# 2AC

## Russia Adv

#### Plan only makes it possible to enforce antitrust – AmEx is overbroad and shields any antitrust application

**Shinder 21** --- Managing Partner of Constantine Cannon’s New York Office.

Jeffrey I., 11-8-2021, "Will New York Become An AmEx Free Zone?" Constantine Cannon, https://constantinecannon.com/antitrust-group/antitrust-today-blog/will-new-york-become-an-amex-free-zone/

While adding little substance to the mix, AmEx does make it harder to enforce federal antitrust laws against platform industries. To prove an antitrust violation in a two-sided transaction market post-AmEx, a plaintiff must demonstrate harm to competition that takes into account both sides of the market.  Moreover, as many predicted, AmEx has been embraced by defendants in numerous industries beyond payments, and courts routinely demand two-sided market proof even when the market in question cannot be properly characterized as a “transaction market.”[[1]](https://constantinecannon.com/antitrust-group/antitrust-today-blog/will-new-york-become-an-amex-free-zone/" \l "_ftn1)  Such overbroad applications of AmEx elevate the burden on antitrust plaintiffs, while giving defendants the ability to justify their infliction of harm to one side of the “market” by showing some procompetitive benefit on the other side.  It is no exaggeration to say that among the many death-by-a-thousand-cuts Supreme Court decisions that have chipped away at the antitrust laws in recent years, AmEx may prove to be the most significant cut of all.

**Pounders – A] FTC policy shifts thump**

**Diessel et al. 22** – Benjamin H. Diessel is a partner at Wiggin and Dana LLP; Robert M. Langer is senior counsel at Wiggin and Dana LLP; Zeynep E. Aydogan is an associate at Wiggin and Dana LLP

Benjamin Diessel, Robert Langer, and Zeynep Aydogan, "FTC Merger Policy Shifts May Spur Uncertainty And Risk," Law360, 1-14-2022, https://www.law360.com/corporate/articles/1455070/ftc-merger-policy-shifts-may-spur-uncertainty-and-risk

The Federal Trade Commission has recently taken bold measures to reshape its enforcement priorities for review of mergers and acquisitions.

The FTC shares jurisdiction over such reviews with the U.S. Department of Justice. Accordingly, new policies have historically been adopted jointly by the FTC and DOJ. Several recent actions of the FTC, however, have been undertaken unilaterally in a stark departure from that tradition.

First, the FTC unilaterally resurrected a long-abandoned practice of requiring prior approval policies in connection with certain transactions.

Second, the commission unilaterally withdrew the vertical merger guidelines that it had adopted jointly with the DOJ in 2020.

Finally, the commission announced that it would start issuing warning letters to parties to potential transactions, increasing the possibility that transactions may be subject to action even beyond the expiration of the 30-day waiting period.

This interagency split could have profound implications for how transactions are reviewed and whether they are approved. The potential tension comes at an unfortunate time, coinciding with exponential increases in transactions reportable under the Hart-Scott-Rodino Act.

This resulting opacity in the merger review processes exercised by the two agencies will require additional care by companies charged with navigating through the mergers and acquisitions process and managing antitrust-related risk.

Reissuing Prior Approval Policies

On Oct. 25, 2021, the FTC unilaterally issued a policy statement that effectively resurrected its pre-1995 practice of requiring prior approval policies.[1]

This policy requires all parties that enter into a merger consent agreement to agree that they will obtain prior approval for at least 10 years before closing any future transaction affecting a relevant market. Under the policy, the FTC may seek prior approval for a future transaction even if the parties abandon that transaction.

By contrast, the DOJ continues to operate under its extant prior notice requirements.

Two dissenting commissioners, Christine Wilson and Noah Phillips, issued a statement on Oct. 29, cautioning about the "chilling" effect that "it will have on mergers and acquisitions activity in the United States."[2]

The statement emphasized the "divergence" that the FTC's actions are causing between it and the Antitrust Division of the DOJ.

Withdrawal of the Vertical Merger Guidelines

On Sept. 15, 2021, the FTC voted to rescind the joint FTC-DOJ ~~vevrtical~~ [vertical] merger guidelines. Shortly thereafter, the DOJ issued a press release indicating that the vertical merger guidelines remain in place at the department.[3]

Phillips and Wilson characterized the FTC's decision to withdraw the vertical merger guidelines as an attempt to "pull the rug out from under the honest businesses and lawyers who advise them."[4]

They wrote that "the Majority's decision to withdraw the Vertical Merger Guidelines adds to the divide between enforcement at the FTC and the Department of Justice,"[5] and invoked long-standing "concerns about different procedures at the agencies."[6]

The dissenting commissioners stated that "unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear."[7]

They expressed concern that the FTC's decision to withdraw the guidelines adds to the divide between enforcement at the FTC and the DOJ, in light of the "concerns about different procedures at the agencies and perceived differences in the standards for an injunction."[8]

If, as predicted by some, the FTC's rescinding of the vertical merger guidelines indicates that it will more aggressively challenge vertical transactions than the DOJ, parties to potential vertical transactions will need to analyze and account for that risk.

Warning Letters Issued by the FTC

On Aug. 3, 2021, the FTC announced that it would begin to issue warning letters to companies to reported transactions when the commission cannot fully investigate within the requisite timeline. The FTC indicated that the warning letters would serve to notify the parties that the FTC's investigation remains open even beyond the HSR waiting period, alerting parties of the risk that the FTC may subsequently determine that the transaction is unlawful.[9]

The FTC's announcement of its practice to start issuing warning letters stands in sharp relief with both agencies' prior practices of rarely challenging consummated transactions. Notably, the DOJ has issued no similar guidance.

This apparent split introduces further uncertainty to parties and counsel navigating through transactions by increasing the risk of post-consummation investigations. Wilson has warned that the new policy will "raise the costs of doing mergers and threaten[s] to chill harmful and beneficial deals alike."[10] Wilson expressed concern "that the carefully crafted HSR framework is suffering death by a thousand cuts."[11]

#### Court doctrine – NCAA decision expanded the scope

Cornell 9/16 – Head of the U.S. antitrust practice at global antitrust powerhouse Clifford Chance LLP

Tim Cornell, 20 years of antitrust experience, has advocated on behalf of dozens of clients before the US Federal Trade Commission, the US Department of Justice, and the federal courts, with Robert Houck, Peter Mucchetti, and Brian Yin, Antitrust Litigation 2021, Last Updated September 16, 2021, <https://practiceguides.chambers.com/practice-guides/antitrust-litigation-2021/usa/trends-and-developments>

NCAA: a Unanimous Decision for a Divided Court

On 21 June 2021, the Supreme Court unanimously held that restrictions imposed by the National Collegiate Athletic Association (NCAA) limiting the "education-related benefits" that member schools could provide to student athletes violated federal antitrust law, re-affirming the virtues of the Court's long-standing "rule of reason" analysis and making clear that the antitrust laws apply to anticompetitive agreements in labor markets. [Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).] While the holding was a major blow to the NCAA, it has important implications beyond college sports—especially for its discussion of how courts could use a "quick look" form of the rule of reason analysis.

In NCAA v. Alston, former and current student-athletes sued the NCAA in class action litigation. They argued that the NCAA's rules restricting compensation were agreements between member schools that unreasonably restrained trade, in violation of Section 1 of the Sherman Act. [15 U.S.C. Section 1.]. The California district court applied a rule of reason analysis, considering:

whether the challenged restraints had substantial anticompetitive effects;

procompetitive rationales; and

whether these procompetitive effects could be achieved through less anticompetitive means.

After trial, the district court upheld the NCAA's restrictions capping undergraduate scholarships and compensation related to athletic performance, accepting that both improve consumer choice among sports enthusiasts by maintaining a distinction between amateur and professional sports. But the court held that the policy limiting "education-related benefits" did not fulfill that objective and violated the law. The Court of Appeals for the Ninth Circuit agreed.

The Supreme Court affirmed. The NCAA argued that the lower courts should have applied an "abbreviated deferential review" of its challenged restraints. Writing for a unanimous Court, Justice Gorsuch explained that the lower courts had properly applied the full rule of reason analysis, given the "complex questions" about the consumer benefits of the challenged policies. In doing so, Justice Gorsuch pointed out that the "market realities" had changed since 1984, when the Court assumed (without deciding) that different NCAA restrictions were justifiable. Justice Kavanaugh's concurrence went further, chastising the NCAA for holding themselves as "above the law" and potentially inviting future plaintiffs to again challenge the NCAA's remaining compensation restrictions (which the plaintiffs had not appealed to the Court).

The majority opinion notably recognised that the "quick look" rule of reason analysis can apply to determine that a challenged restraint is not anticompetitive. Historically, courts have used "quick look" analysis to condemn restraints, when “an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect.” [Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999)]. The Court declined to apply the NCAA's requested quick look, but recognised that certain restraints may be "so obviously incapable of harming competition that they require little scrutiny."

While clearly a blow to the NCAA, the opinion will likely have ripple effects in other industries and contexts. It would not be surprising for more parties to advocate for "quick look" rule of reason analysis – particularly to absolve challenged restraints. And on the other end of the spectrum, the Department of Justice has already cited Justice Kavanaugh's concurrence to argue that price-fixing in labor markets should be per se unlawful. All this makes clear that attorneys and clients must be familiar with this case to be prepared when dealing with future antitrust issues.

#### Only nascent firms foster innovation sufficient to connect to an impact

Hemphill and Wu 20, Moses H. Grossman Professor of Law, New York University School of Law, , Julius Silver Professor of Law, Science and Technology, Columbia Law School.

(C. Scott, and Tim, “Nascent Competitors,” 168 U. Penn. L. Rev. 1879)

Over the last century and a half, small, innovative firms have played a particularly important role in the process of innovation and competition. This is not to discount the important history of innovation at big firms with large research laboratories, such as Bell Labs, Xerox PARC, and research labs at General Electric and Merck.30 However, over the same period, a significant number of disruptive innovations—those that transform industry—have come out of very small firms with new technologies unproven at the time: examples include the Bell Telephone Company, RCA, MCI, Genentech, Apple, Netscape, and dozens of others.31

There is a particular competitive significance of the big innovations at the smaller firms, for they also represent competitive entry, and sometimes completely transform the industry.32 New, unproven innovators are a key source of disruptive innovation.33 Consider that Bell’s telephone did not improve the telegraph, but replaced it, or the impact of Apple’s personal computer on the computing industry. As this suggests, nascent competitors can hold the promise of offering fresh competition for the market, not just in the market. They have the capacity to displace an incumbent through a paradigm shift—for example, a new platform for developing software or decoding a genome. Nascent competition tends to be important in industries marked by rapid innovation and technological change. Software, pharmaceuticals, mobile telephony, e-commerce, search, and social network services are leading examples.

Future potency. Second, a nascent competitor is relevant due to its promise of future innovation. Its potency is not yet fully developed and hence unproven. Whether that innovation will make a difference in the marketplace is subject to significant uncertainty. That is due to the unpredictable rate and direction of technological change. This uncertainty stems from the same forces of technological progress that make innovation so valuable. The nascent competitor may fail in various ways: the unproven cure, despite highest hopes, may flunk its clinical trials; the technologies thought to be the future might, in fact, be overrated. This uncertainty may not be a quantifiable risk, like the odds in a casino, but closer to Knightian true uncertainty—in other words, not readily susceptible to measurement.34 The unpredictable path of innovation often results in product plasticity, in which products evolve and are used for purposes different than the original. For example, in the 1990s, mobile telephones gained popularity as a complement to a wired telephone, as a means for making calls on the go.35 Today, they compete with land lines, cameras, computers, televisions, and credit cards. General purpose technologies such as computing and Internet connectivity act as powerful fuel for unpredictable change.36 Uncertainty about what products the incumbent and the nascent competitor will actually offer in the future has a further consequence—uncertainty about the degree to which those products will actually compete.

#### Our comparative advantage is competition – other countries are larger, which means they can always outbulk us in data

Wheeler 20, visiting fellow in Governance Studies at The Brookings Institution, Chairman of the Federal Communication Commission (FCC) from 2013 to 2017, ‘20

(Tom, “Digital Competition With China Starts With Competition At Home,” <https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_digital_competition_china_wheeler_v3.pdf>)

The United States and China are engaged in a technology-based conflict to determine 21st-century international economic leadership. China’s approach is to identify and support the research and development efforts of a handful of “national champion” companies. The dominant tech companies of the U.S. are de facto embracing this Chinese policy in their effort to maintain domestic marketplace control. Rather than embracing a China-like consecration of a select few companies, America’s digital competition with China should begin with meaningful competition at home and the allAmerican reality that competition drives innovation.

America’s dominant tech companies have seized upon the competition with China as a rationale for why their behavior should not be subject to regulatory oversight that would, among other things, promote competition. “China doesn’t regulate its companies” has become a go-to policy response. When coupled with “of course, we support regulation, but it must be responsible regulation,” it throws up a smokescreen that allows the dominant tech companies to make the rules governing their marketplace behavior.

At the heart of digital competition — both at home and abroad — is the capital asset of the 21st century: data. Initiatives such as machine learning and artificial intelligence are data-dependent, requiring a large data input to enable algorithms to reach a conclusion. China’s immense population of almost 1.5 billion gives it an advantage in this regard. By definition, a population that approaches five times the size of the U.S. population produces more data. The previously “backward” nature of the Chinese economy has resulted in another Chinese data advantage: New smartphone-based apps, created in place of the digital integration that China previously lacked, produce a richer collection of data. This bulk and richness of Chinese data creates an inherent digital advantage when compared to the United States.

If the United States will never out-bulk China in the quantity and quality of data, it must out-innovate China. Here, the United States has an advantage, should it choose to take it. The centralized control of the Chinese digital economy is an anti-entrepreneurial force. In contrast, innovation is the hallmark of a free and open market. But the domestic market must, indeed, be free, open, and competitive.

Currently, the American digital marketplace is not competitive. A handful of companies command the marketplace by hoarding the data asset others need to compete. As innovative as America’s tech giants may be, they represent a bottleneck that starves independent innovators of the mother’s milk of digital competition. If America is to out-innovate China, then American innovators need access to the essential data asset required for that innovation.

The nation’s response to Chinese competition must not be the adoption of China-like national champions, nor the “China doesn’t regulate its companies that way” smokescreen. American public policy should embrace the all-American concept of competition-driven innovation. This begins with breaking the bottleneck that withholds data from its competitive application. This does not necessarily mean breaking up the dominant companies, but it does mean breaking open their mercenary lock on the assets essential for competition-driven innovation.

## TTC Adv

## T Economy Wide

#### Counterinterp – scope means making more stuff illegal

Bauer, Professor of Law, Notre Dame Law School; Visiting Professor, Emory

University School of Law, ‘04

(Joseph P., “Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?” 16 Loy. Consumer L. Rev. 303 2003-2004)

Lately, much attention has been given to the scope of the antitrust laws. This discussion has two overlapping components: (1) consideration of the substantive doctrines specifying the behavioral or structural changes that are or are not unlawful and the appropriate methodology; and (2) analysis for making those determinations with attention given to the appropriate vehicles for enforcing the antitrust laws. Some argue that the antitrust laws proscribe activities that are either pro-competitive or at worst benign.' Further, they assert that the multiplicity of antitrust enforcers and enforcement devices has resulted in undue burdens, including excessive cost, time delay, and forestalling of legitimate, procompetitive behavior.

#### Antitrust laws are Sherman and Clayton

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### If antitrust applied economy-wide, contracts would be illegal – contracts aren’t illegal, therefore antitrust isn’t economy-wide

**Quinn 11** --- Patent attorney and a leading commentator on patent law and innovation policy. Mr. Quinn has twice been named one of the top 50 most influential people in IP by Managing IP Magazine, in both 2014 and 2019.

Gene, 11-17-2011, "Antitrust Law Basics: A Primer on Patent and Copyright Misuse," IPWatchdog, https://www.ipwatchdog.com/2011/11/17/antitrust-law-basics-a-primer-on-patent-and-copyright-misuse/id=20458/

The antitrust laws, which can be found at 15 U.S.C. § 1 et seq, apply to virtually all industries and to every level of business, including manufacturing, transportation, distribution, and marketing. They prohibit a variety of practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce the competitive vigor of particular markets, and predatory acts designed to achieve or maintain monopoly power.

The historic goal of the antitrust laws is to protect economic freedom and opportunity by promoting competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad.

The Sherman Antitrust Act, the first of the major antitrust laws, makes illegal every contract, combination, or conspiracy, in the restraint of trade. Unfortunately, Antitrust Law is not so simple as a cursory reading of the statue would otherwise suggest.

One problem presented by the language of §1 of the Sherman Act is that it cannot mean what it says. The statute says that “every” contract that restrains trade is unlawful. But, as Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, §1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets — indeed, a competitive economy — to function effectively.

Congress, however, did not intend the test of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. The so-called Rule of Reason, for example, has its origins in common-law precedents long antedating the Sherman Act. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.

## Multilat CP

#### Other countries say no

Guzman 98 – Dean & Professor of Law and Political Science,

Andrew T. Guzman, Dean and Carl Mason Franklin Chair in Law, and Professor of Law and Political Science, USC Gould School of Law, Is International Antitrust Possible?, 73 N.Y.U. L. Rev. 1501 (1998)

#### Even if people said yes, attempts for truly globalized antitrust law would fail horribly.

Epstein 2 – former Chief Democratic Counsel, House Judiciary Committee

Julian Epstein, JSD (abd)-Stanford, JD (cum laude)-Georgetow, ARTICLE:The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?, 17 Am. U. Int'l L. Rev. 343 (2002), Lexis

After briefly tracing the evolution of the application of U.S. competition law extraterritorially and developments in international competition law generally, I argue that international negotiators can no longer ignore this parallel track of international trade dealing with national competition laws of member states. Specifically, I propose a minimal international code of competition laws that should be mandated on all WTO member nations that are modeled on the per se violations found in the United States antitrust laws prohibiting such practices as price fixing, cartels, and output restraints. I use these as a baseline because the per se rules proscribe conduct that no country can persuasively argue as having redeeming economic value. If all countries are required to adopt those rules, the vexing problems of comity and judicial abstention should disappear for some offensive conduct. Beyond that baseline, however, I argue that it is foolish to attempt to impose an international competition regime because nationalist courts are ill-equipped to deal with differing economic traditions and concepts of competition and because attempts to harmonize widely divergent definitions of competition that arise from divergent jurisprudential experiences would be futile.

## NGA CP

#### Rogue state DA—CP creates mass uncertainty that chills all business

Robert W Hahn Is Executive Director of the American Enterprise Institute, Brookings Joint Center, which focuses on antitrust and regulatory policy, and Anne Layne-Farrar is a Senior Consultant with NERA Economic Consulting, 2003, Federalism in Antitrust, 26 Harv. J. L. & Pub. Pol'y 877

When states file antitrust cases under state statutes rather than under the Clayton or Sherman Acts, the likelihood of inconsistent and conflicting antitrust precedent is even higher. As a result, state action affects not only current cases, but can also affect future firm behavior. With mergers, the possibility of a challenge from any of the fifty states, each with its own standard of evaluation, could prevent companies from even attempting a beneficial transaction. As Lande points out, "it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies.

Even if state laws were identical, the interpretation and application of those laws would differ "since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts." Philosophical differences in approaches to antitrust enforcement are likely to stem from many sources, such as political affiliation, educational training, and personal experience. The National Association of Attorneys General (NAAG) Merger Guidelines for the states explicitly allow for this, noting that the general policy can be supplemented or varied in light of differing precedents, and "in the exercise of [the AGs'] individual prosecutorial ... discretion." While differing views can be helpful in some areas of law, such as when different states provide a testing ground for new regulations appropriate for federal adoption, this kind of experimentation is likely to be wasteful in the antitrust arena.

## Consult TTC CP

No cards

## Ptx

#### No link – plan would be announced in June

Oyez N.D.

“About the Supreme Court,” *Oyez*, <https://www.oyez.org/about-supreme-court>, accessed 3/20/22.

The Court’s active period runs from the first Monday in October until the end of June the following year. The year in which the term begins is considered the year of the entire term (for example, the term lasting from October 2014 – June 2015 is referred to as the October Term 2014). Argument sessions usually last through April, while May and June are reserved exclusively for opinion announcements.

#### Courts Shield

Keith E. **Whittington 5**, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the **congenial reception** of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials **act in** more-or-less **explicit** **concert** to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are **willing** and able **to accommodate**. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render **controversial decisions** and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to **circumvent a paralyzed legislature** and **avoid the political fallout** that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, **shifting blame** for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### No legislative momentum in the Senate for drug price gaps – uniqueness is highly speculative without a bipartisan bill in play

Castronuovo 3/31/2022 – reporter at Bloomberg Law

Celine, “House Passes Insulin Price Cap as Senate Looks for Path Forward” Bloomberg Law, <https://news.bloomberglaw.com/health-law-and-business/house-passes-insulin-price-cap-as-senate-looks-for-path-forward>

The U.S. House Thursday passed a bill to cap what insured Americans pay for insulin, moving forward a key component of President Joe Biden’s drug pricing agenda.

Lawmakers voted 232-193 in favor of a modified version of the bill (H.R. 6833). Its future remains uncertain for now as a group of senators work to craft a separate insulin proposal that could achieve bipartisan support.

The House bill would limit out-of-pocket costs under private health insurance and Medicare to $35 for a month’s supply of selected insulin products or 25% of a plan’s negotiated price, whichever is less. It would cover products like vials, pumps, inhalers, or other devices that control the dosage.

Biden has for months called on lawmakers to pass his proposals to lower prescription drug costs for consumers, including a price cap on insulin. Approximately 30 million Americans are living with diabetes, but Americans pay as much as five times more for a unit of insulin than people in other high-income countries, according to a 2020 RAND study.

The average annual cost to comply with the measure would be $2 billion and would exceed the private-sector threshold for unfunded mandates, according to Congressional Budget Office estimates. The CBO said it would cost roughly $6.6 billion in total to implement the legislation, which would take effect in 2023.

Democrats have said they would offset the cost by continuing to delay a Trump-era rule aimed at limiting Medicare drug rebates.

Approximately 53% of U.S. adults in a Kaiser Family Foundation study released Thursday identified capping out-of-pocket insulin costs as a top health-care priority for Congress. Roughly 61% said limiting price increases for prescription drugs to the inflation rate was also a high priority.

House Majority Leader Steny Hoyer (D-Md.) told reporters Wednesday that it’s “inexcusable” people are being charged exorbitant prices for “a life-saving and life-sustaining drug.”

Senate Talks

The House previously voted in favor of the insulin cap when it passed the Build Back Better Act (H.R. 5376). That legislation hasn’t moved forward in the Senate due to Republican opposition and complaints of a high price tag from Sen. Joe Manchin (D-W.Va.).

In the Senate, Susan Collins (R-Maine) and Jeanne Shaheen (D-N.H.) are working to develop a bipartisan agreement with Sen. Raphael Warnock (D-Ga.), who has pushed for passage of a bill similar to the one the House passed Thursday. Warnock’s proposal has so far failed to get Republican support.

#### SCOTUS vote is top of the agenda

Kim and Wang 3/30 – Seung Min Kim is a White House reporter for WaPo. Amy B. Wang is a national politics reporter for WaPo.

Seung Min Kim and Amy B. Wang, “Collins says she will back Ketanji Brown Jackson for Supreme Court,” *The Washington Post*, 30 March 2022, https://www.washingtonpost.com/politics/2022/03/30/susan-collins-ketanji-brown-jackson-vote/.

The Senate Judiciary Committee is scheduled to vote on Jackson’s nomination on Monday, triggering a timeline that would put the judge on track to be confirmed to the Supreme Court as early as the following Thursday or Friday, as long as enough Democratic senators are healthy and present.

#### Antitrust is bipartisan – calls to regulate big tech prove

Zakrzewski 10/14/2021 – technology policy reporter

Cat, “Senators aim to block tech giants from prioritizing their own products over rivals’” WaPo, 10/14/2021, <https://www.washingtonpost.com/technology/2021/10/14/klobuchar-grassley-antitrust-bill/>

A bipartisan group of senators plans to introduce a bill that they say would prevent tech platforms from using their power to disadvantage smaller rivals, signaling growing momentum in Congress to rein in Silicon Valley giants.

Sens. Amy Klobuchar (D-Minn.), chair of the Senate Judiciary Committee’s antitrust subcommittee, and Charles E. Grassley of Iowa, the top Republican on the Senate Judiciary Committee, announced that they will introduce legislation early next week making it illegal for Amazon, Apple, Facebook and Google to engage in “self-preferencing,” the tech giants’ practice of giving their own products and services a boost over those of rivals on their platforms.

The bill would effectively outlaw an array of behaviors that lawmakers describe as anticompetitive, like Amazon sucking up data from sellers on its platform to copy the products in-house or Google prioritizing its own services over rivals’ in search results.

Klobuchar said in an interview that the bill reflects a growing realization that competition laws, like the Sherman Act of 1890, which prohibits anticompetitive agreements and attempts to monopolize markets, need to be updated for the digital era. (Amazon founder Jeff Bezos owns The Washington Post.)

The American Innovation and Choice Online Act “really gets at the exclusionary conduct so unique to dominant platforms,” she said. “If there had been an Internet when Sen. Sherman was representing Ohio in the Senate, maybe they would have included this.”

The bill comes as recent cases targeting tech giants have tested existing antitrust laws. Advocates for tech regulation say legislation is needed because laws written in the era of railroads and oil barons are not equipped to address the unique ways that Silicon Valley can harm competition and consumers. Both Facebook and Apple have scored courtroom victories in recent months in high-profile antitrust cases.

The bill is widely viewed as a bellwether of whether Republicans and Democrats will be able to convert the mounting bipartisan animosity toward the tech industry into new laws. House lawmakers have already passed a companion version of this bill through the Judiciary Committee, and it awaits a vote on the House floor. The Klobuchar bill highlights the mounting bipartisan interest in both chambers of Congress in overhauling competition law to target the practices of a handful tech giants.

Klobuchar said the White House has also remained “informed” of her office’s work on the bill, as competition policy has emerged as a key focus of the administration. White House press secretary Jen Psaki said last week that President Biden “looks forward” to working with Congress on tech regulation, including antitrust legislation.

The bill’s announcement invited backlash from industry-backed groups arguing that, if passed, it would have a detrimental impact on tech companies. The bill would take a “hammer” to products that consumers love, said Adam Kovacevich, chief executive of the Chamber of Progress, an industry coalition that counts Google, Amazon and Facebook among its partner companies.

“Preventing Amazon from selling Amazon Basics and banning Google’s maps from its search results isn’t going to do anything to make the Internet better for families,” he said. “This is like calling a car mechanic to fix your laptop.”

Advocates for breaking up large tech companies praised the bill and said the recent bipartisan vote backing tech critic Lina Khan to serve on the Federal Trade Commission underscores there’s willingness in both parties to pass antitrust legislation. But they say this should only be the beginning of Congress’s work on these issues.

“The Senate must continue to reassert its power over the handful of men whose corporations undermine economic dynamism, eviscerate the free press, and threaten our democracy itself,” said Sarah Miller, executive director of the American Economic Liberties Project, a nonprofit organization that advocates for aggressive antitrust enforcement.

The Senate Judiciary antitrust subcommittee has hosted several related hearings, during which they’ve questioned witnesses on ways that the tech giants supposedly use their grip on the smart home or app stores to limit competition. Klobuchar noted that these concerns date back to the previous Congress, when a Republican-controlled committee hosted a hearing on self-preferencing, and lawmakers heard testimony from Google critic Yelp.

“Through it all was a common theme about how the dominant platforms were advantaged because they could exclude competitors as only a dominant platform can,” Klobuchar said.

A news release about the forthcoming legislation said it would give enforcers “strong, flexible tools to deter violations,” including steep fines of up to 15 percent of a company’s revenue during the time it was violating the legislation.

The bill also targets much of the conduct that was raised by House lawmakers last year in the findings of their more than year-long investigation into power in the tech industry.

## FTC Tradeoff DA

#### B] Fiat solves – new authority comes with new funding authorization

Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy, and Gambhir, New America's Open Technology Institute, ‘21

(Christine and Raj, “Does Data Privacy Need its Own Agency?” <https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf>)

Proposals delegating privacy law enforcement to the FTC generally bolster an existing bureau or establish a new bureau within the agency. Senator Wyden’s Mind Your Own Business Act of 2019 would create a new 50-person Bureau of Technology within the FTC and add 125 employees to the Bureau of Consumer Protection—100 of whom would do privacy enforcement work.102 This would bring the total number of FTC employees doing privacy enforcement work up to about 190. While the Wyden bill does not provide figures for how much adding 175 new employees would cost, former FTC Chairman Joseph Simons estimated that a $50 million budget increase from Congress would enable the FTC to hire 160 new staff.103 Under this proposal, the number of employees working on privacy would more than triple. However, it would still only be about one-tenth the size of the Eshoo-Lofgren DPA proposal.

#### No link-uq—tech already a priority for resources

Marguerite Reardon, FTC Chair Lina Khan outlines antitrust priorities, September 23, 2021, <https://www.cnet.com/news/ftc-chair-lina-khan-outlines-antitrust-priorities/>

She also suggested "targeting root causes rather than looking at one-off effects" when it comes to analyzing mergers. She said it's important to assess how business models or conflicts of interest may result in antitrust harms. Among other key principles, she said the agency needs to be "forward-looking" and to act more quickly to mitigate harm. This includes paying close attention to "next-generation technologies, innovations, and nascent industries across sectors."

Khan outlined three specific policy priorities:

Addressing "rampant consolidation." Khan said it's important to focus resources and scrutiny on dominant firms, where a lack of competition makes unlawful conduct more likely. This will include revising merger guidelines in conjunction with the DOJ to deter mergers that the agency and DOJ are likely to challenge.

Going after "dominant intermediaries" or "gatekeepers." Khan wrote, "Business models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse."

**The DOJ and FTC are already overstretched, but their prior resource allocation has proven they’ll move resources away from other less important teams**

**Kern 22** – tech policy reporter for POLITICO

Rebecca Kern, "Antitrust enforcers are drowning in mergers," POLITICO, 1-10-2022, https://www.politico.com/newsletters/morning-tech/2022/01/10/antitrust-enforcers-are-drowning-in-mergers-799773

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).

[[Figure 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.

#### *Amex* specifically eats up agency resources

Ben Brody, Bloomberg, U.S. Google Monopoly Case Could Hit Supreme Court AmEx Hurdle, August 28, 2020, <https://www.bloomberg.com/news/articles/2020-08-28/u-s-google-monopoly-case-could-hit-supreme-court-amex-hurdle>

Google’s lucrative search ad business sells advertising space to brands around the results it provides to consumers. It also plays a key intermediary role connecting buyers and sellers of digital display ads across the web, and as a seller of display ad space for its YouTube video unit. Investigators have looked into all three, Bloomberg has reported.

Antitrust experts said that one reason for the delay in the Google lawsuit, which was expected in July, could be that government lawyers needed more time to construct the case to meet the standards in the AmEx ruling.

“That’s a complex, lengthy complaint to draft, and that takes time,” said Spencer Weber Waller, director of the Institute for Consumer Antitrust Studies at Loyola University Chicago. The government would probably have to create a “a belt-and-suspenders approach” that says why it would win under two kinds of market definitions, he said.

# 1AR

## Multilat CP

**Prohibitions are the means imposed on individuals**

**Battjes 9** – Assistant professor of constitutional and administrative law at the law faculty of VU University, Amsterdam,

Hemme Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed," Leiden Journal of International Law, 22 , pp. 583-621, 9-1-2009, accessed via Nexis Uni

Does this 'relativity' of the minimum level of severity detract from the 'absolute' nature of Article 3, and hence imply a limitation or balancing as meant by the UK government? There is, arguably, no reason to suppose so. As the prohibition is defined by means of the effect a certain treatment has on the individual, its qualification as ill-treatment depends on the circumstances of the case and the features of the person concerned. Thus in Mayeka and Mitunga the Court ruled that detention of an unaccompanied five year-old child constitutes inhuman treatment, [116](https://advance.lexis.com/document/?pdmfid=1516831&crid=e2fb5ec5-8b4a-4989-a11c-3967e3c72dcb&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A605P-2S71-JS0R-23GP-00000-00&pdcontentcomponentid=400004&pdteaserkey=sr3&pditab=allpods&ecomp=qzvnk&earg=sr3&prid=f6e3a168-60b9-46d1-b026-fe8960301bc2) whereas detention under the same conditions would not (or not necessarily)do so for an adult, or the same child if accompanied by its parents. In the latter case the underlying reasoning is not that detention of the child is as such inhuman but justified by the presence of its parents. Rather, the detention of the accompanied minor would not cause fear and anguish. The minimum level of severity is, however, subject to another form of relativity:  
In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. [117](https://advance.lexis.com/document/?pdmfid=1516831&crid=e2fb5ec5-8b4a-4989-a11c-3967e3c72dcb&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A605P-2S71-JS0R-23GP-00000-00&pdcontentcomponentid=400004&pdteaserkey=sr3&pditab=allpods&ecomp=qzvnk&earg=sr3&prid=f6e3a168-60b9-46d1-b026-fe8960301bc2)

#### Prohibition turns on whether something is anticompetitive or not

Light, Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania, ‘19

(Sandra, “The Law of the Corporation as Environmental Law,” 71 Stan. L. Rev. 137)

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 court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations.199

#### And, they’re implemented via legal tests

Mark S. Popofsky, Antitrust Partner at Ropes and Gray, Served as Senior Counsel to DOJ Antitrust Division, Adjunct Professor of Advanced Antitrust Law and Economics at Harvard Law School and the Georgetown University Law Center, 2016, Section 2 and the Rule of Reason: Report from the Front, CPI Antitrust Chronicle March 2016 (1)

Courts remain, in the words of one observer, mired in an “exclusionary conduct ‘definition’ war.”2 Applying Section 2’s broad prohibition on “monopolizing” conduct requires courts to select a governing legal test. Section 2 legal tests run the spectrum from rules of per se legality to rules of near per se illegality.3 Courts, nonetheless, largely apply two dominant paradigms. The first consists of legal tests based on bright-line rules or safe harbors. Familiar examples include the Brooke Group4 below-cost price test for analyzing predatory pricing claims and the Aspen/Trinko5 “profit sacrifice” test for refusals to deal. Developing bright-line rules for Section 2, proponents argue, promotes business certainty and reduces the risk of chilling otherwise procompetitive conduct. The second paradigm is rule of reason balancing. Arguably the default Section 2 legal test,6 courts and commentators have described Section 2’s rule of reason in various ways: as mandating a step-wise approach, as requiring a balancing of pro- and anticompetitive effects, or (to borrow from Section 1) a framework for generating the enquiry “meet for the case.”7 However the rule of reason is expressed, its champions contend, its flexibility and fact-intensive approach permits courts to identify anticompetitive conduct without the under-inclusion that is an admitted feature of safe harbors and other bright-line rules.

#### Differences in antitrust approaches are too entrenched

Buxbaum 18 – Professor of law and John E. Schiller Chair at Indiana University.

Hannah L. Buxbaum, “Transnational Antitrust Law,” *Indiana Legal Studies Research Paper*, no. 384, 18 January 2018, pp. 10-13, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3101038.

III. Economic Globalization and the Prospects for the Convergence of Antitrust Norms

Transnational regulation rarely develops along an evolutionary pathway that begins with an initial stage of unilateral regulation, moves through stages manifesting progressively higher levels of cooperation and integration, and arrives at an end stage of complete harmonization. More frequently, it constitutes a body of norms and enforcement practices generated at multiple sites, both within and outside the state. Yet changes in political or economic conditions can precipitate a move toward greater uniformity of law (whether achieved through top-down lawmaking or through convergence of disparate legal systems). To a significant degree, this has occurred in the area of antitrust regulation as a result of economic globalization.

Economic globalization promotes greater uniformity in antitrust regulation in two particular ways. First, it has produced an increasing degree of trade liberalization, achieved through multilateral instruments (most prominently the General Agreement on Tariffs and Trade), regional accords, and bilateral investment treaties. In order to realize the full benefits of that liberalization, states must prevent private anti-competitive behavior from creating new restraints on trade. This imperative generates pressure to develop basic competition policies, as is reflected in the wave of lawmaking that followed the opening of markets in the 1990s. It also generates pressure to converge around certain substantive norms that are particularly important to trade: for instance, those prohibiting exclusionary practices (both monopolistic exclusions, including by state-owned enterprises, and exclusionary vertical constraints) and hard-core cartels.

Second, economic globalization has produced an increase in cross-border business activity. This has created a new set of global regulatory challenges, including the formation of international cartels, an increase in cross-border merger activity, and the threat of global monopolies or oligopolies. As a result, the transaction costs of maintaining inconsistent antitrust regimes (including the aggregate costs of multiple investigations involving the same transactions or conduct) have increased. In addition, there is increased risk of both underdeterrence—that certain anti-competitive conduct may fall into a regulatory gap between legal systems—and overdeterrence—that the application of multiple laws might deter otherwise beneficial activity. These outcomes likewise produce pressure to harmonize local antitrust rules.

There are limits to the momentum these pressures create. Many developing countries have either ideological or political reasons to resist adopting competition law regimes at all. In some, those regimes are viewed as opening the door to a new form of corporate imperialism; in others, they may be resisted by state or private actors who are deriving rents from a controlled economy. Moreover, while global competition may generate economic growth, the benefits of that growth do not accrue to all economies—or to all participants within particular economies— on the same timeframe or to the same extent. National decision-makers may conclude that the potential long-term gains expected from the adoption of a full-fledged antitrust regime are outweighed by the need to shield emerging industries, protect local employment opportunities, preserve autonomous local governance, or limit the impact of foreign businesses on local constituencies.

Even assuming the desirability of antitrust regulation, significant debate remains regarding the feasibility of broad-scale harmonization. Different countries remain differently situated in terms of their own economic policies and objectives. As noted above, many systems seek not only to maximize consumer welfare, but also to serve other important domestic goals, such as building up emerging domestic industries. It is therefore far from clear that a single set of substantive norms would be compatible with antitrust policy across all jurisdictions. In this regard, one question is whether states linked not by geographic proximity but by shared interests may form communities to develop antitrust norms that challenge the orthodoxy of the U.S.-EU model. The BRICS countries have recently taken steps in this direction, as part of a broader effort to represent the interests of emerging and developing economies in international financial regulation. Furthermore, efforts to identify a shared core, and to develop standards that are broadly compatible with a range of different economic policies, have been criticized for yielding either a “minimal” set of rules or a “least common denominator” solution. In 1980, for instance, the U.N. General Assembly adopted UNCITRAL’s Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The principles were criticized on this basis, and have not had significant impact on the generation of cross-border norms.

Differing economic conditions also mean that the incentives of individual countries to adopt particular norms are not fully aligned across jurisdictions. For instance, vertical restraints are less harmful to buyers in large economies, where there is more competition, and so those regimes have less incentive to regulate them tightly. Indeed, in areas beyond those most critical to the promotion of competition, there may be an offsetting benefit flowing from the experimentation that characterizes the development of antitrust norms today, and the greater ability of individual systems to react quickly to changes in global economic conditions. Finally, some of the countries currently lacking antitrust regimes are at a stage of development where the institutional capacity to implement and then enforce such laws is not sufficiently advanced. That capacity depends not only on governmental institutions such as agencies and judiciaries, but also on other public- and private-sector entities including educational institutions, professional associations, and civil society organizations.

In this light, it is no accident that the area in which a fully effective transnational order has taken hold is hard-core price fixing. Hard-core cartels are purely welfare-diminishing, and harm all economies alike. Moreover, the operation of global cartels creates the risk that inadequate enforcement in some countries would lead to overall underdeterrence, which has helped to shift the legal response to the international plane. In 1998 the OECD adopted a Council Recommendation Concerning Effective Action Against Hard Core Cartels, and urged member states both to adopt laws prohibiting such conduct and to ensure effective enforcement of those laws. The ICN has published an Anti-Cartel Enforcement Manual, and hosts regular conferences in this area. Today, over 100 systems have enacted such legislation, and significant progress has been made in enforcement of those prohibitions.

Further harmonization of antitrust norms might require a shift in philosophy toward a “world welfare” goal— defined as “the aggregate level of consumer benefits and profits realized by consumers and firms in all pertinent countries.”8 Short of that move, the settling of particular norms across multiple legal systems is likely to occur through continued regionalization or in connection with individual substantive areas.

#### No model or deal

Murray 19 – Judicial Law Clerk, US Bankruptcy Courts and Chief Growth Officer, CheckAlt

Allison Murray, JD, Loyola Law School, Given Today's New Wave of Protectionsim, is Antitrust Law the Last Hope for Preserving a, Free Global Economy or Another Nail in Free Trade's Coffin?, 42 Loy. L.A. Int'l & Comp. L. Rev. 117 (2019), Available at: https://digitalcommons.lmu.edu/ilr/vol42/iss1/3

This Article focuses on the challenges to cooperation that arise as national economies seek regulation that advances their own self-interest rather than that of the entire world. The discussion is not intended to suggest that no other challenges to international coopera-tion exist. In fact, such challenges are legion. This Part discusses sev-eral of the more salient hurdles to reaching a substantive international agreement on antitrust policy. Harmonizing antitrust policies is difficult in part because antitrust policy serves different goals in different countries.111 [FN 111] 111 See Eleanor M. Fox, The End of Antitrust Isolationism: The Vision of One World,1992 U. Chi. Legal F. 221, 223-25 (examining differences between goals of U.S. and ECantitrust policy); Joseph P. Griffin, ECIU.S. Antitrust Cooperation Agreement: Impact onTransnational Business, 24 L. & Pol'y Int'l Bus. 1051, 1051-52 (1993) (explaining that even industrialized democracies differ in their views of industrial organization and when devia-tions from norm of competition are appropriate); Hachigian, supra note 36, at 123-25 (giv-ing examples from Britain and Japan); Wood, Impossible Dream, supra note 14, at 304(describing differences among antitrust laws in United States, Canada, and EC). [End FN] In the United States, the primary goal of the antitrust laws is the encouragement of competitive markets.112 In other countries, other objectives are often important to the formulation of antitrust policy. Although the goals that countries pursue through antitrust policy may have converged in recent years,113 significant differences remain. For example, Canadian antitrust policy explicitly seeks not only to promote efficiency, but also to protect small and medium-sized businesses.114

#### No deal / say no

Guzman 98 – Dean & Professor of Law and Political Science,

Andrew T. Guzman, Dean and Carl Mason Franklin Chair in Law, and Professor of Law and Political Science, USC Gould School of Law, Is International Antitrust Possible?, 73 N.Y.U. L. Rev. 1501 (1998)

As agreements become more substantive, difficulties are likely to arise. International cooperation increases the ability of a given coun-try to enforce strict antitrust policies. For countries that prefer a lax policy (e.g., net exporters), heightened cooperation may be harmful. Imagine that a net importer, unable to apply its laws extraterritorially, is negotiating with a net exporter. Both countries may agree to a lowlevel of cooperation because even the net exporter prefers some limitsto firm behavior, and an agreement may facilitate implementation ofthe laws the exporter prefers. More substantive agreements, however, only serve to increase the importer's ability to regulate the behavior of the exporter's firms. For example, access to the compulsory processes and confidential information of the exporter may allow the importerto apply its strict policies to the exporter's firms. Because the ex-porter prefers a policy that is less strict, it will not consent to such anagreement.

Recall that the optimal global policy, though not generally opti-mal for every country, maximizes global welfare. Enough can begained from a transaction for all countries to benefit from increasedwelfare. The problem lies in the distribution of those gains-somecountries may face losses that outweigh their gains.

Reaching agreement would be simple if countries could costlessly negotiate transfer payments. Those countries that stood to gain from an agreement could compensate those countries that stood to lose.With costless negotiation of transfer payments, countries would agreeto the optimal global policy.132

However, in the world of international commercial law, transac-tion costs are far from zero and information is less than perfect. Costs arise due to a variety of factors, including the political realities facedby negotiators (e.g., voters may be against an agreement), uncertainty with respect to the magnitude of the costs and benefits of an agree-ment, and concern regarding the future behavior of other countries. Moreover, there are free rider problems-some countries may choosenot to contribute to the compensation package offered to those coun-tries that lose from an agreement-and agency problems-the objec-tives of negotiators may differ from the objectives of the citizens theyrepresent. The key to reaching agreement is to reduce these costs as much as possible.

#### Absolutely not

Guzman 98 – Dean & Professor of Law and Political Science,

Andrew T. Guzman, Dean and Carl Mason Franklin Chair in Law, and Professor of Law and Political Science, USC Gould School of Law, Is International Antitrust Possible?, 73 N.Y.U. L. Rev. 1501 (1998)

Although the prospects for successful negotiation of an interna-tional antitrust agreement are not good, if such negotiations takeplace, the analysis in this Article offers recommendations about howthey should be structured. Agreement will be more likely if negotia-tions are conducted on a broad basis and include a wide range of is-sues. By structuring negotiations in this fashion, those countries thatstand to gain from an agreement will be better able to compensatethose countries that stand to suffer a drop in welfare.

Regardless of the form in which negotiations occur, however, the prospects for antitrust policy harmonization are not good. The non-cooperative global regime is the result of forces that are difficult to overcome. Because exporters prefer a relaxed antitrust policy, they can simply refuse to agree to an international antitrust law. In sum, cooperation on international antitrust policy remains an unlikely pos-sibility. Although potential gains from agreement exist, optimism that they can be realized easily is probably misplaced.

## NGA CP

#### FTC essential to predictability and business signaling—states destroy it

Wilks, Professor in the School of Public Policy and Administration Carleton University and Joint Research Chair in Public Policy in the Politics Department, ‘96

(Stephen, *Comparative Competition Policy: National Institutions in a Global Market*, Clarendon Press)

We will be concentrating on the formal role of the Antitrust Division and the Federal Trade Commission in enforcing competition law, but there is an important informal element as well. Most issues in competition policy never reach the courts or these agencies, but are instead self-enforced through corporate attorneys who advise their clients what is possible under law and practice and what is not. Therefore, the signals that the two government institutions send to the corporate and legal communities are important for determining what will happen. For example, the 'nonenforcement rhetoric' during the l980s was important in defining how the corporate community would proceed with its merger and pricing acrivities.3  Further, the use of guidelines and formal rules from the FTC can give to private attorneys additional guidance concerning what actions are likely to trigger the interests of regulators.

As noted above, the federal nature of US politics brings into play other actors concerned with competition policy. In some ways this statement may appear unlikely, given the apparent federal monopoly over the regulation of interstate commerce. The federal government certainly does have a dominant position in this area, but the states have managed to a,ct also. In fact, the level of state activity in antitrust has been increasing. This is in part a function of the populist appeal of this activity and the political capital it can build for state attorneys general (elective officials in almost all states). These public officials have begun to file cases of potential national significance in state courts, a practice that could fragment national policy and make the environment of business very uncertain.

The states have been acting to limit competition at least as often as they have acted to promote it. For example, states (and counties and cities) often have laws requiring giving preference on public contracts to vendors coming from inside their political unit. It is not uncommon for these policies to create local monopolies or oligopolies, and perhaps also to create higher costs for the government imposing the policy. These policies do, of course, preserve local employment opportunities. Businesses can also gain protection from federal antitrust competition by accepting more friendly state regulation. On the other hand, through state corporation commissions and similar regulatory bodies, state governments also exercise some sub-national control over concentrations of commerdal power, although in a limited geographical area and subject to local pressures tnat are often not as pro-competitive as national policies tend to be.31

#### Aggressive state enforcement spills over—leads to broad overdeterrence and undermines innovation

DOJ, U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, Updated June 2015, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1

Standards of section 2 liability that overdeter risk harmful disruption to the dynamic competitive process itself. Being able to reap the gains from a monopoly position attained through a hard-fought competitive battle, or to maintain that position through continued competitive vigor, may be crucial to motivating the firm to innovate in the first place. Rules that overdeter, therefore, undermine the incentive structure that competitive markets rely upon to produce innovation.(80) Such rules also may sacrifice the efficiency benefits associated with the competitive behavior.

Importantly, rules that are overinclusive or unclear will sacrifice those benefits not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well. Firms with substantial market power typically attempt to structure their affairs so as to avoid either section 2 liability or even having to litigate a section 2 case because the costs associated with antitrust litigation can be extraordinarily large. These firms must base their business decisions on their understanding of the legal standards governing section 2, determining in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.(81) The Supreme Court has consistently emphasized the potential dangers of overdeterrence. The Court's concern about overly inclusive or unclear legal standards may well be driven in significant part by the particularly strong chilling effect created by the specter of treble damages and class-action cases.(82) Many hearing panelists reiterated this concern.(83)

#### Specifically, giving this much state control will guarantee politicized enforcement

Krakoff 22 – Furman Academic Scholar

Joseph Krakoff, JD, NYU Law, yes that Krakoff but it’s real and published by JustSecurity and is about consumer litigation which is his area of focus and also Michigan doesn’t read a big tech affirmative so “sue” us, Big Tech Is Not Big Tobacco, How Today's Toxic Politics Would Distort Attorneys General Consumer Litigation Against Facebook, *Just Security*, January 13, 2022, https://www.justsecurity.org/79836/big-tech-is-not-big-tobacco/

Former Massachusetts Attorney General Scott Harshbarger and former San Francisco Chief Assistant City Attorney Dennis Aftergut recently made a fascinating proposal on Just Security, arguing that state attorneys general (AGs) should lead litigation against Big Tech, as they did with Big Tobacco 23 years ago. While the proposal offers an attractively creative method of regulating Big Tech and holding it accountable, a few cautions are warranted – namely that, in today’s hyper-polarized political environment, empowering elected, partisan AGs to dictate the way in which information on platforms circulates likely comes with more costs and fewer benefits than the authors assume.

Big Tech and Big Tobacco May Not Be as Similar as They Seem

The Harshbarger and Aftergut proposal seeks to solve harms ranging from social media’s disastrous effects on youth mental health to disinformation by harnessing national coordination between all 50 AGs, akin to the litigation strategy that resulted in the Tobacco Master Settlement Agreement (TMSA) of 1998. Scholars have called the TMSA, which required the largest tobacco companies to pay over $200 billion and included every state, the functional equivalent of federal law. This nationally coordinated AG model, the authors argue, should now be transplanted to another Big T – Big Tech. They further argue that courts ought to recognize an “AGs enforcing state law” exception to the (in)famous Section 230 of the U.S. Communications Decency Act (47 U.S.C. § 230, or “Section 230”), which currently immunizes platforms like Facebook from harms that result from both content Facebook lets circulate and its moderation decisions.

Harshbarger and Aftergut’s proposal is timely. The Ohio AG recently became first to file a suit against Facebook modeled in part on the tobacco claims. Shortly thereafter, a coalition of AGs from 10 states launched a joint investigation into Instagram’s impact on teens. Harshbarger and Aftergut are very likely correct that AG suits against Big Tech will increase, prompting inevitable comparisons to tobacco suits.

As the authors point out, too, in consumer protection suits against both the tobacco companies then and tech companies now, private litigation utterly fails to generate compensation or corporate accountability. And in both cases, Congress failed to update the existing statute or pass new ones to address novel but obvious public policy problems. Those two factors make AG suits, as an option of last resort, enticing.

But private claims failed in the two contexts for very different reasons. The tobacco defendants attacked the victims as irresponsible addicts – and, employing a “blame the smoker” strategy – had a near-perfect record until the AGs got involved. As the architect of the AGs’ litigation strategy, former Mississippi AG Mike Moore, put it, the state had “never smoked a cigarette,” and so couldn’t be blamed.

Big Tech is different. Private lawsuits against platforms have failed (or are highly likely to fail) due to a federal statute known as Section 230. Section 230 essentially immunizes platforms from civil lawsuits based on real-world injuries that their user-generated content causes by treating the platforms as publishers, not speakers, even in the context of algorithmically “boosted” messages, and immunizes any “good faith” content moderation choices that the platforms do undertake, on the same publisher theory.

As the authors rightly acknowledge, for the AGs to sue the platforms regarding any of the regulatory issues they identify, they would need to get a court to hold that Section 230 didn’t apply to AGs ever when they litigated state law claims regarding any asserted “informational” harm. And they propose a novel “loophole” to do just that:

Liability is not barred for actions under state law that are “consistent with” Section 230. A strong argument is available that a[n AG] lawsuit against Facebook based on state consumer laws that prohibit deceiving the public is “consistent with” §230’s immunity for a “publisher” of content.

Although novel, such a reading is far from implausible. While historically the Supreme Court has read Section 230 broadly, that appears very likely to change as the balance of the Court shifts in favor of conservative justices. In 2020 alone, Justice Thomas publicly inveighed on Section 230’s breadth twice, explicitly castigating how it legitimizes Twitter’s power to “cut off speech” as against core First Amendment values. That position is echoed by conservative jurists on lower courts, most recently DC Circuit Judge Laurence Silberman, whose inflammatory dissent charged Section 230 with permitting powerful Silicon Valley firms to engage in extreme “repression of political speech” which is “fundamentally un-American.” Prominent conservative jurists are actively searching for a mechanism to cabin Section 230’s reach – and an AG exception based in principles of states’ rights and state sovereignty may be an appealing means solution. The Court has consistently afforded AG litigation with what it has called a “special solitude” based on strong deference to sovereign enforcement of state laws, permitting AG suits to bypass other limitations for antitrust enforcement, tobacco litigation, and, most recently, opioid litigation.

Still, the novelty of this argument will likely make it an uphill battle. And beyond the question of whether courts would recognize the “AG exception” to Section 230 is the equally important question of whether they should recognize it.

The objective of the Aftergut-Harshbarger proposal – utilizing tobacco-style suits to regulate Big Tech’s enabling of viral spread of misinformation, which endangers everything from public health to democracy itself – is beyond reproach. But it overlooks three related problems with translating the AG model from Big Tobacco to Big Tech. Taken together, these problems suggest that the costs of recognizing an AG exception to Section 230 outweigh the benefits.

What Benefits Would AG Litigation Actually Deliver?

Overall, the long-term benefits of the TMSA have been disappointing, which bodes poorly for the real-world impact of consumer litigation that takes tobacco as its model.

First, Aftergut and Harshbarger argue that transposing the TMSA model would produce financial compensation for Big Tech’s victims. But while AG Harshbarger’s state of Massachusetts used settlement money to compensate victims and fund public health initiatives, a large majority of other states did not. According to a recent article by leading public health litigation experts Robert Rabin and Nora Freeman Engstrom, the TMSA failed to compensate victims structurally: the settlement contained no requirements on how states would spend their recoveries, so the money was deposited in state general treasuries and used for whatever purpose the legislature saw fit. The result, according to Engstrom and Rabin, was that states “cannibalize[d]” the TMSA money for uses entirely unrelated to public health, let alone tobacco.

Criticism of the TMSA has come from all corners. Senator John McCain took the AGs to task for how they used the TMSA in 2003, as did numerous media reports in the early aughts. As of 2016, the America Lung Association, the main consumer advocacy group tracking use of the TMSA funds, gave 41 states an “F” because, even still, virtually none of their recovery had gone toward its intended purpose. The GAO and NIH’s assessments are equally dire, while TMSA architect Moore called the way funds were allocated one of the “biggest disappointments” of his career.

Second, and perhaps more importantly, the authors argue that the TMSA model provides a long-term and effective mechanism to regulate Big Tech. But the TMSA’s regulatory and deterrent effects on the tobacco industry were largely ineffective, and in some ways counter- productive. That settlement turned the 50 states into the biggest shareholders of the five largest tobacco companies, which some argue functionally immunized the tobacco industry from antitrust claims while locking in the Big 5’s market dominance. The Ninth Circuit expressly rejected antitrust suits despite evidence of a price-fixing conspiracy, holding they were preempted by the TMSA. The antitrust issue is more problematic in the Big Tech context where antitrust has emerged as the key vehicle of corporate accountability.

The upshot is that evidence from the vast majority states shows a TMSA approach would result neither in compensation for victims nor effective regulation of Big Tech.

AG Litigation Risks Further Polarizing Big Tech Regulation

The nationwide coordination that made Big Tobacco litigation successful would also be necessary for Big Tech litigation to work, as Aftergut and Harshbarger acknowledge. But, given the extreme levels of political polarization regarding Section 230 and Big Tech, it is more likely that AGs today would fracture along party lines and fail to coordinate nationally, which would balkanize internet regulation and feed bitter cycles of polarization.

As Margaret Lemos points out, one of the most important considerations about AG suits is how any such litigation would fit into the politics of the moment. This is because the AGs are not normal private lawyers or civil servants at the Department of Justice or Federal Trade Commission. Rather, they are majoritarian political actors – 43 of 50 are directly elected – who use their position as a springboard for higher office often enough to generate the tongue-in-cheek aphorism that “AG stands for almost governor.” As such, one crucial driver of their litigating, settling, and fund distribution choices isn’t altruism – it’s political self-interest. After all, the main reason most elected officials do just about anything is to win more elections.

#### Connects to 1AC impact – continued innovation is the only way to develop new FinTech capabilities – they won’t develop tech if they never know what business practices they’re liable for

Huddleston, JD, Director of Technology and Innovation Policy, American Action Forum, ‘20

(Jennifer, “Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation,” December 18, <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>)

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

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

#### Even zero us emissions does nothing

--using *their own models* as per a super-qualified NASA and IPCC scientist

John Christy ’16, Distinguished Professor of Atmospheric Science at the University of Alabama in Huntsville, Awarded NASA Medal for Exceptional Scientific Achievement (1991), awarded Special Award, American Meteorological Society (1996), Lead Author, Contributing Author and Reviewer of United Nations IPCC assessments, “Testimony in front of the U.S. House Committee on Science, Space & Technology,” 2/2/16, pgs. 14-15, <http://docs.house.gov/meetings/SY/SY00/20160202/104399/HHRG-114-SY00-Wstate-ChristyJ-20160202.pdf>

In any case, impact on global temperature for current and proposed reductions in greenhouse gases will be tiny at best. To demonstrate this, let us assume, for example, that the total emissions from the United States were reduced to zero, as of last May 13th, 2015 (the date of a hearing at which I testified). In other words as of that day and going forward, there would be no industry, no cars, no utilities, no people – i.e. the United States would cease to exist as of that day. Regulations, of course, will only reduce emissions a small amount, but to make the point of how minuscule the regulatory impact will be, we shall simply go way beyond reality and cause the United States to vanish. With this we shall attempt to answer the question of climate change impact due to emissions reductions.

Using the U.N. IPCC impact tool known as Model for the Assessment of Greenhouse-gas Induced Climate Change or MAGICC, graduate student Rob Junod and I reduced the projected growth in total global emissions by U.S. emission contribution starting on this date and continuing on. We also used the value of the equilibrium climate sensitivity as determined from empirical techniques of 1.8 °C. After 50 years, the impact as determined by these model calculations would be only 0.05 to 0.08 °C – an amount less than that which the global temperature fluctuates from month to month. [These calculations used emission scenarios A1B-AIM and AIF-MI with U.S. emissions comprising 14 percent to 17 percent of the 2015 global emissions. There is evidence that the climate sensitivity is less than 1.8 °C, which would further lower these projections.]

As noted, the impact on global emission and global climate of the recent agreements in Paris regarding global emissions is not exactly quantifiable. Knowing how each country will behave regarding their emissions is essentially impossible to predict besides the added issue of not knowing how energy systems themselves will evolve over time.

Because halting the emissions of our entire country would have such a tiny calculated impact on global climate, it is obvious that fractional reductions in emissions through regulation would produce imperceptible results. In other words, there would be no evidence in the future to demonstrate that a particular climate impact was induced by the proposed and enacted regulations. Thus, the regulations will have no meaningful or useful consequence on the physical climate system – even if one believes climate models are useful tools for prediction.

#### And no modeling – countries act in their own self-interest – if they \*do\* implement it’ll be because it’s worthwhile for them, not because of US action

Yaniv Reingewertz, 2016

Assistant Professor at the division of Public Administration and Policy, School of Political Sciences at the University of Haifa, “Will leading by example help in mitigating climate change? A comment on ‘the economics of leadership in climate change mitigation’ by Gregor Schwerhoff,” Climate Policy Volume 0, 2016, Accessed 8/26/16

1. Reciprocal behaviour

Will a country react in a reciprocal manner to the leader’s effort in climate mitigation? Although this is certainly a possibility, the international relations literature also **provides us with a different answer**.

Countries are often seen as **rational entities** **that pursue their self-interests** (Fearon, 1995). Reciprocal behaviour due to fairness considerations might prevail at the individual level, **but not** necessarily **in the national or international arenas**. If anything an increase in climate change mitigation by the leader might **lead the follower to** free-ride and reduce its efforts (Nordhaus, 2015). Indeed, freeriding is considered the most severe problem in the efficient provision of public goods in general, and climate change mitigation in particular. **It is not at all clear** that **reciprocity can overcome freeriding**.

2. An increase in the perceived value of climate change mitigation

If the leader is willing to pay additional costs for climate change mitigation, it signals that mitigation might be worth more to them than originally expected. This new information might bring the follower to re-examine their valuation of climate change mitigation. The crucial point here is that the effects of climate change differ across countries. Mitigation by the leader might show us how their constituency values climate change mitigation, but that doesn’t necessarily mean **that the followers’ constituency would have the same** (or even a similar) **valuation**. Second, mitigation might reveal the projected climate change costs that will be incurred by the leader. Yet again, that doesn’t tell us much aboutthe costs of climate change being borne by the followers. Lastly, the level of uncertainty in terms of the impacts of climate change and their geographical pattern is so great so **that the information content of the leader’s action might be negligible**. Schwerhoff also mentions that knowing the preferences of other countries is valuable, although it is not clear why this should lead the followers to adopt more stringent climate change mitigation policies.

3. Cost reductions

According to Schwerhoff, mitigation by the leader might reduce the mitigation costs borne by the followers in several ways. Mitigation by the leader might show the followers what the optimal policy design is, and might allow for improvements in mitigation technology. Both of these points are problematic.

The first will only be relevant **if** the **followers want to increase** their **mitigation** efforts **in the first place**. Moreover, local contingencies suggest that the optimal policy design might be very different **between countries**.

The second point is more important, and deserves some more thought. If the demand for mitigation technologies increases due to the leaders initiative, these technologies might **become more expensive and not cheaper** as suggested by Schwerhoff. This could occur because an increase in the demand **will create an upward shift in the demand curve** for these technologies, **leading to an increase in prices**(Bernstein & Griffin, 2006; Mankiw, 2015). Another issue is that mitigation efforts, e.g. using alternative energy sources, might reduce the demand for fossil fuels, **leading to the polluting alternative costing less** **and** thus reducing the incentive to mitigate. This mechanism is the focus of a large literature talking about carbon leakage (e.g. Babiker, 2005; Di Maria &Van derWerf, 2008; Eichner & Pethig, 2011; Felder & Rutherford, 1993; Kuik & Hofkes, 2010; Paltsev, 2001). These papers, among others, describe how **mitigation by some countries might lead other countries to** reduce mitigation **and increase GHG emissions** – e.g. because some polluting industries would move from countries with stricter regulations **to others that are less stringent**. It follows that this could also happen in the leader–follower scenario described by Schwerhoff.

4. An alternative approach

Owing to the limitations of the mechanisms that were suggested by Schwerhoff, I suggest that **it is** not at all clear **that taking a leading position** **in** climate change **mitigation** **will increase mitigation by other countries** (the so-called followers). Even if countries choose to reciprocate, or if they perceive mitigation as more valuable, **free-riding might still happen** **and carbon leakage might reduce mitigation** by followers.’

#### Even limited exchanges guarantee extinction via nuclear winter – eliminates food supplies and brings us back to the Ice Age

Starr ‘15

Steven. Director of the University of Missouri's Clinical Laboratory Science Program, as well as a senior scientist at the Physicians for Social Responsibility. “Nuclear War, Nuclear Winter, and Human Extinction.” Federation of American Scientists. Public Interest Report. Summer/Fall 2015– Volume 68 Number 3. <https://fas.org/wp-content/uploads/2015/10/Starr_NuclearWinter.pdf>

While it is impossible to precisely predict all the human impacts that would result from a nuclear winter, it is relatively simple to predict those which would be most profound. That is, a nuclear winter would cause most humans and large animals to die from nuclear famine in a mass extinction event similar to the one that wiped out the dinosaurs.

Following the detonation (in conflict) of US and/or Russian launch-ready strategic nuclear weapons, nuclear firestorms would burn simultaneously over a total land surface area of many thousands or tens of thousands of square miles. These mass fires, many of which would rage over large cities and industrial areas, would release many tens of millions of tons of black carbon soot and smoke (up to 180 million tons, according to peer-reviewed studies), which would rise rapidly above cloud level and into the stratosphere. [For an explanation of the calculation of smoke emissions, see Atmospheric effects & societal consequences of regional scale nuclear conflicts.]

The scientists who completed the most recent peer-reviewed studies on nuclear winter discovered that the sunlight would heat the smoke, producing a self-lofting effect that would not only aid the rise of the smoke into the stratosphere (above cloud level, where it could not be rained out), but act to keep the smoke in the stratosphere for 10 years or more. The longevity of the smoke layer would act to greatly increase the severity of its effects upon the biosphere.

Once in the stratosphere, the smoke (predicted to be produced by a range of strategic nuclear wars) would rapidly engulf the Earth and form a dense stratospheric smoke layer. The smoke from a war fought with strategic nuclear weapons would quickly prevent up to 70% of sunlight from reaching the surface of the Northern Hemisphere and 35% of sunlight from reaching the surface of the Southern Hemisphere. Such an enormous loss of warming sunlight would produce Ice Age weather conditions on Earth in a matter of weeks. For a period of 1-3 years following the war, temperatures would fall below freezing every day in the central agricultural zones of North America and Eurasia. [For an explanation of nuclear winter, see Nuclear winter revisited with a modern climate model and current nuclear arsenals: Still catastrophic consequences.]

Nuclear winter would cause average global surface temperatures to become colder than they were at the height of the last Ice Age. Such extreme cold would eliminate growing seasons for many years, probably for a decade or longer. Can you imagine a winter that lasts for ten years?

The results of such a scenario are obvious. Temperatures would be much too cold to grow food, and they would remain this way long enough to cause most humans and animals to starve to death.

Global nuclear famine would ensue in a setting in which the infrastructure of the combatant nations has been totally destroyed, resulting in massive amounts of chemical and radioactive toxins being released into the biosphere. We don’t need a sophisticated study to tell us that no food and Ice Age temperatures for a decade would kill most people and animals on the planet. Would the few remaining survivors be able to survive in a radioactive, toxic environment?

It is, of course, debatable whether or not nuclear winter could cause human extinction. There is essentially no way to truly “know” without fighting a strategic nuclear war. Yet while it is crucial that we all understand the mortal peril that we face, it is not necessary to engage in an unwinnable academic debate as to whether any humans will survive.

What is of the utmost importance is that this entire subject –the catastrophic environmental consequences of nuclear war – has been effectively dropped from the global discussion of nuclear weaponry. The focus is instead upon “nuclear terrorism”, a subject that fits official narratives and centers upon the danger of one nuclear weapon being detonated – yet the scientifically predicted consequences of nuclear war are never publically acknowledged or discussed.

Why has the existential threat of nuclear war been effectively omitted from public debate? Perhaps the leaders of the nuclear weapon states do not want the public to understand that their nuclear arsenals represent a self-destruct mechanism for the human race? Such an understanding could lead to a demand that nuclear weapons be banned and abolished.

Consequently, the nuclear weapon states continue to maintain and modernize their nuclear arsenals, as their leaders remain silent about the ultimate threat that nuclear war poses to the human species.

#### No extinction

Bojanowski 14

Axel Bojanowski, staff writer, Citing the IPCC and Ragnar Kinzelbach, a zoologist at the University of Rostock, Der Spiegel, March 26, 2014, “UN Backtracks: Will Global Warming Really Trigger Mass Extinctions?”, http://www.spiegel.de/international/world/new-un-climate-report-casts-doubt-on-earlier-extinction-predictions-a-960569.html#

Humans have shrunk the habitats of many life forms, through unsustainable agriculture, fishing or hunting. And it is going to get even worse. Global warming is said to be threatening thousands of animal and plant species with extinction. That, at least, is what the Intergovernmental Panel on Climate Change (IPCC) has been predicting for years.

But the UN climate body now says it is no longer so certain. The second part of the IPCC's new assessment report is due to be presented next Monday in Yokohama, Japan. On the one hand, a classified draft of the report notes that a further "increased extinction risk for a substantial number of species during and beyond the 21st century" is to be expected. On the other hand, the IPCC admits that there is no evidence climate change has led to even a single species becoming extinct thus far.

'Crocodile Tears'

At most, the draft report says, climate change may have played a role in the disappearance of a few amphibians, fresh water fish and mollusks. Yet even the icons of catastrophic global warming, the polar bears, are doing surprisingly well. Their population has remained stable despite the shrinking of the Arctic ice cap.

Ragnar Kinzelbach, a zoologist at the University of Rostock, says essential data is missing for most other life forms, making it virtually impossible to forecast the potential effects of climate change. Given the myriad other human encroachments in the natural environment, Kinzelbach says, "crocodile tears over an animal kingdom threatened by climate change are less than convincing."

The draft report includes a surprising admission by the IPCC -- that it doubts its own computer simulations for species extinctions. "There is very little confidence that models currently predict extinction risk accurately," the report notes. Very low extinction rates despite considerable climate variability during past hundreds of thousands of years have led to concern that "forecasts for very high extinction rates due entirely to climate change may be overestimated."

In the last assessment report, Climate Change 2007, the IPCC predicted that 20 to 30 percent of all animal and plant species faced a high risk for extinction should average global temperatures rise by 2 to 3 degrees Celsius (3.6 to 5 degrees Fahrenheit). The current draft report says that scientific uncertainties have "become more apparent" since 2007.

It notes that key environmental processes and life form characteristics were given scant consideration in the models -- the ability of plants and animals to adapt to new climatic conditions, for example. Consequently, the new assessment report will not include any concrete figures regarding the percentage of species that could become extinct as a result of global warming.

#### No bioweapon threat – development obstacles

Morrow 17 (John, PhD in genetics, University of Washington, authored over 60 peer-reviewed publications reporting original research in genetics, immunology, developmental biology, evolution, cancer biology and animal science, “Bioweapons: An Existential Threat?” March 6, 2017, http://www.newportbiotech.com/pages/blog/entry/48/)

Today, large scale production, storage, protection and field testing of weaponized bacteria or viruses are beyond the abilities of a small group or a terrorist cell. However, a number of countries in the world have demonstrated the ability – and the will – to unleash horrific attacks upon their perceived enemies. They undoubtedly are following the current advances in gene manipulation technology with great interest. For now though, such advances in gene manipulation, while making the process faster, simpler and more accessible, are still quite a challenge to carry out.

CRISPR/Cas9 is the best of a new generation of tools for manipulating genes, and is being used to develop cures for diseases, improve agricultural products and engineer organisms that can carry out a variety of industrial processes. It is undergoing constant improvement, making it faster and easier to employ.

Fortunately, there are many obstacles to the execution of a credible biological warfare program, perhaps the greatest is the uncertainty of the behavior of these agents once released into the environment. In the commercial realm of engineered agricultural products (herbicides, pesticides, fertilizers), all manner of living and inert substances undergo arduous evaluation (usually for years) before they can be released to the environment; yet these new inventions still have phenomenal failure rates.

Given that engineered bacteria and viruses are lethal materials, their handling and use in battle would be extremely risky, and loading them with a burden of genetic modifications could affect their behavior outside of the laboratory in unpredictable ways. In order to be confident that the bioweapon would have its desired effect, it would be essential to have field data, which could require years of testing. Would a terrorist be content to keep deploying flawed product until hitting the motherlode?