## 1AC

### Adv---Separation of Powers---1AC

#### 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.

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.

### Adv---Anti-competitiveness---1AC

#### 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.

#### 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

#### 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.

#### The plan is key---establishes clarity and certainty---alternative is a hodgepodge of inconsistent judge splits.

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

It is worth pointing out that not every court has ignored the First Amendment foundations of the Noerr doctrine. Courts have sometimes insisted on a First Amendment analysis prior to granting Noerr immunity. For example, consider the litigation from the early 2000s centered on allegations that a drug manufacturer sought to delay the entry of competitive generic drugs by wrongly listing its patent in the FDA’s orange book. In rejecting a Noerr defense, the district court agreed with the Federal Trade Commission that the listing was not a petition protected by the First Amendment and was therefore not entitled to Noerr immunity. It did so on the premise that, as the FTC argued, the FDA’s decisions to list the patents in the orange book were ministerial as opposed to discretionary; there is no Noerr immunity when the “government does not perform any independent review of the validity of the statements, does not make or issue any intervening judgment and instead acts in direct reliance on the private party's representations.” Similarly, the FTC, at least, believes that misrepresentative communications to government are not protected by the First Amendment and also not protected by Noerr.

This might be a fine approach if followed generally, but it is not; the very inconsistency strengthens the case for overruling Noerr. While the approach of the cases just discussed is the better one, nothing obliges a court to follow this formula when deciding a case, and the Supreme Court itself has ignored it. Hence, until Noerr is overruled, the immunities that attach to speech and petition will remain a hodgepodge of immunity associated with First Amendment protections that is purely judge-made and inconsistent with the anticorruption purposes of the Sherman Act.

#### The plan solves---it prohibition under antitrust requires the exact determination of the First Amendment. Reinstates congressional intent, ends free-floating judicial doctrine, and creates court consistency. FTC has called for the plan.

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.

## 2AC

### Adv---Separation of Powers

**SCOTUS won’t overturn Chevron now---AHA case proves.**

**Nachmany 21** [Eli Nachmany is a third-year law student at Harvard Law School, where he serves as Editor-in-Chief of the Harvard Journal of Law & Public Policy. Prior to law school, Nachmany worked in the White House Office of American Innovation as a domestic policy aide and as the Speechwriter to the U.S. Secretary of the Interior. 8-9-2021 https://www.yalejreg.com/nc/scotus-faces-a-chevron-decision-tree-in-american-hospital-association-v-becerra-by-eli-nachmany/]

Chevron has become the target of intense criticism over the years. Some argue that deferring to an agency’s interpretation of a statute that it is charged with administering scrambles the separation of powers. Others point out that Chevron runs counter to the Administrative Procedure Act, which instructs courts to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” And still others urge that Chevron offends due process, given the systemic advantage it confers upon the government in regulatory litigation.

But is **A**merican **H**ospital **A**ssociation the proper vehicle for overturning Chevron? Three main obstacles block the way toward the overturning of Chevron in the case. The first is the Court’s resolution of an additional question that it asked the parties to brief, concerning the reviewability of HHS’s interpretation. The second is the Court’s potential interest in a sort of **Chevron exceptionalism** for interpretations about appropriations provisions. And the third is the possibility that the Court itself **is just not ready to overturn Chevron**, instead preferring an alternate path even if it reaches the question.

### Adv---Anti-competitiveness

#### Economic predictions fail---variables have undergone pandemic-induced deterioration.

David J. Lynch 1-11. Global Economics Correspondent for Washington Post with a MA in International Relations from Wesleyan University. Here’s another thing the pandemic has screwed up: Economic forecasts. Washington Post. 1-11-2022. https://www.washingtonpost.com/business/2022/01/11/jobs-pandemic-shepherdson-omicron/

Ian Shepherdson knew he was sticking his neck out. But last Thursday, he went public with a startling forecast: The next government labor market report would show that the U.S. economy had created 850,000 jobs in December.

Less than 24 hours later, it became clear that Shepherdson, the chief economist and founder of Pantheon Macroeconomics, had missed the mark and missed badly. Employers in the last month of the year actually had hired just 199,000 workers, less than one-fourth the number he predicted, according to the government’s closely watched monthly tally.

For Shepherdson — and many others on Wall Street — the jobs forecast was both an unmitigated flop and an illustration of how difficult the pandemic makes it for even the most astute observers to assess the $23 trillion economy.

“Everybody wants to be pursuing precision,” he said Monday in an interview. “But even before covid, it was like hitting a moving target from a moving vehicle. Now, we’ve got a blindfold on as well.”

Indeed, economic prognostication long has provided proof for a remark attributed to baseball great Yogi Berra: “It’s tough to make predictions, especially about the future.”

But the pandemic is making a tough job even tougher. As the virus waxed and waned, it delivered some of the wildest ups and downs in U.S. labor market history. The covid recession and recovery also erased long-standing economic relationships, emptying downtown office districts, sending workers to toil in their living rooms and leaving economists fumbling for insight.

That’s resulted in an economy perched uncomfortably between the world of early 2020 and whatever reality will emerge once the pandemic is a memory. Meanwhile, familiar relationships among key economic variables have gone haywire.

Though wages are growing faster than at any point in the decade before the pandemic, for example, the number of Americans lured back into the labor market has been disappointing. Two years after covid-19 first hit the United States, the labor force participation rate remains near its lowest mark since the 1970s, when women began entering the workforce in significant numbers.

Yet a different measure, which tracks the number of employed Americans 25 to 54 years of age, relative to the total population, last year showed the fastest one-year gain since the government began keeping track in 1949.

“This is a historically unique U.S. economy,” tweeted economist Skanda Amarnath, executive director of Employ America, a nonprofit that promotes tight labor markets.

Monthly jobs gains also have been exceptionally volatile. In the last half of 2019, each month’s hiring ranged between 161,000 and 234,000 individuals. The last six months of 2021 saw swings between 199,000 and 1.1 million, a much wider band.

All this tumult has left government and private-sector economists struggling to fathom what businesses, workers and consumers will do next.

“It is extremely difficult to forecast in the current environment,” said Gregory Daco, chief U.S. economist for Oxford Economics. “It requires a heavy dose of humility. We’re more likely to be wrong, given how rapidly things are shifting.”

Even if economists are well schooled to calculate future levels of hiring, investment or trade, they are no better qualified than anyone else to foretell the next move by a shape-shifting virus — or the likely policy response in a hyper-polarized capital.

Still, after more than three decades tracking major economies, Shepherdson is no novice. He launched the research firm Pantheon, which is based in Newcastle upon Tyne in the United Kingdom, in 2012 after stints at two other firms. And he is a two-time winner, in 2014 and 2003, of the Wall Street Journal’s award for best economic forecaster.

He also wasn’t alone in botching the December jobs call. The consensus of professional economists called for more than twice as many jobs as were actually added. Moody’s Mark Zandi expected 750,000 while analysts at Goldman Sachs predicted 500,000.

Economic forecasters rely on computer models to predict the future. In layman’s language, they analyze how companies and workers have behaved in the past under various economic conditions to predict how they will behave in the future.

Ideally, economists make predictions by comparing current conditions to a previous period when the underlying structure of the economy was similar, said economist Michael Strain of the American Enterprise Institute.

But there is no precedent for determining what happens when a globalized economy operates amid a lethal respiratory virus that has killed more than 5 million people worldwide.

“The problem is what possible period do we have when the economy is close to what it is today?” said Strain, a former Federal Reserve system economist. “Some people are just using the same models they’ve been using and that’s not working.”

Shepherdson isn’t one of them. He says he realized that the pandemic had rendered traditional models — based on macroeconomic indicators such as industrial production and oil prices — “more or less useless.”

So he completely overhauled his proprietary formula to take account of the economy’s ongoing makeover, placing greater reliance upon high-frequency data from HomeBase, a provider of scheduling and payroll software for small businesses.

The British-born economist blends the HomeBase data with additional real-time input from ADP, a payroll processing company that releases its own employee count, as well as other economic inputs, to get a monthly payrolls estimate.

HomeBase data has been praised by Federal Reserve officials for its usefulness in anticipating labor market moves. But the firm has been producing its monthly reports only since the start of the pandemic, while traditional government labor market data extends to the late 1940s.

Relying on a shorter data series inevitably means a fatter margin of error, Shepherdson said.

“Until we’ve got five years of this HomeBase data, we won’t really know how useful it is,” he said, adding that he may begin emphasizing the wide range of possible outcomes when he issues future payroll estimates.

Forecasters today face a double-barreled challenge: uncertainty over where the United States is in the business cycle and what the post-pandemic economy will look like, according to Erica Groshen, senior economic adviser to Cornell University’s School of Industrial and Labor Relations.

The adjustments that government economists use to compensate for routine seasonal fluctuations, including retailers’ big holiday season hiring and firing cycle, also are misfiring amid the pandemic. Lower response rates to the government’s monthly surveys are further complicating assessments.

“Models are predicting what’s normal in a world that isn’t normal,” said Groshen, a former head of the Bureau of Labor Statistics.

This is not the first time models have failed. In 2008, many Wall Street firms were stunned when the housing implosion triggered huge losses on mortgage-backed securities. The big banks’ “value-at-risk” models, based on years of housing market data, had made no provision for housing prices to decline on a national basis.

Since previous downturns had been limited to specific regions, such as Southern California, Wall Street’s best-and-brightest assumed future declines would be similarly limited. When they weren’t, a wave of foreclosures led to massive losses on securities made up of repayment streams from hundreds of individual mortgages.

Venerable firms such as Bear Stearns, Lehman Brothers and Merrill Lynch failed or were swallowed up by rivals. American households’ net worth fell by more than $11 trillion.

“This entire market depended on finely honed computer models — which turned out to be divorced from reality,” concluded the 2011 report of the Financial Crisis Inquiry Commission.

Wall Street’s reliance on the past to predict the future has limits. Most investment solicitations carry some version of the warning “past performance is no guarantee of future results,” Wall Street’s way of saying your mileage may vary.

#### Our internal link to growth outweighs---Noerr immunity makes companies think they can gain an anticompetitive advantage---crushes competition.

Alden Abbott 17. Deputy Director of Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. “The FTC Takes on “Petitioning” of Government as an Anticompetitive Exclusionary Tactic” The Heritage Foundation. 02-24-17. https://www.heritage.org/trade/commentary/the-ftc-takes-petitioning-government-anticompetitive-exclusionary-tactic

Background Some of the most **pernicious and welfare-inimical anticompetitive activity** stems from the efforts of firms to use governmental regulation to raise rivals’ costs or totally exclude them from the market (see, for example, here). The **surest cure to such economic harm** is, of course, the elimination or reform of anticompetitive government laws and regulations, but that is hard to do, given the existence of **well-entrenched interest groups** who have an **interest** in lobbying to protect their special **legally-bestowed privileges.** A somewhat different potential limitation on **effective competition** associated with government **arises from the invocation of governmental processes** – in particular, judicial and regulatory filings and petitions – to harm competitors and maintain a protected position in the marketplace. Dealing effectively with this problem presents its own set of difficulties. Protecting the right to seek governmental redress consistent with existing rules is a key part of our system of limited government and the rule of law. Indeed, the First Amendment to the U.S. Constitution specifically protects “the right of the people . . . to petition the Government for a redress of grievances”, indicating that government must tread carefully indeed before taking any action that could be deemed as a curtailment of such petitioning. This has particular salience for antitrust, as Scalia Law School Professor David Bernstein has explained in The Heritage Guide to the Constitution: [T]he right to petition . . . continues to have some independent weight. Most importantly, under the Noerr-Pennington doctrine, an effort to **influence the exercise of government power, even for the purpose of gaining an anticompetitive advantage**, does not create liability under the antitrust laws. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. (1961); United Mine Workers of America v. Pennington (1965). The Supreme Court initially adopted this doctrine under the guise of freedom of speech, but it more precisely finds its constitutional home in the right to petition. Unlike speech, which can often be punished in the antitrust context, as when corporate officers verbally agree to collude, the right to petition confers absolute immunity on efforts to influence government policy in a noncorrupt way.

### 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.

#### Courts can expand the scope of antitrust.

Michael Kades 19. The director for Markets and Competition Policy at the Washington Center for Equitable Growth. “The state of U.S. federal antitrust enforcement”. https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true#antitrust\_enforcement\_activity

Antitrust enforcement is also often treated as a single entity, but multiple forces affect both the intensity and effectiveness of enforcement: enforcement activity (the number and type of cases that enforcers bring), the resources Congress provides for antitrust enforcement, and, in the federal system, the merger filing-fee system that has become the primary source of antitrust funding. These are not the only factors that affect antitrust enforcement. In the United States, judicial interpretations define the scope of the antitrust laws. The individuals running the antitrust agencies have broad discretion to determine which cases to pursue.

#### 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.

#### 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.

|  |  |
| --- | --- |
| 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. |

### T---Per se

#### “By” means we don’t only have to be prohibitions

Crown Academy of English 18, (Andrew, Fully qualified English teacher with TESOL (Teaching English to Speakers of Other Languages) qualification. “Preposition BY – Meaning and use”, https://www.crownacademyenglish.com/preposition-by-meaning-use/)

by + ING form of verb

This describes how to do something. It describes the method for achieving a a particular result.

#### C/i---Prohibition includes per se and rule of reason.

Anu Bradford and Adam S. Chilton 18. 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.

Before discussing our data and the coding of the CLI, it is important to recognize that there are limitations to any index that attempts to quantify competition regulation. This is because it is difficult to produce a single metric that tells the comprehensive story of country’s competition regime. For example, if a specific type of conduct is prohibited, is it prohibited always (per se) or sometimes (rule of reason)? This seems like a relevant distinction to code, but it turns out to be difficult to capture systematically in many jurisdictions. For instance, Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) seems to regulate anticompetitive agreements under the rule of reason standard in the European Union, but, in practice, cartels are per se prohibited. This highlights the challenge of coding even just the law in books, let alone accounting for all the nuances of a country’s competition policies.20

#### Anticompetitive business practices include rule of reason.

Charlotte Wezi Mesikano-Malonda 16. Executive director. "Global Competition Review". No Publication. 7-22-2016. https://globalcompetitionreview.com/review/the-european-middle-eastern-and-african-antitrust-review/the-european-middle-eastern-and-african-antitrust-review-2017/article/malawi-competition-and-fair-trading-commission

Anticompetitive business practices are generally defined as the category of agreements, decisions and concerted practices that result in the prevention, restriction or distortion of either actual or potential competition. Abuse of dominance and market power is an example of anticompetitive business practices and hence falls within the purview of the CFTA.3 Anticompetitive business practices are either illegal per se or illegal by rule of reason. A conduct is illegal per se if, regardless of its objective and effect or any justifications of the conduct, there is a presumption of harm on competition.

#### No bright line---rule of reason is a prohibition---they function synonymously

Light 19, Sarah E. Light Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania., The Law of the Corporation as Environmental Law, 71 Stan. L. Rev. 137, 2019, Lexis/Nexis

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive. As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition. The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199 Associations of firms have adopted numerous mechanisms of private environmental governance to address the management of common pool resources like fisheries, forests, and the global climate. 200 Examples include the Sustainable Apparel Coalition's Higg Index 201 and the American Chemistry Council's Responsible Care program. 202 But private industry standards raise special antitrust concerns. An agreement among competitors with respect to product or process specifications may exclude competitors who fail to meet such standards, raising the specter that such industry collaborations really constitute output limitations or efforts to limit competition. 203 While the U.S. Supreme Court has scrutinized private standard-setting associations carefully, 204 it has noted that if associations "promulgate … standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition … , those private standards can have significant procompetitive advantages." 205 In the absence of price fixing or a boycott, a rule of reason analysis generally applies to product standard setting by private associations. 206 The uncertain outcome [\*179] inherent in the application of antitrust law in this context could therefore serve as a potential disincentive to the adoption of private industry standards. 207 The challenge of course is that some form of explicit sanctions on noncompliant industry members may be necessary for private industry standards to be effective. In the context of private reputational mechanisms like the New York Diamond Dealers Club, 208 Barak Richman has pointed out that the Club's use of reputational sanctions and voluntary refusals to deal with actors who flout industry norms, while welfare enhancing, could nonetheless amount to violations of antitrust law. 209 This echoes the concern raised by Andrew King and Michael Lenox in their extensive empirical analysis of the Responsible Care program created by the Chemical Manufacturers Association (now the American Chemistry Council). 210 King and Lenox concluded that the absence of explicit sanctions on members who failed to meet the standards set by the program left the program vulnerable to "opportunism." 211 While they suggested that industry associations could look to third parties to enforce the rules, 212 an alternative way to facilitate the long-term environmental benefits of stronger sanctions would be to interpret antitrust law in conformity with the environmental priority principle presented below. 213 [\*180] In some instances, the conflict between the values of promoting competition and conserving environmental resources can be stark. 214 Jonathan Adler, for example, has identified this conflict in the context of fisheries - a tragedy of the commons situation in which some form of collective action is required to avoid overfishing. 215 He cites as an example Manaka v. Monterey Sardine Industries, Inc., in which a fisherman was excluded from a local fishing cooperative. 216 The fisherman sued the cooperative under the Sherman Act, and the court found an antitrust violation in his exclusion. 217 While the fishing cooperative's policies were no doubt exclusionary, Adler contends that they also promoted conservation by restricting catch. 218 The fishery collapsed by the 1950s, a collapse Adler hypothesizes might have been "inevitable" but that perhaps might not have occurred in the absence of the antitrust suit. 219 While a court performing a rule of reason analysis must consider whether a restraint on trade suppresses or destroys competition, Adler points out that courts may also "consider offsetting efficiencies from otherwise anticompetitive arrangements." 220 It is not clear, however, that the courts have consistently taken these factors into account. 221 Among other potential remedies, Adler argues that to resolve this tension between antitrust law, on the one hand, and private collective action to conserve environmental resources, on the other, courts should more actively consider the "ancillary conservation benefits of otherwise anticompetitive conduct." 222 Recognizing the long-term health of a fishery would be consistent with antitrust law's purpose of ensuring viable markets exist in the future, and consistent with the environmental priority principle introduced below. 223

### T---Expand

#### Expand means to increase the scope.

Dictionary.Com ND. “Expand.” ND. https://www.dictionary.com/browse/expand

verb (used with object)

to increase in extent, size, volume, scope, etc.:

Heat expands most metals. He hopes to expand his company.

to spread or stretch out; unfold:

A bird expands its wings.

to express in fuller form or greater detail; develop:

to expand a short story into a novel.

#### “scope” is the range of what’s covered

Cambridge Dictionary. "scope". https://dictionary.cambridge.org/us/dictionary/english/scope

scope noun [U] (RANGE)

C1

the range of a subject covered by a book, program, discussion, class, etc.:

1. I'm afraid that problem is beyond/outside the scope of my lecture.
2. Oil painting does not come within the scope of a class of this kind.
3. We would now like to broaden/widen the scope of the discussion and look at more general matters.

**Expand the scope means new activities are covered that were not before**

**Breyer 7 –** Stephen Gerald Breyer is an American lawyer and jurist who has served as an associate justice of the Supreme Court of the United States since 1994, ‘7 127 S.Ct. 2301 (2007) 551 U.S. 142, Lisa WATSON, et al., Petitioners, v. PHILIP MORRIS COMPANIES, INC., et al.

The upshot is that a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone. A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (2000 ed. and Supp. IV) (mandating disclosure of testing results in the context of pesticide registration). Neither language, nor history, nor purpose lead us to believe that Congress intended any such expansion.

### CP---Advantage

#### Noerr spills-over to other causes.

Dan Fligsten 14. Practices environmental toxic torts, municipal liability, and business litigation. He is also of counsel to the Law Offices of Roy L. Mason, P.A., an environmental toxic tort firm. “The U.S. Supreme Court may ultimately decide how far Noerr-Pennington applies outside the antitrust context” Los Angeles Lawyer. February, 2014. <https://www.lacba.org/docs/default-source/lal-magazine/2014-test-articles/february2014testarticle.pdf>

THE **NOERR-PENNINGTON** DOCTRINE **provides immunity from antitrust laws** to those who petition the government through lobbying,1 the initiation of a lawsuit, or the submission of forms required for the approval of governmental action.2 **The doctrine has also been expanded to other causes of action.** Courts within the Ninth Circuit, for example, have held that the Noerr-Pennington doctrine is not limited to antitrust and **applies to all civil causes of action**.3 California state courts have also taken an expansive view of Noerr-Pennington and have routinely applied it to areas outside antitrust.4 Some have pushed for even **greater expansion of Noerr-Pennington immunity** and have recently attempted to persuade judges that the doctrine is not only a rule of liability but also a rule of evidence that can **shield statements that concern petitioning** from even being considered by a jury. However, the recent case of AMCORD v. Hernandez suggests that even courts that take an expansive view of Noerr-Pennington may be willing to push the doctrine only so far and no farther.5

### CP---Multilat

#### The counterplan gets struck down under the First Amendment.

Michael Pemstein 14**.** Attorney, Quinn Emanuel Urquhart & Sullivan, LLP. “The Basis For Noerr-Pennington Immunity: An Argument That Federal Antitrust Law, Not The First Amendment, Defines The Boundaries Of Noerr-Pennington” <https://heinonline.org/HOL/LandingPage?handle=hein.journals/thurlr40&div=9&id=&page=>

The second type of error that may occur is not an error in result, but an error in reasoning. If the "proper" level of protection for petitioning activity in a non-antitrust cause of action happens to be the same level that would be required by the Noerr-Pennington doctrine, then while courts may reach the correct outcome by transposing the Noerr-Pennington doctrine outside the context of antitrust law, these courts will base this result on an improper analysis. Even though this is a mistake in reasoning and not in result, there still may be consequences. For example, courts which make this mistake may be avoiding constitutional questions concerning the proper scope and application of the First Amendment right to petition when they should be addressing them. This can occur because the Noerr-Pennington doctrine is primarily based on an interpretation of federal antitrust statutes and therefore it is imbued with statutory interpretation principles. These principles require courts to take a cautious approach and to be hesitant to attribute an intent to infringe or chill constitutionally protected freedoms to the legislature. For example, in Noerr, the Court avoided "difficult constitutional questions" by refusing to interpret the Sherman Act as imposing antitrust liability for political activities, noting that Congress had traditionally been hesitant to regulate such activities. 62 These statutory interpretation principles, however, are not applicable in petitioning immunity cases based on common law causes of action. The common law is the sole province of the judicial branch. By imputing these statutory interpretation principles into the realm of common law, courts, like the one in Theme Promotions,are shirking their institutional responsibility to address the "difficult constitutional questions" posed by petitioning immunity suits that are based on common law causes of action.163 As a result, the right to petition, an already underdeveloped area of law, will continue to be neglected, potentially compounding these problems in future petitioning immunity cases. Another consequence to this error in reasoning is that it attributes constitutional status to levels of protection which were primarily based on non-constitutional considerations**. As a result it entirely precludes Congress from changing the levels of protection afforded to petitioning activity in areas of law governed by statute**. **Any changes to those levels of protection would have to come by way of constitutional amendment or court decision.**

#### Say no---won’t take sovereignty losses.

Bruno Bastos Becker 16. Associate of the Competition Practice at Barbosa, Müssnich & Aragão Advogados. Revista Do Ibrac Volume 22 - Número 1- 2016 Prêmio Ibrac - Tim 2015 “Decentralized Globalization: Possible Solutions for Multiple Merger Control Regimes in Cross-Border Transactions”. https://d1wqtxts1xzle7.cloudfront.net/52329387/SSRN-id2926207.pdf?1490635488=&response-content-disposition=inline%3B+filename%3DDecentralized\_Globalization\_Possible\_Sol.pdf&Expires=1633221921&Signature=AdZzigmFmDWzAJDsFfwmed9N0wgp7JMqh1Z7XUAIxb2ocUtkMJLFCwRj4NslBFsxzWeYwJ~gkHQm0Zb22NuvJwQzbnHnUMGlXzDXdujTXsxQFyE4fSapKDT9lbk2uWrYgrCBMfw0sli1tKJPOQsVlVyeKiSWoFIfkj5M9wQaGyLoucnRYm~66PajYX~ureUvwk~kMFcr4wNpXWCO~reag8ObhcgUhRDwNB34iNJF4Z08o4VGIOwP4CqvSs1VV3gIY4-rLKazwWkwkWHj1hK11yy3~HRWtDevXLzli8qGpvvc7Z8KKEA~nj-6HTtMX7Ps9nHZZJZVQW-lNK4fXHrCow\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA

Over the last decade, several scholars have proposed different solutions for the problem of the decentralized globalization. However, none of the efforts resulted in a cohesive merger control system41. One of the main reasons is that merger policy is strongly related to industrial policy and, therefore, countries have rejected the possible loss of sovereignty42

---FOOTNOTE 42 STARTS, MIDPARAGRAPH---

42 “Because merger policy is usually closely linked to industrial policy, nowadays most countries are not ready to relinquish part of their sovereign rights in this area in order to support some sort of international merger policy, negotiated and implemented at a multilateral level. Therefore, absolutely no agreement on substantive rules to tackle mergers, not even in the form of «rule of reason» guidelines, seems to be foreseeable at international level in the near future”. (MONTINI, Massimiliano. Globalization and International Antitrust Cooperation. International Conference Trade and Competition in the WTO and Beyond. 1999. p. 18 Available at: http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-069.pdf)

---FOOTNOTE 42 ENDS, PARAGRAPH CONTINUES---

that is part of the main proposals so far. Furthermore, as pointed out by Jörg Terhechte, there are many differences between authorities that must be taken into account for the designing of a possible solution, like financial and personal resources, composition at the decisional level, independence, accountability43

#### AND concession aversion, framing effect, and ambiguity aversion.

NOTE---BE = Behavior Economics.

Armin Steinbach 16. Senior Research Fellow, Max Planck Institute for Research on Collective Goods in Bonn (Germany); Associate Member, Nuffield College, Oxford University. “The Trend towards NonConsensualism in Public International Law: A (Behavioural) Law and Economics Perspective.” The European Journal of International Law Vol. 27 no. 3

Antitrust governance remained decentralized, largely due to national approaches towards antitrust enforcement. How can the persistent dominance of unilateral antitrust rules be explained? The extraterritorial actions of the economic powers have been interpreted as the hegemonic mode of economic governance in line with hegemonic stability theory.45 Other approaches refer to antitrust matters as public goods production, according to which market regulation and enforcement are common goods in a globalized economy where some countries can free-ride.46 Several issues related to jurisdictional and sovereignty claims may comprise a fundamental reason not to surrender national competences. Moreover, the uncertainty surrounding the design of a universal standard of antitrust governance and the scope of discretionary practice of national authorities form another barrier. All of these factors translate into significant sovereignty and monitoring costs, thus rendering consensualism (via cooperation) an unattractive option.47

However, no one can clearly predict whether cooperation on antitrust matters would fail. From a welfare perspective, a uniform standard of antitrust governance that ensures a worldwide level playing field is generally perceived to be desirable since monopoly rents and competitive biases are to be avoided. Without transnational regimes, information costs are incurred because fact-finding processes abroad are more difficult to achieve without the formal involvement of respective countries. Costs may also be incurred because of the insufficiency of a holistic approach. By contrast, common and uniform regimes and standards reduce costs, essentially avoiding a ‘rag rug’ of different national rules and transaction costs from gaps or overlaps of a wide range of policies and jurisdictions. A scope for clashes of national policies evidently exists (for example, competition policies with industrial policies abroad).48 Accordingly, realizing Kaldor–Hicks improvements is deemed possible through a negotiation solution.

Why then has cooperation on common standards of prosecution, investigation and conditions of anti-competitive conduct failed and been limited to comity in enforcement and exchange of information? A RC answer would be that cooperation gains, at least for some parties, would not be sufficiently high. This may be the case because benefits from a level playing field through uniform rules do not exceed the potential disadvantages (for example, legal uncertainty, less domestic policy discretion). However, even if RC analysis would generally suggest that cooperation gains exist for all countries, failure of cooperation may be explained using the BE perspective and the concept of loss aversion mentioned above. The actors involved in bargaining situations perceive their own concessions as losses, and those they receive from others as gains, thus leading to ‘concession aversion’.49

Overestimating the values of the concessions of these actors and undervaluing those of their adversaries may form an impasse in negotiations, thereby frustrating compensation solutions in line with Kaldor–Hicks. In such cases, parties accept the adverse effects of possible termination to minimize their respective concessions. Furthermore, bargaining over the allocation of losses is less likely to lead to an agreement than bargaining over gains, which suggests that much depends on the framing of the situation. Accordingly, a gain or loss relies on the so-called ‘framing effect’, such that decisions made can actually vary based on how circumstances are presented (that is, as either positive or negative).50 Concession aversion may be particularly applicable where countries, as in antitrust matters, would ‘lose’ their well-established legal regime or practice. In these settings, the present rules and practice governing anti-competitive conduct and enforcement are perceived as being costly achievements, a loss of which would be very painful in the return of a new legal regime.

While sovereignty issues are at stake in other areas as well (for example, in financial law), the particular sensitivity may be rooted in the imminent economic impact of antitrust measures on business. This may explain why only procedural and informal modes of cooperation have been agreed upon in antitrust matters offering several procedural advantages: the enhanced flow of information, the provision of technical assistance and the establishment of the obligations of positive comity. To this end, the Organisation for Economic Co-operation and Development and the International Competition Network have developed the best practices and platforms upon which member countries can exchange knowledge.51 These ‘procedural mitigations’ fit in the rational choice framework because they are ‘low-hanging fruits’ intended to facilitate the conduct of antitrust proceedings without giving up sovereignty.

In this vein, the USA has rejected deeper multilateral antitrust cooperation based on the fear that a multilateral agreement would entail compromise on the potential encroachment on sovereignty. In turn, developing countries have discarded the initiative so that the more dominant foreign companies could gain access to their markets.52 In this case, sovereignty losses have been the overarching threat associated with a uniform competition law regime. The fact that the USA and the European Union (EU) have relied on the well-established jurisprudence on the extraterritorial stretch of their jurisdictions has significantly reduced the incentives and prospective benefits of a change towards multilateral governance.53 Again, this may be explained by the concept of loss aversion. Sunk costs – those that are not recoverable and should have no bearing on the decision-making process – are considered losses that may prolong the implementation of current policies despite the existence of better alternatives. This is exemplified by how wars are carried out despite the uncertainties of their outcomes. Sunk costs may also be associated with any policy that has been pursued in the past, the establishment of which has required resources and practice. Even though a reformed regime (in antitrust, a more harmonized global system) is more likely to be beneficial than past practice, the sunk cost bias suggests that countries will stick to their well-established regimes.54 This may even be in light of the expanding practice of effect-based approaches to national antitrust laws. Since national practice has been established through a ‘costly’ jurisprudence and antitrust enforcement practice in the past, these sunk costs create barriers to replace this practice by new international standards.

From a BE perspective, we can say further that ‘ambiguity aversion’ can be used to explain why multilateralism fails, especially where a RC analysis would suggest that an equilibrium in multilateral cooperation should be reached due to cooperation gains. This is because actors are ambiguity averse when probabilities cannot be easily predicted – hence, actors prefer known outcomes over unknown ones. As mentioned, the degree of uncertainty in antitrust coordination is high, and the foreseeability on the harmonized regime seems limited – over decades, states have established national antitrust rules. While heterogeneity across legal orders persists, any substantial change (going beyond comity practice) would create uncertainty about the applicable legal standard that could potentially lead to legal uncertainty affecting the entire business sector. Hence, the effect of loss aversion would be exacerbated. In sum, the use of BE perspective in studying antitrust matters involves three insights: concession aversion, framing effect and ambiguity aversion. These insights collectively prevent states from neutrally perceiving and assessing the benefits of the international level playing field by following the same set of rules.

#### 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.

#### Permutation do the plan and [CP’s mechanism] over enforcement

Bruno Bastos Becker 16. Associate of the Competition Practice at Barbosa, Müssnich & Aragão Advogados. Revista Do Ibrac Volume 22 - Número 1- 2016 Prêmio Ibrac - Tim 2015 “Decentralized Globalization: Possible Solutions for Multiple Merger Control Regimes in Cross-Border Transactions”. https://d1wqtxts1xzle7.cloudfront.net/52329387/SSRN-id2926207.pdf?1490635488=&response-content-disposition=inline%3B+filename%3DDecentralized\_Globalization\_Possible\_Sol.pdf&Expires=1633221921&Signature=AdZzigmFmDWzAJDsFfwmed9N0wgp7JMqh1Z7XUAIxb2ocUtkMJLFCwRj4NslBFsxzWeYwJ~gkHQm0Zb22NuvJwQzbnHnUMGlXzDXdujTXsxQFyE4fSapKDT9lbk2uWrYgrCBMfw0sli1tKJPOQsVlVyeKiSWoFIfkj5M9wQaGyLoucnRYm~66PajYX~ureUvwk~kMFcr4wNpXWCO~reag8ObhcgUhRDwNB34iNJF4Z08o4VGIOwP4CqvSs1VV3gIY4-rLKazwWkwkWHj1hK11yy3~HRWtDevXLzli8qGpvvc7Z8KKEA~nj-6HTtMX7Ps9nHZZJZVQW-lNK4fXHrCow\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA

As seen above, none of the proposed solutions is able to thoroughly address both costs, procedural issues and different outcome problems described in this paper. On the one hand, the difficulties to establish a unified supranational authority faces the problem of loss of sovereignty, and on the other hand, the partiality of bilateral agreements and soft law make the proposed solutions insufficient in the current antitrust development scenario. Therefore, a more suitable solution for the “decentralized globalization” should involve the maintenance of the countries’ sovereignty and the freedom for the authorities to participate in this process: a case-by-case cooperation among authorities.

In this model, there would be no need for an ex-ante multilateral agreement among the authorities, since it would be defined on a case-by-case basis. The involved authorities (i.e., authorities of the countries affected by the transaction according to the effects doctrine) would jointly analyze cross-border transactions but without strict bindingness, and thus, leaving it possible an individual (traditional) assessment.

In this case, the involved authorities would sign a commitment whereby they would delegate case handlers in order to form an international group (“Comission”) – similar to an arbitral tribunal 67 - which would be comprised of members of all authorities of the countries affected by the transaction. Applying the notion of “enhanced comity”, “the state whose competition regime is best equipped to enforce any sanctions or remedies” would lead this commission68. Taking into account different internal procedures among the authorities, each one would determine the selection procedural for the case-handler in charge of the transaction. This person would be responsible for the thorough assessment of the transaction and the negotiation of remedies inside their institutions.

Once established, the Commission would also jointly define procedural issues (i.e., forms, deadlines, fees) and information required for the case assessment. Finally, the Commission would be in charge of discussing the assessment (i.e., definition of relevant markets, methodology and eventual remedies). Eventual disagreements would be discussed by the Commission and the divergent authority is able to issue a dissent decision, applying or not its own restrictions.

On the authorities’ perspective, and taking into account the already mentioned solutions (i.e., supranational agency, harmonization through soft law, bilateral agreements and multilevel system), this new alternative would possibly be more acceptable, since it would not require loss of sovereignty or impose substantial transaction costs to the authorities, like bilateral agreements or other costly adjustments. It would work as a sort of regulatory dualism in this international antitrust field69 , leaving it open to each authority (and every case) its adoption, depending on strategic and internal policy issues.

#### Multilateralism is strong.

Richard Gowan 18. A Senior Fellow at the Centre for Policy Research at United Nations University. “Multilateralism in Freefall?” United Nations University, Centre for Policy Research. 07-30-2018. <https://cpr.unu.edu/the-multilateral-freefall.html>

US disengagement aside, the three most noteworthy features of multilateral diplomacy in the last few years have been slightly **reassuring.** Firstly, a majority of states have responded to the Trump administration’s attacks on international mechanisms by **increasing their support** for them. No other country has followed Washington out of the Paris agreement. Secondly, there is still some **room for innovation in multilateral affairs**: the UN’s members have just signed off on a new Global Compact on Migration (GCM) **despite America’s decision not to participate** in the process. Thirdly, operational arms of the multilateral system **continue to function despite** facing extreme levels of strain in crises, albeit highly imperfectly. UN peacekeeping forces have not been able to halt violence in Mali or South Sudan, but there has been no general collapse of blue helmet missions comparable to that which followed the Rwandan and Balkan disasters in the mid-1990s. The flow of refugees from Syria came close to overwhelming relief agencies completely in 2015, but they have managed to struggle on.

### CP---States

#### 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

### DA---FTC tradeoff

#### Overstretch and re-allocation are non-unique---Antitrust agencies are swamped now.

Rebecca Kern & Leah Nylen 1/10. \*\*Tech policy reporter for POLITICO. \*\*Covers antitrust and investigations for POLITICO Pro. “Antitrust enforcers are drowning in mergers.” 1/10/22. <https://www.politico.com/newsletters/morning-tech/2022/01/10/antitrust-enforcers-are-drowning-in-mergers-799773>

— Merger overload: The number of mergers that the FTC and DOJ must review doubled in 2021, and the agencies are struggling to keep up.

— COPPA check-in: House Democrats wrote to six privacy compliance organizations asking how they follow self-regulation guidelines related to a 1998 children’s online privacy law.

— FCC draft rule: The Federal Communications Commission has released its draft rulemaking spelling out how to implement its Affordable Connectivity Program, which received $14.2 billion in the infrastructure bill.

HAPPY MONDAY. It’s Rebecca Kern, POLITICO’s newest tech policy reporter, and I’m leading Morning Tech this week. It’s my first MT rodeo so please send lots of scoops and tips at @Rebeccamkern or via email at rkern@politico.com.

Got an event for our calendar? Send details to techcalendar@politicopro.com. Anything else? Team info below. And don’t forget: Add @MorningTech and @PoliticoPro on Twitter.

Also, drumroll: Folks, we’ve got some exciting news! Brendan Bordelon will be joining POLITICO as Morning Tech’s newsletter author on Jan. 25. He plans to dive into emerging tech debates reshaping the industry. Brendan joins us after covering tech policy at National Journal and Morning Consult. Give him a big POLITICO welcome!

TECH OF THE TOWN

FIRST IN MT: MORE LIKE A MERGER TSUNAMI — The Federal Trade Commission and Justice Department have been warning for months that a surge in merger filings has stretched them thin. They weren’t just grousing: In 2021, companies reported 4,130 mergers to the two agencies — more than double the number from the previous year, according to an analysis by the law firm White & Case. In December alone, businesses reported 285 mergers, dwarfing any previous December figure since 2011 (even though December often sees a surge, as companies seek to wrap up deals by the end of the calendar year).

**---CHART OMITTED---**

The flood of deals has forced the agencies to devote more of their already scarce resources to them. The FTC has moved some attorneys focused on policy and international affairs, for example, to help with merger review. Under law, the FTC and DOJ only have 30 days to decide whether a deal warrants a more in-depth probe, an added time pressure.

Plea for funds: Neither agency responded to a request for comment from MT on how the tidal wave of mergers has affected their operations. Both the DOJ and FTC have pleaded with Congress for more money, particularly after their hopes for a $500 million boost for each agency died along with the rest of the Democrats’ social spending bill. The text of a bill by Sens. Amy Klobuchar (D-Minn.) and Chuck Grassley (R-Iowa) to increase the money the agencies receive from merger filings was tucked into the Senate-passed U.S. Innovation and Competition Act, but the House has yet to act on it.

#### Antitrust and overstretch now

Joshua Fineman 1/19/22. SeekingAlpha News Editor. “FTC head Khan sees a 'fierce sense of urgency' to her job at the antitrust agency.” https://seekingalpha.com/news/3789295-ftc-head-khan-sees-a-fierce-sense-of-urgency-to-her-job-at-the-antitrust-agency

Federal Trade Commission Chairwoman Lina Khan sees a "fierce sense of urgency" to her time at the antitrust agency before a new administration takes over after the next election.

"Look for us it’s a big moment," Khan said in an interview with CNBC. "I think there’s an opportunity here to really change and learn from the mistakes of the past and that’s what we are going to try to do.”

Khan's comments come after the FTC and the Dept. of Justice yesterday announced plans to review merger guidelines in an attempt to potentially make them stricter. Her comments also follow yesterday's announcement of Microsoft's (NASDAQ:MSFT) planned almost $70B purchase of Activision (NASDAQ:ATVI), which analysts and investors expect will get a very thorough antitrust review.

Khan said that her antitrust agency is "severely" understaffed and has about 1,100 employees, which is two-thirds of the number of workers the agency had in the 1980s.

"The number of transactions has dramatically increased," Khan said in the interview. "That creates significant strain and we have to make very difficult choices about which billion dollar deals we are going to ensure we are closely investigating. But there are very real tradeoffs in terms of what that work is going to come at the expense of.”

#### 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.

#### Tons of antitrust now.

Lina Saigol,1-18-22. reporter for Barron's in London, spent 16 years at the Financial Times Reuters. "M&A Is Booming. Gear Up for an Antitrust Crackdown.". Barrons. 1-18-2022. https://www.barrons.com/articles/mergers-booming-us-regulators-crackdown-51642534456?tesla=y

Aggressive antitrust enforcement is back. That is the stark message that President Joe Biden has sent the business community, and regulators have already kicked into action, threatening to rein in a [record-setting merger boom](https://www.wsj.com/articles/m-a-likely-to-remain-strong-in-2022-as-covid-19-looms-over-business-plans-11640255406?mod=Searchresults_pos9&page=1). Those charged with delivering Biden’s message are two Big Tech critics: Lina Khan, chair of the Federal Trade Commission, and Jonathan Kanter, head of the Justice Department’s antitrust division. On Tuesday, they outlined a plan to [revise how the agencies will review mergers](https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers). They want public comment on how to update federal guidelines “to better detect and prevent illegal, anticompetitive deals,” they said in a statement. “Our country depends on competition to drive progress, innovation, and prosperity,” Kanter said. “We need to understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy.” Earlier on Tuesday, [Microsoft](https://www.barrons.com/market-data/stocks/msft) (ticker: MSFT) said it would acquire gaming company [Activision Blizzard](https://www.barrons.com/market-data/stocks/atvi) (ATVI) in [an all-cash transaction valued at nearly $70 billion](https://www.barrons.com/articles/microsoft-buys-activision-blizzard-stock-acquisition-51642513147?mod=hp_LEAD_1&mod=article_inline). The acquisition needs regulatory and shareholder approval. Wedbush analyst Dan Ives wrote that there may be regulatory hurdles because of [the acquisition’s size](https://www.barrons.com/articles/microsoft-stock-activision-blizzard-deal-metaverse-51642522838?mod=hp_LEAD_1_B_1&mod=article_inline). But he expects the deal to close because Microsoft isn’t under the same scrutiny as some of its tech rivals. Earlier this month, a federal judge ruled the [FTC can move forward with its revised antitrust lawsuit](https://www.wsj.com/articles/federal-judge-rejects-facebooks-request-to-dismiss-ftcs-latest-antitrust-lawsuit-11641932982?mod=Searchresults_pos5&page=1) against [Meta Platform](https://www.barrons.com/market-data/stocks/fb) ‘s (FB) Facebook that alleges the social media platform is unlawfully suppressing competition. Many bankers and lawyers say they aren’t too worried, contending that tighter enforcement might slow the mergers and acquisitions market rather than derail it. That is due in part because the FTC is constrained by limited manpower and budget. Also, regulators don’t have authority on their own to block a merger—federal judges can issue orders blocking it. “Of course there has been an increased level of scrutiny and managements and boards have raised the bar on what they will consider, but we will continue to see large deals with compelling strategic imperative,” Bruce Evans, global co-head of M&A at [Deutsche Bank](https://www.barrons.com/market-data/stocks/db) , told Barron’s. In December, the FTC [sued to block](https://www.barrons.com/articles/ftc-sues-to-block-nvidias-40b-acquisition-of-arm-51638481709?mod=article_inline) computer-chip powerhouse [Nvidia](https://www.barrons.com/market-data/stocks/nvda) (ticker: NVDA) from spending [$40 billion](https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger) for British technology provider Arm, saying the blockbuster deal would unfairly stifle competition. Just weeks earlier, the Justice Department [sued to halt](https://www.barrons.com/articles/justice-department-penguin-random-house-simon-schuster-merger-51635873536?mod=article_inline) a proposed [$2.2 billion](https://www.justice.gov/opa/press-release/file/1445916/download) tie-up between publishers Penguin Random House and Simon & Schuster, which would create a mega-publisher in the books market. The agency argues that consolidation would hurt authors and readers. The lawsuits come after Biden signed a sweeping [executive order](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/) in July aimed at curbing the power of big business by cracking down on anticompetitive practices in sectors ranging from agriculture to pharmaceuticals to labor. Consolidation in industries over the past several decades has denied Americans the benefits of an open economy and widened racial, income, and wealth inequality, the executive order stated. The administration sees less corporate competition as one of the causes of inflation. “Higher prices and lower wages caused by lack of competition are now estimated to cost the median American household [$5,000](https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/) a year,” according to the order. Rising equity markets and widespread stimulus measures helped spur companies worldwide to clinch more than 62,000 deals worth [$5.8 trillion](https://www.barrons.com/articles/global-deal-making-record-high-2021-51640960224?mod=article_inline) last year, up 64% from the previous year, according to data provider Refinitiv. [Big pharmaceutical companies](https://www.barrons.com/articles/drug-companies-cash-product-buys-research-51641423117?tesla=y&mod=article_inline) could be one of the biggest sectors at risk of regulatory scrutiny. The FTC put the industry on alert in July when it said it would review more deals amid skyrocketing drug prices and ongoing concerns about anticompetitive conduct. The industry still has record levels of cash to spend and needs to merge to innovate. By the end of this year, 18 large-cap U.S. and European biopharmas will have more than $500 billion in cash on hand, according to estimates by SVB Leerink analyst Geoffrey Porges. Deal makers will be closely watching [Pfizer](https://www.barrons.com/market-data/stocks/pfe) ‘s (PFE) [$6.7 billion takeover](https://www.barrons.com/articles/pfizer-arena-pharmaceuticals-acquisition-51639396154?mod=article_inline) of [Arena Pharmaceuticals](https://www.barrons.com/market-data/stocks/arna) , announced in December, which could become a test case for the FTC’s view of pharma M&A. Citi analyst Andrew Baum said the deal was “highly attractive” for Pfizer, but the key issue would be whether the “newly muscular” FTC would fight it and allow it to proceed given the significant overlap between important drugs. The two companies might need to sell parts of the business to push the deal through. Some companies are calling off their planned mergers as soon as they receive feedback. In December, outdoor sporting goods retailer [Sportsman’s Warehouse Holdings](https://www.barrons.com/market-data/stocks/spwh) (SPWH) and Great Outdoors Group, owner of the Bass Pro Shops chain, [canned](https://www.marketwatch.com/story/sportsman-s-warehouse-shares-fall-19-after-takeover-deal-terminated-271638556601) their deal in the belief that it wouldn’t be approved, according to a regulatory filing. Months earlier, insurance brokers [Aon](https://www.barrons.com/market-data/stocks/aon) (AON) and [Willis Towers Watson](https://www.barrons.com/market-data/stocks/wtw) (WTW) pulled their merger after the DOJ sued to stop the [$30 billion](https://www.barrons.com/articles/aon-willis-towers-scrap-30-billion-merger-amid-antitrust-impasse-51627328024?mod=article_inline) tie-up. The brokers said regulators’ objections created “unacceptable delay and uncertainty.”

#### 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.**

### DA---Defense mergers

#### Minimal defense mergers coming

Jon Harper, 2-2-2021, "," Defense Industry Could See Another Wave of Mergers, Acquisitions, https://www.nationaldefensemagazine.org/articles/2021/2/2/defense-industry-could-see-another-wave-of-mergers-acquisitions

However, Sanders doesn’t anticipate consolidation on a scale seen in the 1990s after the Last Supper for several reasons. One is the expectation that U.S. defense spending will remain more robust than it was after the threat posed by the Soviet Union disappeared.

“The Cold War had ended. There was a definite sense that we were just in a different strategic state, whereas [today] there’s a … very big bipartisan concern with Chinese activities,” he said. “Even if you disagree about the amount of defense spending needed, we’re not going from a period of higher tension to a lower one.”

The amount of consolidation that has already occurred also means there are now fewer opportunities for contractors to merge, and analysts predict that proposed combinations of large companies would face intense regulatory scrutiny.

Some elements of the Democratic Party are less friendly toward big business. Sanders said the incoming Biden administration will likely be more wary of M&A than the previous one.

#### No spillover----their ev is about specific standards in CALERA not the plan

1NC Eakin ’21 [Dr. Douglas; 2021; Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University; American Action Forum – The Daily Dish, “Losing Focus on Antitrust,” https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/]

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

#### Biden’s XO thumps

Jack Ellrodt, 9-28-2021, Georgetown School of Foreign Service. "Vertical Mergers: A Key Role in the Defense Innovation Lifecycle" National Defense Industrial Association, https://www.ndia.org/policy/recent-posts/2021/9/28/vertical-mergers-a-key-role-in-the-defense-innovation-lifecycle

On July 9th of this year, President Biden issued a sweeping Executive Order entitled “Promoting Competition in the American Economy”. The order, which includes more than 70 distinct initiatives, seeks to address the Administration’s concerns surrounding corporate consolidation and anti-competitive practices across an array of industries. Of important note for the defense industry, the order focuses particular attention on encouraging the Attorney General and Chair of the Federal Trade Commission to “review the horizontal and vertical merger guidelines and consider whether to revise those guidelines”.

At the very least, it seems likely that regulators will require Lockheed to submit to certain mandates if the merger is approved. In the past, regulators have required firms to submit to certain behavioral or structural mandates if a potentially anticompetitive merger is approved. Behavioral remedies are designed to prevent newly merged companies from using acquired information or technologies to the detriment of their rivals (e.g., mandating that an acquired technology still be provided to competitors). Alternatively, structural remedies are intended to prevent companies from obtaining an anticompetitive advantage in the first place, namely through the forced divestiture of certain assets. Even so, Chair Khan has also argued that such directives are often not enough, and that regulators should more often consider opposing potentially anticompetitive deals outright.

Recognizing the sentiment established in both President Biden’s July 9th Executive Order and Chair Khan’s August 6th letter, it seems that the Administration is gravitating towards discouraging vertical mergers and acquisitions. It is unclear whether the Administration’s aversion, especially as it relates to the defense industry, is derived more from a concern of consolidation amongst the largest players or a general perception that all vertical mergers hinder competitiveness. Unfortunately, the relevant statues and review frameworks fail to effectively differentiate between the merger and/or acquisition of small, medium, and large companies. Given that the statutory rules do not afford separate classifications for different sorts of companies, regulatory decisions intended to prevent consolidation and anti-competitiveness at the highest levels may very well stifle innovation and investment in emerging technologies and the lowest levels. The resulting effects of such trends could be devastating.

#### Lockheed merger kills hypersonics, missile defense competition and supply base

Don Loren, 3-8-2021, "Lockheed Buying Aerojet Is Bad For Defense," Breaking Defense, https://breakingdefense.com/2021/03/lockheed-buying-aerojet-is-bad-for-defense/

Lockheed Martin, one of America’s most trusted defense companies, recently declared its intent to purchase and merge with Aerojet Rocketdyne, the nation’s last sole provider of solid rocket motors. This proposed plan is currently under review by the Department of Defense and the Federal Trade Commission. Rather than simply accept it as a fait accompli, decision makers must look at the dangerous consequences for our industrial base from such a deal. If approved, competition within the US missile defense industry, hypersonics in particular, would cease to exist.

So while this proposed merger would bring significant benefits to Lockheed Martin, there are significant downsides for the defense industry as a whole. Given the high stakes involved, it must be carefully and critically reviewed, because these type of defense sector mergers create mega-companies that eliminate competition, drive up costs and overwhelm market share.

Since Aerojet Rocketdyne sells missile propulsion systems to several large U.S. defense companies, a merger with Lockheed Martin would be a crushing blow to the rest of the field. They would be forced to either rely on a major competitor for a vital component; seek out foreign suppliers; undermine a Biden administration executive order to use more U.S. component providers; or drop out of missile defense competition entirely.

In 2015, then-Undersecretary of Defense for Acquisition, Technology and Logistics, Frank Kendall said, “the trend toward fewer and larger prime contractors has the potential to affect innovation, limit the supply base, pose entry barriers to small, medium, and large businesses, and ultimately reduce competition-resulting in higher prices to be paid by the American taxpayer.”

### DA---Midterms

#### No link---Voters don’t care about the plan.

Anna Edgerton, 1-19-2022, "Tech Group Warns Biden That Antitrust Bills Carry Political Risk," Yahoo News, https://www.yahoo.com/now/tech-group-warns-biden-antitrust-192037656.html

A tech-backed group is warning the White House that supporting an antitrust bill designed to curb the power of internet giants isn’t politically popular and could hurt Democrats ahead of November’s midterm elections.

The Chamber of Progress, which counts Amazon.com Inc., Apple Inc., Meta Platforms Inc. and Alphabet Inc.’s Google among its members, on Tuesday shared its own polling figures with White House officials showing that voters in key states don’t prioritize technology regulation.

#### Dems lose no matter what---agenda and normalcy failures

Lisa Lerer and Emily Cochrane, 1-14-2022, "Frustrated Democrats Call for ‘Reset’ Ahead of Midterm Elections," New York Times, https://www.nytimes.com/2022/01/14/us/politics/democratic-midterms.html

With the White House legislative agenda in shambles less than a year before the midterm elections, Democrats are sounding alarms that their party could face even deeper losses than anticipated without a major shift in strategy led by the president.

The frustrations span the spectrum from those of the party’s liberal wing, which feels deflated by the failure to enact a bold agenda, to the concerns of moderates, who are worried about losing suburban swing voters and had believed Democratic victories would usher a return to normalcy after last year’s upheaval.

Democrats already anticipated a difficult midterm climate, given that the party in power historically loses seats during a president’s first term. But the party’s struggle to act on its biggest legislative priorities has rattled lawmakers and strategists, who fear their candidates will be left combating the perception that Democrats failed to deliver on President Biden’s central campaign promise of rebooting a broken Washington.

“I think millions of Americans have become very demoralized — they’re asking, what do the Democrats stand for?” said Senator Bernie Sanders, the Vermont independent in charge of the Senate Budget Committee. In a lengthy interview, he added, “Clearly, the current strategy is failing and we need a major course correction.”

Representative Tim Ryan, a Democrat from a blue-collar Ohio district who is running for the state’s open Senate seat, said his party isn’t addressing voter anxieties about school closures, the pandemic and economic security. He faulted the Biden administration, not just for failing to pass its domestic agenda but also for a lack of clear public health guidance around issues like masking and testing.

“It seems like the Democrats can’t get out of their own way,” he said. “The Democrats have got to do a better job of being clear on what they’re trying to do.”

The complaints capped one of the worst weeks of the Biden presidency, with the White House facing the looming failure of voting rights legislation, the defeat of their vaccine-or-testing mandate for large employers at the Supreme Court, inflation rising to a 40-year high and friction with Russia over aggression toward Ukraine. Meanwhile, Mr. Biden’s top domestic priority — a sprawling $2.2 trillion spending, climate and tax policy plan — remains stalled, not just because of Republicans, but also opposition from a centrist Democrat.

“I’m sure they’re frustrated — I am,” said Senator Richard J. Durbin of Illinois, the No. 2 Senate Democrat, when asked this week about the chamber’s inability to act on Mr. Biden’s agenda. Discussing the impact on voters ahead of the midterm elections, he added, “It depends on who they blame for it.”

The end of the week provided another painful marker for Democrats: Friday was the first time since July that millions of American families with children did not receive a monthly child benefit, a payment established as part of the $1.9 trillion pandemic relief plan that Democrats muscled through in March without any Republican support.

Plans to extend the expiration date for the payments, which helped keep millions of children out of poverty, were stymied with the collapse of negotiations over the sprawling domestic policy plan. And additional pandemic-related provisions will expire before the end of the year without congressional action.

“That’s just about as straightforward as it gets,” said Mr. Ryan. “If the Democrats can’t get on with a tax cut for working families, what are we for?”

In recent days, Mr. Biden has faced a wave of rising anger from traditional party supporters. Members of some civil rights groups boycotted his voting rights speech in Atlanta to express their disappointment with his push on the issue, while others, including Stacey Abrams, who is running for governor in Georgia, were noticeably absent. Mr. Biden vowed to make a new forceful push for voting right protections, only to see it fizzle the next day.

#### No transformational Dem policies even if they win Congress- narrow majorities, new strategies, and SCOTUS block

Jeff Stein, 1-17-2022, "The left dreamed of remaking America. Now, it stares into the abyss as Biden’s plans wither.," Washington Post, https://www.washingtonpost.com/us-policy/2022/01/17/liberal-promises-biden-midterm/

But with the 2022 midterms months away, the intellectual optimism and energy that defined the American left during that window has been markedly deflated. During the Trump administration, the party’s progressives dreamed of returning to power and enacting generational policy change — national health care; more than doubling the minimum wage; cancellation of student debt; a complete overhaul of the immigration system; major new social and education programs.

These aspirations — already optimistic — have been battered repeatedly in the years since the primary but most severely over the last several months, as the failure of much of President Biden’s economic agenda becomes increasingly likely.

The uncertainty has become ever more urgent as Democrats weigh their campaign message in the 2022 midterm elections. Leading Democratic campaign officials have called for the party to revamp its message to avoid a wipeout in the midterms, forcing the party grapple with whether it will jettison the far-reaching ideas that helped define it now that Republicans appear in the ascendancy.

Long gone are the days when Sens. Elizabeth Warren (D-Mass.) and Bernie Sanders (I-Vt.) sparred across Iowa and New Hampshire over whose policy platform was most transformative, motivated by a sense that they had a chance to usher in a new era of American politics.

Instead, Warren, Sanders and the rest of Washington’s liberal policy apparatus sit by without recourse as Sens. Joe Manchin III (D-W.Va.) and Kyrsten Sinema (D-Ariz.) decide the fate of Biden’s Build Back Better Act — either by paring it back dramatically or defeating it altogether. Manchin and Sinema have final say over the Build Back Better legislation because Democrats have only a one-vote margin in a Senate evenly divided between the parties, which allows them to dream of change while having little room to actually achieve it.

The ossification of Biden’s legislative agenda underscores the long-term structural challenges facing the party’s left-flank, highlighting how difficult it will be to enact liberal policy change even with Democratic control of Congress.

Compounding liberal disillusionment is conservatives’ grip on the Supreme Court, which acts as a backstop against left policy change even if the obstacles to legislation are eventually overcome. The Supreme Court on Thursday blocked the Biden administration’s vaccination-or-testing requirement for the country’s biggest firms, a devastating blow to the White House’s efforts to fight covid.

The federal government’s uneven response to the pandemic has also exposed the lack of U.S. administrative capacity to implement new programs. And the reemergence of inflation this year as a defining economic threat — a policy challenge that liberals had not been preparing to confront — appears at odds with the left’s vision to usher in a new paradigm with transformational spending programs.

Bob Hockett, who served as an outside policy adviser to Sanders, Warren, and Rep. Alexandria Ocasio-Cortez (D-N.Y.), reflected on “the sense of limitless possibility unlike anything in my lifetime” during the 2020 Democratic primary. Democratic candidates put forward an increasingly ambitious series of policy reforms, and experts debated the relative merits of far-flung ideas such as a federal jobs guarantee, a universal basic income, and sector-wide union bargaining.

“For those years, there was this real effervescence in what you might call ‘the idea space’ — the space of policy innovation. There was this sense that there were no limits in American policy — it was very vertiginous, almost dizzying,” Hockett said.

“It was a heady and incredibly exciting time for progressives. Now, it’s just watching to see what Sinema and Manchin will do. Deflated seems like the right word — there’s been a damper thrown on it all.”

To be sure, political parties tend in general to think big when they are out of power before being faced with the realities of legislative governance. Republicans promised to repeal Obamacare, which they failed to do while in office. The GOP was forced to shelve other policy goals — such as cutting federal entitlement programs — with their thin Senate margins under the Trump administration.

#### Legislative agenda does not matter---COVID and the economy are the only thing voters care about

Ronald Brownstein 10-15-21. Senior editor at the Atlantic. "Is a Democratic Wipeout Inevitable?" Atlantic. 10-15-21. https://www.theatlantic.com/politics/archive/2021/10/curse-presidents-second-year-biden/620391/

It’s common now for democrats to argue that the agenda they are struggling to implement on Capitol Hill represents the party’s most ambitious since the “Great Society” Congress convened in 1965. That’s a reasonable assessment—but one that the party today should consider as much a warning as an inspiration. Under the relentless prodding of President Lyndon B. Johnson, the Democratic-controlled House and Senate passed landmark legislation at a dizzying pace during that legendary 1965–66 legislative session.

Over those two years, the 89th Congress, finally completing a crusade started by Harry Truman almost two decades earlier, created the massive federal health-care programs of Medicare for the elderly and Medicaid for the poor. It put a capstone on the civil-rights revolution by approving the Voting Rights Act. It created the first large-scale system of federal aid to elementary and secondary schools and launched the Head Start program. It approved breakthrough legislation to combat pollution in the air and water. It created new Cabinet departments, a new agency to regulate automobile safety, and national endowments to fund the arts and humanities. It transformed the face of America with sweeping immigration legislation that finally undid the restrictive quotas that had virtually eliminated new arrivals since the early 1920s.

“It was one of the most productive and impressive Congresses that we’ve had,” says Julian Zelizer, a historian at Princeton University and the author of The Fierce Urgency of Now, a book about Johnson’s push for his Great Society agenda. “Today, it’s unimaginable.”

Then, suddenly, when the work of the 89th Congress was finally finished, Democrats lost 47 seats in the House and three in the Senate during the midterm election of 1966. The Democrats’ bitter disappointment is a cautionary tale for their party descendants hoping to materially improve their odds in next year’s midterm contest by reaching agreement on the sweeping economic bills that have divided the party for months.

The lesson of history is that it is extremely difficult for presidents to translate legislative success in their first year into political success in the midterm elections of their second year. Those early achievements can boost presidents in their reelection bids, but in almost all cases they have not proved an antidote to the other midterm factors that cause the president’s party to lose ground in Congress.

Failing to pass their agenda could compound the Democrats’ problems by disillusioning their base and sending a message of dysfunction to swing voters. But completing the agenda isn’t likely to save them from the president’s party’s usual midterm losses unless voters also grow more optimistic about contemporary conditions in the country—particularly the fight against COVID-19 and the economic instability flowing from the persistent pandemic.

Democrats must “recognize that the potential upside of [their economic] bills [is] limited for next year, regardless of how virtuous they are in the policy,” says Simon Rosenberg, the president of NDN, a Democratic research and advocacy group. “Joe Biden was elected to do one thing, which was to defeat COVID. And when he was defeating it, his numbers went way up, and when COVID started defeating him, his numbers went way down. The key to him getting his numbers going back up is he has to defeat COVID and get credit for it. This has to be the central governing and political priority for the Biden administration.”

Sarah Longwell, the founder of the Republican Accountability Project, an organization of Republicans critical of former President Donald Trump, likewise says that in recent focus groups she’s conducted in Pennsylvania and Wisconsin, few voters were following the legislative maneuvering over the Democrats’ huge agenda. “The thing that people care about right now is getting COVID under control, and all of the attending economic consequences relating to COVID,” Longwell told me. Not all analysts agree that the Democrats’ legislative agenda is unlikely to affect the midterms. Many campaign aides and operatives at the Democratic House and Senate campaign committees are eagerly anticipating that if the party reaches agreement on its big economic proposals, candidates next year can run on the trinity of creating jobs (through the infrastructure bill), bolstering families (mostly by extending the Child Tax Credit) and reducing health-care costs (through increasing federal subsidies under the Affordable Care Act and authorizing Medicare to negotiate for lower prescription drug prices). They are especially keen to highlight the lockstep Republican opposition to all of those measures.

The Democratic pollster Celinda Lake, who was one of Biden’s lead polling advisers during the 2020 campaign, told me that many voters will view passing legislation that helps stabilize family budgets as an integral part of an effective COVID response. “I don’t think it’s a dichotomy,” she said. “We have got to deliver something to working- and middle-class families.” The emergence of the Delta variant, Lake said, surprised and dismayed many Americans who thought the country was on a steady path to recovery—one focus-group participant called it “a kick in the gut”—and now they worry that more unpleasant surprises will threaten their family’s health and finances. “For women in particular, we have to deliver something to their family, to their kitchen tables,” she said.

Yet, in the past, delivering on legislative promises has rarely been enough to prevent the president’s party from losing House seats in his first midterm election. (Senate results have varied more.) That’s been true for presidents in both parties.

Like the Great Society Congress, the 1913–14 Democratic Congress under President Woodrow Wilson was among the most productive ever; it created the federal income tax, the Federal Reserve Bank to stabilize the economy, and the Federal Trade Commission to monitor fraud in the marketplace. When it was over, Democrats lost 61 House seats in the 1914 election.

In 1981, Ronald Reagan pushed his signature tax cuts through Congress, arguably the most significant conservative policy achievement of the past half century; the next year, Republicans lost 26 House seats. Republicans lost 42 seats in 2018 after Trump and the Republican-controlled Congress passed their massive tax cut in 2017.

Bill Clinton lost 54 House seats in 1994 after passing a sweeping budget bill, a substantial crime bill, and the most significant gun-control legislation Congress has ever approved. The losses were even greater in 2010 after Barack Obama passed his stimulus plan, expansive financial-reform legislation, and, above all, the Affordable Care Act, extending health insurance to more of the uninsured than any other federal initiative had since Medicare and Medicaid. Despite, or perhaps because of, all that, Democrats lost 63 House seats in 2010, the biggest midterm loss for either party in more than 70 years.

Why hasn’t legislative success in year one produced more political success in year two? Sometimes the answer is that legislative victories for one party provoke an intense backlash from voters in the other. “It stimulates your opponents, and it could very well cost you because a lot of people don’t like what you do,” Zelizer says.

That certainly seemed the case in 2010, when the backlash to the ACA helped ignite the conservative Tea Party movement that powered the GOP gains; and in 1994, when a backlash from gun owners helped doom Democrats in southern and rural seats; and in 2018, when many more voters opposed than approved of Trump’s tax cut, [according to surveys](https://fivethirtyeight.com/features/the-gop-tax-cuts-are-even-more-unpopular-than-past-tax-hikes/). (The failed GOP attempt to repeal Obama’s health-care law in Trump’s first year was also unpopular.) But presidents have suffered midterm losses even after advancing popular ideas: A majority of Americans, for instance, supported Reagan’s 1981 tax cut, and lopsided majorities backed the creation of Medicare in 1965, [polls at the time showed](https://news.gallup.com/poll/8491/gallup-brain-medicares-early-days.aspx).

A more common problem is that whether or not new programs are popular in theory, in practice, their benefits are rarely fully felt by voters as soon as the first midterm. (That dynamic was a particular problem for Democrats with the Affordable Care Act in 2010.) Another common issue is that no matter how popular a new program might be, opponents can usually pull out one element of it that strikes many voters as illogical or wasteful. A prime example of homing in on a seeming weak link was evident in 1994, when Republicans highlighted a “midnight basketball” program for young people to portray Clinton’s crime bill—which many liberals viewed as too punitive because it showered money on police and prisons—as permissive and wasteful.

“Democrats point to polls and say everybody wants these bills, but as soon as it passes, Republicans dig up midnight basketball and run on those sorts of things,” the Republican pollster Glen Bolger says. “And I know that this may shock you, but there is usually waste in these bills—and stupid stuff, too.”

The clearest modern exception to this pattern of first-year legislative gains and second-year electoral losses occurred in 1934, when Democrats gained nine House seats after the Democratic Congress frenetically approved the initial iteration of President Franklin D. Roosevelt’s New Deal. Republicans also gained eight House seats in 2002, after President George W. Bush passed his tax-cut and education-reform bills over the previous two years.

Those might be the exceptions, though, that illuminate a larger rule. Few in either party believe that the GOP gained in 2002 because of Bush’s legislation; what lifted Republicans was the public sense that he had responded effectively to the September 11 terrorist attacks. Even in 1934, though the Depression still exacted a terrible price, unemployment was lower and economic growth much higher than they had been when FDR took office.

No single cause explains all of these results, positive and negative, for the president’s party. But from these cases, the clearest rule might be that midterm elections turn less on assessments of legislation that may eventually affect people’s lives than on verdicts about the country’s condition in the here and now. Medicare and Medicaid didn’t cause the Democratic losses in 1966, but they weren’t enough to overcome discontent over inflation, urban turmoil after the Watts Riots of 1965, and Vietnam. Reagan’s tax cuts didn’t trigger the GOP losses in 1982, but they weren’t enough to overcome discontent over high interest rates and double-digit unemployment. An old political adage holds that presidential elections are always about the future; midterms seem to be more about today. As Bolger put it to me, voters “step outside and feel how the weather is, and if I feel uncomfortable with it, I take it out on the incumbent party.”

Maybe the most remarkable proof that current conditions outweigh legislative achievements in midterm elections is a data point that the Emory University political scientist Alan Abramowitz calculated for me from the [University of Michigan’s National Election Studies](https://cps.isr.umich.edu/project/american-national-election-studies-anes/) covering the 1964 and 1966 elections. According to Abramowitz’s analysis of the results, those surveys found that even after Democrats created Medicare, the party’s share of the vote among seniors in House elections fell slightly from 1964 to ’66, giving the GOP a slight majority among them.

## 1AR

### Adv---Separation of Powers

#### No, it’s not

2NC McGinnis 20 – (John O. McGinnis is the George C. Dix Professor in Constitutional Law at Northwestern University, graduate of Harvard College, Balliol College, Oxford, and Harvard Law School; “The Chevron Doctrine’s Shrinking Domain”; Law & Liberty; D.A. June 27th 2020, [Published April 23rd 2020]; <https://lawliberty.org/the-chevron-doctrines-shrinking-domain/>) //LFS—JCM

[TITLE]: The Chevron Doctrine’s Shrinking Domain

Today, Chevron is under fire. It has not been overruled nor do I think it is likely to be. But its domain is shrinking and will continue to get smaller. If President Trump gets another term, it may well resemble the Cheshire cat—a still-powerful symbol for a body of law without much doctrinal substance. Just as Chevron was an iconic decision marking the continuing rise of the power of the administrative state, its relative decline in importance captures the three reasons that the administrative state is being cut back. Thus, this essay will use Chevron to introduce these three factors—the return of originalism, the rise of textualism, and the greater distrust of unsupervised expertise—that are transforming administrative law and, with it, the administrative state.

#### Chinese AI won’t be regulated---no public accountability---US development is key.

Economist 17. "Why China’s AI push is worrying". 7-27-2017. https://www.economist.com/leaders/2017/07/27/why-chinas-ai-push-is-worrying

IMAGINE the perfect environment for developing artificial intelligence (AI). The ingredients would include masses of processing power, lots of computer-science boffins, a torrent of capital—and abundant data with which to train machines to recognise and respond to patterns. That environment might sound like a fair description of America, the current leader in the field. But in some respects it is truer still of China. The country is rapidly building up its cloud-computing capacity. For sheer volume of research on AI, if not quality, Chinese academics surpass their American peers; AI-related patent submissions in China almost tripled between 2010 and 2014 compared with the previous five years. Chinese startups are attracting billions in venture capital. Above all, China has over 700m smartphone users, more than any other country. They are consuming digital services, using voice assistants, paying for stuff with a wave of their phones—and all the while generating vast quantities of data. That gives local firms such as Alibaba, Baidu and Tencent the opportunity to concoct best-in-class AI systems for everything from facial recognition to messaging bots. The government in Beijing is convinced of the potential. On July 20th it outlined a development strategy designed to make China the world’s leading AI power by 2030. An AI boom in the world’s most populous place holds out enormous promise. No other country could generate such a volume of data to enable machines to learn patterns indicative of rare diseases, for example. The development of new technologies ought to happen faster, too. Because typing Chinese characters is fiddly, voice-recognition services are more popular than in the West; they should improve faster as a result. Systems to adjust traffic lights automatically in response to footage from roadside cameras are already being tested. According to the McKinsey Global Institute, a research arm of the consultancy, AI-driven automation could boost China’s GDP growth by more than a percentage point annually. Yet the country’s AI plans also give cause for concern. One worry is that the benefits of Chinese breakthroughs will be muted by data protectionism. A cyber-security law that came into force in June requires foreign firms to store data they collect on Chinese customers within the country’s borders; outsiders cannot use Chinese data to offer services to third parties. It is not hard to imagine tit-for-tat constraints on Chinese firms. And if data cannot be pooled, the algorithms that run autonomous cars and other products may not be the most efficient. A second area of unease is ethics and safety. In America, the technology giants of Silicon Valley have pledged to work together to make sure that any AI tools they develop are safe. They will look at techniques like “boxing”, in which AI agents are isolated from their environment so that any wayward behaviour does not have disastrous effects. All the leading AI researchers in the West are signatories to an open letter from 2015 calling for a ban on the creation of autonomous weapons. If it happens at all, the equivalent Chinese discussion about the limits of ethical AI research is far more opaque. Chinese AI companies do have incentives to think about some of these issues: rogue AI would be a problem for the planet wherever it emerged. There is a self-interested case for the formulation of global safety standards, for example. But a third concern—that AI will be used principally to the benefit of China’s government—is a less tractable problem. Autocratic intelligence The new plan is open about AI’s value to the state. It envisages the use of the technology in everything from guided missiles to predictive policing. AI techniques are perfect for finding patterns in the massive amounts of data that Chinese censors must handle in order to maintain a grip on the citizenry. It is easy to imagine how the same data could boost the country’s nascent plans to create a “social-credit” system that scores people for their behaviour. Once perfected, these algorithms would interest autocratic regimes around the world. China’s tech firms are in no position to prevent the government in Beijing from taking advantage of such tools. Baidu, for example, has been appointed to lead a national laboratory for deep learning. Chinese AI will reflect the influence of the state. Western firms and governments are no angels when it comes to data collection and espionage. But Western companies are at least engaged in an open debate about the ethical implications of AI; and intelligence agencies are constrainedby democratic institutions**.** Neither is true of China. AI is a technology with the potential to change the lives of billions. If China ends up having most influence over its future, then the state, not citizens, may be the biggest beneficiary.

### Adv---Anti-competitiveness

### CP---Advantage

### DA---Defense mergers

#### Defense mergers are blocked all the time

Jerry Mcginn, 3-30-2021, executive director with the Center for Government Contracting at George Mason University "Where is defense M&A policy headed? Here’s some advice for the new administration.," Defense News, https://www.defensenews.com/opinion/commentary/2021/03/30/where-is-defense-ma-policy-headed-heres-some-advice-for-the-new-administration/

In 2011, then-Under Secretary of Defense for Acquisition, Technology, and Logistics Dr. Ash Carter articulated the only recent declarative DoD policy toward M&A when he stated that the DoD was “not interested in seeing further consolidation” among the largest five or six prime contractors. This posture has frankly guided Democratic and Republican administrations since the blocked 1997-1998 attempt to merge Lockheed Martin and Northrop Grumman.

This, however, has hardly been a “greenlight” for unrestricted consolidation below the very top level. The DoD closely analyzes each transaction, from the companies involved to affected programs across the DoD as well as the transaction’s impact on competitors. Mergers are cleared, denied or approved with conditions (e.g., divestitures in airborne radios, military GPS, and electro-optical/infrared sensors were required for approval of the 2019 merger between Raytheon and United Technologies Corporation).

In 2017, for example, Ultra Electronics attempted to purchase Sparton. These two companies are the only two domestic manufacturers of sonobuoys, which are sonar systems used for anti-submarine warfare. Chronically mediocre demand since the end of the Cold War and a long-running joint venture between the companies had led to a situation where neither company could independently produce several classes of sonobuoys. The Department of Justice, working with the DoD, made it clear that it would block this transaction because it essentially eliminated competition; so the parties eventually abandoned the transaction in 2018. More importantly, the DoD promptly began the work of rebuilding domestic sonobuoy capacity by dismantling the unhealthy joint venture and investing in projects such as Title III of the Defense Production Act.

#### Specific to radical changes to CWS

Eakin ’21 [Dr. Douglas; 2021; Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University; American Action Forum – The Daily Dish, “Losing Focus on Antitrust,” https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/]

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

#### Just about M&A---not the aff

Goure ’21 [Dan; October 29; Vice President of the Lexington Institute, served in the Pentagon during the George H.W. Administration, Ph.D. and taught at Johns Hopkins and Georgetown Universities and the National War College; National Interest, “Could Antitrust Legislation Threaten National Security?,” https://nationalinterest.org/blog/reboot/could-antitrust-legislation-threaten-national-security-195407]

There is a real danger in allowing the FTC to set the kinds of limits on vertical mergers that it is seeking in the case of Illumina and Grail. Not only could this impair the ability of the medical system to detect cancers more easily, but it could also set a dangerous precedent for vertical mergers in the defense, aerospace, and other sectors.

The defense and aerospace sector is in the midst of overlapping structural and technological revolutions. The Department of Defense (DoD), with strong Congressional support, is pushing defense companies to be more innovative. The military services have also taken up the mantra of calling for faster change and greater innovation. Emblematic of this drive was the first strategic message to his service by the Air Force Chief of Staff General C.Q. Brown titled [“Accelerate Change or Lose.”](https://www.af.mil/Portals/1/documents/csaf/CSAF_22/CSAF_22_Strategic_Approach_Accelerate_Change_or_Lose_31_Aug_2020.pdf)

The change to which he is referring will be comprehensive: organizational, operational, and technological. The DoD is supporting this effort to move faster and be more innovative by adopting new ways of contracting with the private sector, and by creating special funds to help small, innovative companies enter the defense market.

An important tool that contributes to the private sector being more innovative and accelerating change is mergers and acquisitions. In response to the trend of reduced defense spending, as well as reductions in the number of major programs, the defense and aerospace sector has been in a continuous state of consolidation since the end of the Cold War.

In addition, until the recent drive toward shortening acquisition timelines, major programs often took fifteen years or more to go from initial design to full-rate production. Scale and financial resources were also important for the ability of defense companies to survive changes in national security priorities or decisions to cancel major acquisition programs. Therefore, small and mid-sized firms often found it extremely difficult to thrive in the defense and aerospace sector. As a result of these factors, the number of major prime contractors has shrunk to, at best, [two or three companies](https://www.pogo.org/analysis/2019/08/the-incredibly-shrinking-defense-industry/) in each defense subsector.

Mergers and acquisitions will continue to be an important tool for defense and aerospace companies in accelerating change, improving their performance, reducing costs, and providing the rapid innovation demanded by the Pentagon. Recent examples include the merger of L3 and Harris; the merger between Raytheon and United Technologies; the acquisition of Sanders Electronics from Lockheed Martin by BAE Systems; the acquisition of OrbitalATK by Northrop Grumman; and finally, the proposed acquisition of Aerojet Rocketdyne by Lockheed Martin.

But where mergers and acquisitions may be particularly significant is in bringing unique products to bear on critical defense problems. The acquisition of small and mid-sized companies (particularly those without a foothold in the defense sector) by larger firms is an important way of providing them with the access to customers, financial and human resources, and management support required to enter and survive in the defense market.

Over the past several years, the Federal Trade Commission (FTC) has pursued several misguided antitrust investigations and suits. One of these was against [Qualcomm](https://www.realcleardefense.com/articles/2019/11/22/the_ftcs_suit_against_qualcomm_is_a_serious_threat_to_national_security_114864.html), despite senior DoD officials warning that this would harm national security. The recurring theme in these actions is the need to reign in corporations based on size or market presence. This reflects a growing sentiment at the FTC that corporate success as reflected in size or dominant performance is suspect. As a recent [Wall Street Journal editorial](https://www.wsj.com/articles/unfortunately-big-is-bad-is-back-11622995107) observed, the premise of the new approach is that “big is bad.”

#### About platforms

Abbott ’21 [Alden; February 2021; Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University; Concurrences, “Competition Policy Challenges for a New U.S. Administration: Is the Past Prologue?” <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>]

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [[12](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb12)] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [[13](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb13)] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [[14](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb14)] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [[15](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb15)] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [[16](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb16)] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### This internal link is investment---that’s shot

Nathaniel Meyersohn 21. Retail reporter at CNN Business. “Omicron slams into American businesses: 'We've taken a big nose dive'” 12-21-21. https://www.cnn.com/2021/12/21/business/businesses-workers-covid-omicron/index.html

Spreading cases and collective anxiety **are starting to take a toll** on restaurants, stores, hotels and other businesses, which are desperate to recover from the pandemic and jumpstart business during the holidays.

Some **shop owners describe a feeling of déjà vu** and are struggling to respond to the latest Covid-19 wave.

In Philadelphia, Phil Korshak was forced to shut down his bagel shop on Thursday after one of his employees tested positive and the whole staff was exposed.

The store, Korshak Bagels, stayed closed through the weekend. He hopes to reopen Wednesday.

"I closed for the three days of the week where I make the most money," he said. "I had to generate payroll without income for all the employees."

Korshak is now keeping a rapid Covid-19 test on hand for each employee, but he's worried he will be forced to shut down for an extended period this winter. He wouldn't be able to handle closing for longer than that.

"Is there a possibility we will be shut down for so long a time that I won't hold on to staff?"

'Perfect storm'

For many businesses in the service sector, the holidays are the most important stretch of the year.

In the retail industry, stores often rack up the majority of their sales during the holiday shopping season as customers splurge on gifts and big-ticket items. Restaurants rely on big holiday dinners to help get them through the leaner winter months.

"The holidays are our Black Friday," said Sean Kennedy, the executive vice president of the National Restaurant Association, an industry group.

Nicole Panettieri, owner of The Brass Owl, a boutique clothing, accessories and gift shop in Astoria, Queens, said the mood has shifted at her store.

Nicole Panettieri, owner of The Brass Owl, a boutique clothing, accessories and gift shop in Astoria, Queens, said the mood has shifted at her store.

Ninety thousand restaurants — approximately 14% of all US restaurants— have permanently shut down during the pandemic, according to the group.

Many restaurants were already struggling with a labor shortage and a sharp rise in wholesale prices, Kennedy said. Now, customer **confidence is dropping as Covid-19 cases surge.**

#### No impact to hypersonics—takes too long, structural constraints, too hard to build

Bitzinger, 19 - Visiting Senior Fellow with the Military Transformations Program at the S Rajaratnam School of International Studies (Richard, ‘Hypersonics: Next Big Thing or Next Big Fad?’, October 22 2019, https://www.rsis.edu.sg/rsis-publication/rsis/hypersonics-next-big-thing-or-next-big-fad/#.XdwWUi3MzOR)

Hypersonics: Next Big Fad or Hyper Challenges? As if by clockwork, we are currently searching for the next fad, the next big game-changer. For some, it is artificial intelligence (AI), the idea of autonomous, “learning machines” that could conceivably take charge of our thinking and our actions on the battlefield. For others, it is hypersonics. Today, the hypersonic missile is the holy grail of the kinetic-kill weapons system. Travelling at a speed of anywhere from five to 15 times the speed of sound (that is, 6,000 to 18,000 kilometres an hour) and able to manoeuver while doing so, the hypersonic cruise missile is believed unstoppable and impossible to defend against. Keep in mind that hypersonics is not new. Countries have been working on them for decades, the United States in particular. The X-15, a manned rocket airplane that flew in the late 1950s and early 1960s, frequently exceed Mach 5, the definition of hypersonic speed. At the same time, the US has worked on scramjet technologies since the 1960s and currently has several active hypersonic weapons programmes. Up until recently, however, no one really worried themselves too much about hypersonics, especially hypersonic weapons. For one thing, the technology is daunting. Achieving hypersonic speeds is incredibly challenging, and most hypersonic projectiles rely on being given an initial boost on either a supersonic aircraft or a ballistic missile. Moreover, the missile has to be made of materials that can withstand the punishing friction and heat of hypersonic speeds. As a recent New York Times article said about current US hypersonic prototypes, the skin of these projectiles “expands and deforms and kicks off a plasma like the ionised gas formed by superheated stars, as they smash the air and try to shed all that intense heat.” Jumping on the Hypersonics Bandwagon For a long time, therefore, technological challenges appeared to be an effective barrier to weaponising hypersonics. The Soviet Union (and later Russia) has been working on hypersonics as long as the US, with little to show for it (reports are that it could not perfect the necessary shielding to prevent the projectile from melting and breaking up). Most other countries were content with perfecting ballistic missiles and subsonic (but highly manoeuvrable and low-observable) cruise missiles. Today, however, it seems that everyone is working on hypersonics. Russia has supposedly accelerated its programme to develop the Avangard hypersonic glide vehicle (HGV), which would be launched by an intercontinental ballistic missile (ICBM); according to reports, Moscow wants to deploy up to 60 Avangards by 2027. India is also working on a hypersonic version of its BrahMos cruise missile (which currently flies at supersonic speeds), and the New York Times says that France, Australia, Japan, and the European Union all have military or civilian hypersonics research projects underway. In particular, Japan supposedly wants its own hypersonic weapon by 2025. But it is China, as usual, that is driving most of the recent concerns over a hypersonics arms race. China has been working on an HGV designated the DF-ZF, and it has been test-launched several times, boosted by a conventional missile. The DF-ZF is reportedly capable of flying up to Mach 10 (12,000 kilometres an hour), possibly nuclear armed, and could be launched from an ICBM, giving it global coverage. A Hypersonic Missile Gap? All this, of course, has caused growing panic in the West, particularly the United States. Despite having worked for literally decades on the problem, there is now a new sense of urgency in Washington when it comes to closing a perceived hypersonic “missile gap” with China and Russia. In response, the US has been stepping up its game when it comes to hypersonics, such as developing a “conventional prompt strike” capacity using a hypersonic projectile. But let’s pump the brakes for a minute. It is true that hypersonics is a “big thing,” although probably not the next big thing. The physics of hypersonics is a cruel mistress, and crafting a truly operational hypersonic weapon is still years off. Most current systems, even the Russian Avangard, are still basically proof-of-concept vehicles. And their supposedly invincibility is not destined to last forever. ICBMs are hypersonic vehicles, and some were even outfitted with manoeuvrable warheads, but defences have been developed to cope with these threats. China’s DF-21D antiship ballistic missile was considered at one time to be a game-changing “carrier killer,” against which there was no defence; now it appears that such fears were exaggerated. This is not to say that hypersonic vehicles do not matter, or that they will not be an extremely important metaphorical arrow in the quiver of future warfare. At the same time, faddism should not drive military acquisition. Just remember what happened to the laser disc, Google Glass, and New Coke.