maker; it does not have to go to court to impose penalties or other remedies. Moreover, in contrast to the U.S., the Commis- sion’s decisions are given significantly more discretion with respect to competition policy choices and the assessment of complex economic issues.2

#### Plan is not uncertain---perm do both solve that solvency argument BUT Decades of unilateral application thump---foreign companies having their industries restricted proves if they do win a link the net benefit has no impact uniqueness.

#### Inevitable.

Michael 2NC Ristaniemi 20, PhD Candidate in Commercial Law at the University of Turku, Vice President for Sustainability at the Metsä Group, Participant in the Visiting Scholar Programme at the University of California, Berkeley, “International Antitrust: Toward Upgrading Coordination and Enforcement”, Doctoral Dissertation, October 2020, https://core.ac.uk/download/pdf/347180879.pdf

The increase in jurisdictions with competition law and enforcers is – in itself – a positive development, but not unconditionally. International antitrust has traditionally been dominated by American and European voices. This traditional dichotomy is already becoming broader, with regimes such as Brazil and Canada making interesting and relevant contributions.75 However, along with this increase in regimes with active views on antitrust increases in the complexity and difficulty for the primary market actor, the firm, to operate. The status quo is thus one of both substantial and procedural inconsistency, which leads to unpredictability for businesses as well as economic inefficiency in general.

## Trade DA

#### Dialogue solves concerns.

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

4. Process and Transparency in Remedy Determinations 15. In addition to policy transparency, the Agencies recognize the importance of transparency, procedural fairness, and non-discrimination with regard to individual remedy determinations, particularly those implicating extraterritoriality. In situations in which an Agency deems an extraterritorial remedy necessary, transparency and procedural fairness ensure that the parties understand the Agency’s rationale for and have the opportunity to provide input into the decision.30 Among other benefits, actively engaging with parties helps the Agencies to craft appropriate resolutions that address the specific competitive harm in the jurisdiction, including by better understanding the scope of a remedy that may be under consideration in another jurisdiction. 31 Such engagement allows for more efficient remedies and improves the potential for cooperation and coordination of remedies, when appropriate. 16. An explanation of why a particular remedy is needed is also helpful if the remedy will apply outside the jurisdiction. Such an explanation enables foreign parties and sister agencies to understand the rationale for the application of the extraterritorial remedy and to appreciate that it is applied in a non-discriminatory manner.32

#### They’ll work cooperatively.

Patricia A Brink and Ruediger Schuett 18. Brink is the director of civil enforcement for the Antitrust Division of the US Department of Justice. Schuett is international counsel in the Antitrust Division’s International Section. “United States: Department of Justice, Antitrust Division”. Global Competition Review. 9-19-18. https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/the-antitrust-review-of-the-americas-2019/article/united-states-department-of-justice-antitrust-division

Over the past year, the Antitrust Division of the US Department of Justice has maintained its long-standing commitment to international cooperation, both in its investigations as well as through multilateral organisations and initiatives. As the antitrust enforcement community is confronting an increasing number of cross-border transactions, shared policy challenges and the globalisation of cartel investigations, the Antitrust Division's relationships with foreign antitrust agencies continue to grow stronger. Indeed, the division views close cooperation with its counterparts north and south of the borders, as well as with antitrust agencies worldwide, as an important tool to further enhance the effectiveness and efficiency of its enforcement programme. The number of investigations involving coordination with foreign agencies clearly demonstrates the division's commitment to international cooperation. In 2017 and 2018 alone, the Antitrust Division has cooperated with 19 different antitrust agencies from 17 countries worldwide – including six countries in the Americas – on 26 different civil investigations. The Antitrust Division also actively supports and promotes the invaluable work of international organisations such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD) in the antitrust enforcement arena, and it has recently launched a new initiative to promote and strengthen procedural fairness in antitrust investigations globally.

#### No internal link.

Allison Murray 19, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

#### Trade doesn’t solve war---commerce just re-routes.

Joanne Gowa & Raymond Hicks 17. \*\*William P. Boswell Professor of World Politics of Peace and War, Princeton. \*\*Statistical Programmer, Niehaus Center for Globalization and Governance; PhD in political science, Emory. “Commerce and Conflict: New Data about the Great War.” *British Journal of Political Science* 47(3): 653-74. Emory Libraries.

The findings we report show that the Great War led to a **rerouting**, rather than a wholesale breakdown, of trade. This did not come as a surprise to states: the historical record shows that states anticipated wartime shifts in their trade channels. Most belligerents nonetheless incurred efficiency losses as a consequence of the shifts, but the losses pale in light of the aggregate costs the war imposed on them. These findings suggest that neglecting wartime trade channels can **overstate** the deterrent power of ex ante trade. It is reasonable to question the extent to which wartime trade can, in general, substitute for its ex ante counterpart. This depends, as we noted above, on the composition of trade. The dominance of homogenous products in trade at the time of World War I made substitution a feasible option. For the same reason, other wars that occurred during the first half of the twentieth century seem likely to have precipitated the same trade dynamics as did the Great War. Preliminary empirical analyses are consistent with this argument. 95 After World War II, however, intra-industry trade – that is, trade in differentiated products between countries with similar factor endowments – came to account for a much larger share of commerce. Krugman notes, for example, that intra-industry rose from about 22 per cent of trade between the industrialized countries in 1962 to about 50 per cent in 2006. 96 This trade tends to involve ‘highly specialized imported varieties for which domestic imports are hard to find’, 97 raising the estimated gains from trade that accrue to countries shifting from autarky to free trade. Trade in these products can magnify wartime trade costs to the extent that trade across enemy lines engages imports that cannot easily be obtained from other trading partners. Production networks also spread more widely across countries over time. This implies that conflicts in the more recent past might indeed have wreaked havoc on trade, raising the deterrent power of ex ante trade. But the composition of conflicts also shifted over time. After 1945, no war would ever again split the major trading states. As we noted above, the advent of the Cold War transformed them into each other’s sturdiest allies. Because the advanced industrialized countries account for a large share of **intra-industry trade**, post-World War II conflicts **did not endanger** the exchange of differentiated products. The same is true of foreign direct investment: for most of the twentieth century, it was largely the major developed country trading partners that were both its home and host countries. 98 The **changing composition of warring dyads** after World War II may help explain the findings in the empirical literature on this period that conflict and ex ante trade are inversely related. The effects of conflicts on wartime commerce in this period have yet to be examined, however. Conclusion That the First World War unleashed tremendous destruction is indisputable. It marked the inception of what has been described as the long European civil war. It resulted in sixteen million deaths and twenty million wounded and destroyed large amounts of physical capital. 99 In its wake, the great powers never established anything remotely similar to the Concert of Europe that succeeded the Napoleonic Wars. Their best efforts produced a League of Nations that was unable to resolve the conflicts of interest that stymied co-operation among them. They could agree neither on the enforcement of the Versailles Treaty nor on a collective response to the Great Depression, which set the stage for the outbreak of the Second World War. The Great War also reputedly destroyed the large trade flows that existed during the first golden age of globalization. For this reason, it has become central to debates about the liberal peace. Its outbreak seemed to destroy any hope that leaders had internalized the idea that war had become a ‘great illusion’, more likely to impose costs than benefits because of the concomitant destruction of the trade that had become integral to the growth of national power. 100 Because its belligerents had been each other’s major trading partners ex ante, the Great War seemed to destroy hopes that economic linkages would secure peace. Yet, the evidence we present here suggests that one of the largest wars in history did not induce a breakdown of trade. Instead, large shifts occurred in interstate commerce, privileging trade between allies, penalizing commerce between adversaries and increasing trade with neutrals. The composition of early twentieth-century trade helped to mitigate the welfare losses these shifts imposed, as it enabled states to switch trading partners and transit routes more easily than might seem possible later in the twentieth century. Because ex ante commerce between belligerents is not necessarily a good indicator of their ex post trade, estimates of the deterrent power of trade need to take both into account.