# NDT Round 3 Wiki

## 1NC

### 1NC – T Exemptions

#### “Expand the scope” means broadening the range of claims that can be brought legitimately---that’s distinct from changing what is prohibited

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

**The plan violates – The only way to do that is by reducing an antitrust exemption---the scope of antitrust laws is *only limited* by sectoral exemptions, state action immunity, and Noer-Pennington immunity**

**Kobayashi and Wright 20** – Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason, University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University and holds a courtesy appointment in the Department of Economics

Bruce H. Kobayashi and Joshua D. Wright, "Antitrust Exemptions and Immunities in the Digital Economy," Global Antitrust Institute, 5-28-2020, https://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/

Introduction

The antitrust laws were designed to regulate private conduct in order to promote competition and protect consumer welfare from exercises of monopoly power by firms. In other words, the antitrust laws, as “the magna carta of free enterprise,”[1] are designed primarily to regulate private conduct, not government conduct and public restraints of trade.[2] Private activity may still fall **outside the scope of the antitrust laws** when it is **exempted specifically** by Congress, heavily guided or **influenced by the governmen**t, or relates to **attempts to petition the government** to take action.

**Antitrust laws’ outer boundaries** fall into **three categories**: (1) **sectoral** or **industry-level exemptions**, which single out an industry or business line from antitrust scrutiny; (2) **state action immunity**, which provides immunity for anticompetitive behavior by state governments and municipalities under certain conditions; and (3) **Noerr-Pennington immunity**, which aims to protect speech in the form of petitioning activity from antitrust liability.[3] The digital economy interfaces with the government in many respects; therefore, the **antitrust laws’ reach**—shaped by these **exemptions** and **immunities**—plays a clear role in guarding consumer welfare.

**Vote neg---**

**[1]---Limits---any other interpretation allows the aff to change *any* determination the courts have made about the legality of private sector practices, which creates an untenable research burden**

#### [2]---Grounds---provides a core mechanism that can predictably and reliably be the focus of neg contestation

### 1NC – Offsets

#### The United States Federal Government should NOT substantially increase prohibitions on anticompetitive business practices by the private sector, NARROWING the scope of its core antitrust laws to exempt gun manufacturers AND prohibit anticompetitive behavior by defense contractors that results in market domination.

#### First, their plan wording makes this compete. The plan explicitly mandates an increase in prohibitions and expansion in scope. The CP is a PIC that does the opposite.

**Ayres & Wickelgren 18** --- \*William K. Townsend Professor - Yale Law School. Professor - Yale School of Management. \*\*Bernard J. Ward Professor in Law - University of Texas at Austin

Ian & Abraham, 3-14-2018, "A gun control solution manufacturers can get behind," Brookings, [https://www.brookings.edu/research/a-gun-control-solution-manufacturers-can-get-behind/](about:blank)

The idea that government might act as a cartel ringmaster affirmatively facilitating private collusion might seem far-fetched. But Congress already has explicitly exempted baseball and insurance from parts of the Sherman Act. More to the point, the 1997 multi-state tobacco settlement effectively reduced harm by facilitating a huge price increase on tobacco products. Under this deal, manufacturers had to pay “damages” of 35 cents a pack on future sales but the settlement [exempted a substantial quantity of sales](about:blank) from the damages formula. The settlement quickly led to an across the board price increase with the [manufacturers earning an extra 35 cents a pack on all of the exempted sales](about:blank).

#### Second, the CP is net-beneficial – It narrows the scope of antitrust law to exempt gun manufacturers. That would spur monopolization and massive price hikes for guns, engineering *de facto* gun control.

**Ayres & Wickelgren 18** --- \*William K. Townsend Professor - Yale Law School. Professor - Yale School of Management. \*\*Bernard J. Ward Professor in Law - University of Texas at Austin

Ian & Abraham, 3-14-2018, "A gun control solution manufacturers can get behind," Brookings, https://www.brookings.edu/research/a-gun-control-solution-manufacturers-can-get-behind/

One of the more daunting tasks in the current struggle to pass sensible gun control legislation is how to neutralize the political power of gun manufacturers who potentially have hundreds of millions of dollars at stake.

But there is a straightforward, if perverse, way to co-opt the gun industry into supporting some restrictions: Help firearm manufacturers cartelize their industry. Congress could immunize gun manufacturers from antitrust liability—making it legal for them to collude and raise gun prices.

Our antitrust laws are designed to prevent firms from agreeing to limit supply in order raise prices. In most markets, this is in the service of protecting consumers and enhancing efficiency. But for products that cause harm, both the public and the producers of the product can benefit from higher prices and reduced supply. Legalizing a gun cartel by itself is a kind of gun control. Just as OPEC is the friend of any environmentalist who wants to reduce oil consumption, a gun manufacturing cartel will reduce the quantity of guns sold in order to raise prices.

Consider, for example, the AR-15 rifle.  The AR-15 isn’t a brand name sold by single manufacturer.  Rather it is a genus of rifles produced by more than [a dozen competitors](about:blank)—sometimes with prices [less than $700](about:blank). But protected by antitrust immunity, these erstwhile competitors could band together and raise the price toward what a monopolist would charge.  Remember last year when Turing Pharmaceuticals realized it was the only seller of [Daraprim and raised the price more than 50 fold.](about:blank) Monopolists sometimes charge prices many multiples of their cost. The demand for guns has been estimated to have [a fairly high price elasticity](about:blank)—so even relatively small price increases of these deadly firearms might have put them beyond the means of the purchasers of the [AR-15 style rifles used in the Parkland, Newtown, and Aurora mass shootings](about:blank).

#### Guns kill people, and gun control solves it, BUT direct gun control is politically impossible.

**Lopez 17** --- Senior Correspondent at Vox.

German, 10-4-2017, "The research is clear: gun control saves lives," Vox, https://www.vox.com/policy-and-politics/2017/10/4/16418754/gun-control-washington-post

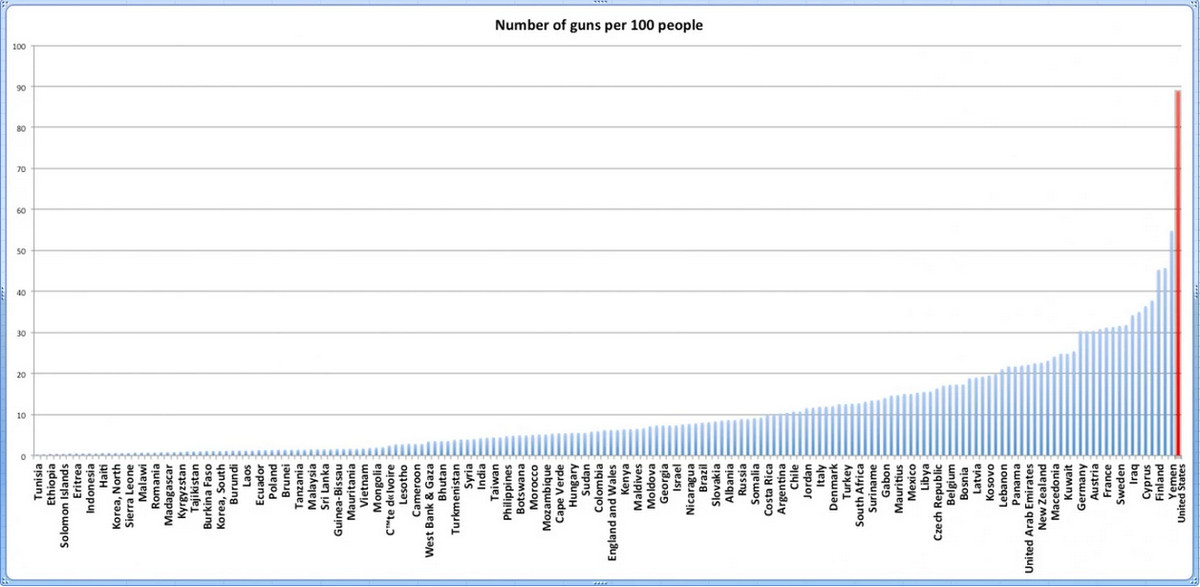
In fact, it’s so persuasive that it changed my mind. I was once skeptical of gun control; I doubted it would have any major impact on gun deaths (similar to [the views I took on drugs](about:blank)). Then I looked at the actual empirical research and studies. My conclusion: Gun control likely saves lives, even if it won’t and can’t prevent all gun deaths.

America’s affair with guns is unique in the developed world

To understand this issue, there’s one thing you need to know: America stands alone when it comes to guns. Not only does the US have more guns than any other country in the world, it also has far more gun deaths than any other developed nation.

The US has nearly six times the gun homicide rate of Canada, more than seven times that of Sweden, and nearly 16 times that of Germany, according to [United Nations data](about:blank) compiled by the Guardian. (These gun deaths are a big reason America has a [much higher overall homicide rate](about:blank), which includes non-gun deaths, than other developed nations.)

The US also has by far the highest number of guns in the world. Estimated in 2007, the number of civilian-owned firearms in the US was 88.8 guns per 100 people, meaning there was almost one privately owned gun per American and more than one per American adult. The world's second-ranked country was Yemen, a quasi-failed state torn by civil war, where there were 54.8 guns per 100 people.



In short, America has the most gun deaths in the developed world, and the most guns period. What’s more, the research indicates these two issues are very much related.

The research is very clear: more guns mean more gun deaths

Going back to the Washington Post op-ed, Libresco argues that her research proved her initial bias — that gun control works — wrong.

But there have been much more thorough statistical analyses than what Libresco published at FiveThirtyEight or wrote about in the Washington Post. They all point to one fact: Gun control does work to save lives.

Last year, researchers from around the country [reviewed](about:blank) more than 130 studies from 10 countries on gun control for Epidemiologic Reviews. This is, for now, the most current, extensive review of the research on the effects of gun control. The findings were clear: “The simultaneous implementation of laws targeting multiple firearms restrictions is associated with reductions in firearm deaths.”

The study did not look at one specific intervention, but rather a variety of kinds of gun control, from licensing measures to buyback programs. Time and time again, they found the same line of evidence: Reducing access to guns was followed by a drop in deaths related to guns. And while non-gun homicides also decreased, the drop wasn’t as quick as the one seen in gun-related homicides — indicating that access to guns was a potential causal factor.

Based on the other research, this actually isn’t a very surprising finding. Regularly updated reviews of the evidence compiled by the [Harvard School of Public Health’s Injury Control Research Center](about:blank) have consistently found that when controlling for variables such as socioeconomic factors and other crime, places with more guns have more gun deaths.

“Within the United States, a wide array of empirical evidence indicates that more guns in a community leads to more homicide,” David Hemenway, the Injury Control Research Center’s director, wrote in [Private Guns, Public Health](about:blank#v=onepage&q=david%20hemenway%20%22more%20guns%20in%20a%20community%20lead%20to%20more%20homicide%22&f=false).

For example, this chart, from [a 2007 study](about:blank) by Harvard researchers, shows a correlation between statewide firearm homicide victimization rates and household gun ownership after controlling for robbery rates:

Chart, scatter chart

Description automatically generated

A more recent [study](about:blank) from 2013, led by a Boston University School of Public Health researcher, reached similar conclusions: After controlling for multiple variables, the study found that each percentage point increase in gun ownership correlated with a roughly 0.9 percent rise in the firearm homicide rate.

This holds up around the world. As [Zack Beauchamp explained for Vox](about:blank), a breakthrough analysis in the 1990s by UC Berkeley’s Franklin Zimring and Gordon Hawkins found that the US does not, contrary to the old conventional wisdom, have more crime in general than other Western industrial nations. Instead, the US appears to have more lethal violence — and that’s driven in large part by the prevalence of guns.

“A series of specific comparisons of the death rates from property crime and assault in New York City and London show how enormous differences in death risk can be explained even while general patterns are similar,” Zimring and Hawkins wrote. “A preference for crimes of personal force and the willingness and ability to use guns in robbery make similar levels of property crime 54 times as deadly in New York City as in London.”

So America’s easy access to guns seems to lead to more gun violence and death.

But let’s focus on Australia and the UK in particular, since that’s what Libresco did in her Washington Post piece.

It is true that this is a difficult area to study. In part, that’s because these countries have such low homicide rates — to some degree because of previously existing, stricter gun control, criminal justice researcher Jerry Ratcliffe [pointed out](about:blank) — that it’s going to be difficult to produce any statistically significant findings. It’s also difficult to wash out external effects, besides gun control, on gun deaths, even under the most statistically rigorous models.

The evidence from Australia in particular, though, is very suggestive. In her article for FiveThirtyEight, Libresco cited two studies — [one from 2003](about:blank) and [another from 2016](about:blank) — that found what she described as little evidence of the effectiveness of gun control. This seems to be true for the 2003 analysis. But the 2016 analysis is much more mixed, noting that there were faster drops in gun deaths after the buyback program was put in place, but failed to reach any hard conclusions because non-gun deaths also dropped more quickly (even more than gun deaths), suggesting that other variables were likely involved.

But this isn’t the only research into Australia’s laws. As my colleagues [Dylan Matthews](about:blank) and [Zack Beauchamp](about:blank) noted, other studies found positive impacts of the law. [A review of the evidence](about:blank) by Harvard’s David Hemenway and Mary Vriniotis, for one, concluded that Australia’s law “seems to have been incredibly successful in terms of lives saved.”

[A 2010 study](about:blank) by Andrew Leigh of Australian National University and Christine Neill of Wilfrid Laurier University also found that buying back 3,500 guns per 100,000 people correlated with up to a 50 percent drop in firearm homicides and a 74 percent drop in gun suicides. The drop in homicides wasn’t statistically significant, largely because the country’s gun homicide rate is so low that it’s hard to tease out even sharp drops with a lot of certainty. But the drop in suicides was statistically significant.

Most tellingly, Leigh and Neill’s study found that “the largest falls in firearm deaths occurred in states where more firearms were bought back.” Hemenway and Vriniotis reached similar conclusions in their review: “First, the drop in firearm deaths was largest among the type of firearms most affected by the buyback. Second, firearm deaths in states with higher buyback rates per capita fell proportionately more than in states with lower buyback rates.”

By homing in on individual states and types of guns, these studies provide a more rigorous and robust look at Australia’s law than a study like the 2016 analysis that Libresco cited, which broadly looked at nationwide data. And they conclude that the buyback program, along with other changes brought on by the 1996 law, reduced gun deaths.

But most importantly, this goes along with the rest of the evidence — including the extensive review published in Epidemiologic Reviews. When you put it all together, it’s hard to come to any conclusion other than gun control does, at least to some extent, reduce gun deaths.

Gun control can’t stop all violence. But it can help.

With that said, it's probably true that this aspect of the gun control debate is not emphasized enough: Guns are a factor, not the only factor. Other factors include, for example, poverty, urbanization, and alcohol consumption.

But when researchers control for other confounding variables, they have found time and time again that America's high levels of gun ownership are a major reason the US is so much worse in terms of gun violence than its developed peers — and stricter access to guns could help.

Another issue is that many of the policies researchers have studied seem to have, politically speaking, little to no chance in the US, at least at the federal level. Australia outright banned some types of guns, and set up a registry for all firearms owned in the country, required a permit for all new purchases. And, as if that wasn’t enough, its buyback program was mandatory — meaning you had to turn in your weapons, which is essentially government-mandated confiscation.

America can’t even get universal background checks through Congress. These much stricter measures have almost no chance of happening. That hinders the potential effectiveness of US laws: As Dylan Matthews [explained](about:blank), milder versions of gun control do have some evidence behind them in terms of reducing gun deaths, but they’re nowhere as strong as the effects seen with stricter policies.

It’s also true, as Libresco [said on Twitter](about:blank), that we could always use more research into gun policy (or, really, any policy issue). But the federal government has [stifled](about:blank) gun research for years.

Still, the current research is clear: Gun control does cut down on gun deaths. A single data journalist’s look at some of the evidence doesn’t change that fact.

### 1NC – M&A pharma

#### There’s a wave of M&A now – companies doubt rule changes will affect them now

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

**The aff signals a new era with a substantive shift in antitrust application---that chills biopharma mergers and decks efficient pharmaceutical innovation**

**Abbott 2/21** – senior research fellow with the Mercatus Center at George Mason University and a law and economics research fellow with the Scalia Law School. He formerly served as the Federal Trade Commission’s general counsel

Alden Abbott, "The FTC Should Keep Its Hands Off Innovative Biopharma Mergers," National Review, 2-21-2022, https://www.nationalreview.com/2022/02/the-ftc-should-keep-its-hands-off-innovative-biopharma-mergers/

Our nation’s biopharmaceutical companies are a great American success story. They are the world leaders in discovering the drugs and vaccines that are generating the cures and treatments for diseases that plague humanity. Strong U.S. government protection for patents and less-intrusive regulation than is found overseas have sparked the massive volume of R&D that has brought forth this bounty. What’s more, the biopharma sector is responsible for more than 4 million good American jobs and contributes over $1.1 trillion annually to the U.S. economy.

The “warp speed” development in 2020 of Covid-19 vaccines and the imminent release of effective Covid antiviral drugs are just two of the many path-finding achievements by American biopharma firms. But a government crackdown on biopharma mergers led by the Federal Trade Commission (FTC) could undermine future accomplishments, harming the American economy and American (and foreign) patients alike.

Biopharma Merger Review in a Nutshell

While the FTC and the Department of Justice share authority over antitrust enforcement, the FTC is primarily responsible for overseeing pharma-industry business practices, including mergers. It reviews all biopharma merger proposals with an eye on preventing acquisitions that would substantially reduce competition among drugmakers.

Biopharma mergers are particularly good at facilitating new-product introductions that advance medical science. They do this in two ways:

First, they allow for the scaling up of remedies that are developed by small biotechnology and research firms. Small entities that specialize in the initial R&D that yields innovative cures cannot scale up efficiently. Larger acquiring firms have the capabilities to undertake the trials, regulatory work, and marketing that speed up the release and broad dissemination of innovative drugs.

Second, they create synergies. Proprietary data and intellectual property brought together by a merger give the new entity access to greater pools of technically important information, laying the groundwork for innovations without spending increases. This new information resource may improve the quality of product-related research, thereby raising the probability of new-product breakthroughs without increasing risk.

Until very recently, the FTC invoked general merger guidelines applicable to all industries (jointly issued with DOJ) in assessing biopharma consolidations. Reviews of Biopharma mergers proceeded in a manner that was well understood by the private sector. But recent FTC policy changes may threaten these socially desirable mergers.

The FTC Is Jettisoning Sound Merger Policy

Last March, the FTC set up an interagency working group (including the DOJ and foreign and state antitrust agencies) to “build a new approach” to biopharma mergers. The FTC’s press release stressed an interest in “going beyond” traditional merger analysis and exploring “new or expanded theories of [merger-related] harm.” And a recent FTC challenge to a vertical merger shows that the risks these changes pose to good biopharma acquisitions are real, not just theoretical.

Illumina is a leader in “next generation sequencing” (NGS) platforms used to support genetic-testing programs that it and other companies develop. In 2015, it established and then later spun off Grail, a small firm dedicated to developing a blood test for the very early detection of cancer. The spinoff helped Grail attract capital and great management, a key to its successful creation of a unique “liquid biopsy” test that detects up to 50 cancers before symptoms appear.

In September 2020, Illumina sought to reacquire Grail. This would allow rapid scaling up and distribution of the new test and cost reductions in marketing it. These undoubted efficiencies echo the benefits of biopharma mergers that involve the acquisition of small R&D-specialist firms.

But in March 2021, the FTC sued to block the merger, claiming a theoretical threat to competition in some future market for “multi-cancer early detection tests.” Such purely speculative concern about a market that does not yet even exist is at odds with accepted antitrust norms, which focus on likely harm in actual markets. It also gives short shrift to the clear benefits of the transaction.

A former FTC chair and chief economist together condemned this lawsuit. They explained that “it would be tragic if the FTC’s misapplication of the appropriate standards for evaluating a vertical merger were to delay the American people[’s] access to such an important lifesaving breakthrough in cancer treatment for the benefit of a hypothetical future competition.” Their words serve as a dire warning applicable to future biopharma mergers.

Conclusion

Uncertainty generated by the FTC’s new threat to beneficial mergers threatens to reduce U.S. biopharma R&D, slowing the creation of breakthrough drugs and vaccines. This will undermine American leadership in producing the cures of the future, which is vital to our nation and to millions of people around the world.

The solution is simple. The FTC should back off its recent threats against innovative biopharma mergers by publicly and explicitly restoring pre-2021 merger policies. If it does not, Congress should consider stepping in.

**Continued pharmaceutical innovation is key to survival---COVID was only the first warning shot**

EID = Emerging Infectious Disease

**Excler et al. 21** – Jean-Louis Excler, International Vaccine Institute, Seoul, Republic of Korea; Melanie Saville, Coalition for Epidemic Preparedness Innovations (CEPI), London, UK; Seth Berkley, Gavi, the Vaccine Alliance, Geneva, Switzerland; Jerome H. Kim, International Vaccine Institute, Seoul, Republic of Korea

Jean-Louis Excler, Melanie Saville, Seth Berkley, and Jerome H. Kim, "Vaccine development for emerging infectious diseases," Nat Med 27, 591–600, 4-12-2021, [https://www.nature.com/articles/s41591-021-01301-0](about:blank)

**Newly emerging** and **reemerging infectious viral diseases** have **threatened humanity** throughout history. Several **interlaced** and **synergistic factors** including **demographic trends** and high-density **urbanization**, modernization favoring **high mobility** of people by all modes of transportation, **large gatherings**, altered human behaviors, **environmental changes** with modification of ecosystems and **inadequate global public health** mechanisms have **accelerated** both the **emergence** **and** **spread of animal viruses** as **existential human threats**. In 1918, at the time of the ‘Spanish flu’, the world population was estimated at 1.8 billion. It is projected to reach 9.9 billion by 2050, an increase of more than 25% from the current 2020 population of 7.8 billion (https://www.worldometers.info). The novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) responsible for the coronavirus disease 2019 (COVID-19) pandemic1,2,3 engulfed the entire world in less than 6 months, with high mortality in the elderly and those with associated comorbidities. The pandemic has severely disrupted the world economy. Short of lockdowns, the only means of control have been limited to series of mitigation measures such as self-distancing, wearing masks, travel restrictions and avoiding gatherings, all imperfect and constraining. Now with more than 100 million people infected and more than 2 million deaths, it seems that the addition of **vaccine(s)** to existing countermeasures **holds the best hope** for pandemic control. Taken together, these reasons compel researchers and policymakers to be vigilant, reexamine the approach to surveillance and management of **emerging infectious disease threats**, and revisit global mechanisms for the control of pandemic disease4,5.

Emerging and reemerging infectious diseases

The appearance of new infectious diseases has been recognized for millennia, well before the discovery of causative infectious agents. Despite advances in development of countermeasures (diagnostics, therapeutics and vaccines), **world travel** and **increased global interdependence** have added **layers of complexity** to containing these infectious diseases. **Emerging infectious diseases** (EIDs) **are threats to human health and global stability6**,7. A review of emerging pandemic diseases throughout history offers a perspective on the emergence and characteristics of coronavirus epidemics, with emphasis on the SARS-CoV-2 pandemic8,9. As human societies grow in **size and complexity**, an **endless variety of opportunities** **is created** **for infectious agents to emerge** into the unfilled ecologic niches we continue to create. To illustrate this constant vulnerability of populations to emerging and reemerging pathogens and their respective risks to rapidly evolve into devastating outbreaks and pandemics, a partial list of emerging viral infectious diseases that occurred between 1900 and 2020 is shown in Table 1.

[[Figure Omitted]]

Although nonemerging infectious diseases (not listed in Table 1), two other major mosquito-borne viral infections are yellow fever and dengue. Yellow fever, known for centuries and an Aedes mosquito-borne disease, is endemic in more than 40 countries across Africa and South America. Since 2016, several yellow fever outbreaks have occurred in Angola, Democratic Republic of Congo, Nigeria and Brazil to cite a few10, raising major concerns about the adequacy of yellow fever vaccine supply. Four live attenuated vaccines derived from the live attenuated yellow fever strain (17D)11 and prequalified by the WHO (World Health Organization) are available12.

Dengue is an increasing global public health threat with the four dengue virus types (DENV1–4) now cocirculating in most dengue endemic areas. Population growth, an expansion of areas hospitable for Aedes mosquito species and the ease of travel have all contributed to a steady rise in dengue infections and disease. Dengue is common in more than 100 countries around the world. Each year, up to 400 million people acquire dengue. Approximately 100 million people get sick from infection, and 22,000 die from severe dengue. Most seriously affected by outbreaks are the Americas, South/Southeast Asia and the Western Pacific; Asia represents ~70% of the global burden of disease (https://www.cdc.gov/dengue). Several vaccines have been developed13. A single dengue vaccine, Sanofi Pasteur’s Dengvaxia based on the yellow fever 17D backbone, has been licensed in 20 countries, but uptake has been poor. A safety signal in dengue-seronegative vaccine recipients stimulated an international review of the vaccine performance profile, new WHO recommendations for use and controversy in the Philippines involving the government, regulatory agencies, Sanofi Pasteur, clinicians responsible for testing and administering the vaccine, and the parents of vaccinated children14.

Two bacterial diseases, old scourges of humanity, are endemic and responsible for recurrent outbreaks and are increasingly antimicrobial resistant. Cholera, caused by pathogenic strains of Vibrio cholerae, is currently in its seventh global pandemic since 1817; notably, the seventh pandemic started in 196115. Global mortality due to cholera infection remains high, mainly due to delay in rehydrating patients. The global burden of cholera is estimated to be between 1.4 and 4.3 million cases with about 21,000–143,000 deaths per year, mostly in Asia and Africa. Tragic outbreaks have occurred in Yemen and Haiti. Adding to rehydration therapy, antibiotics have been used in the treatment of cholera to shorten the duration of diarrhea and to limit bacterial spread. Over the years, antimicrobial resistance developed in Asia and Africa to many useful antibiotics including chloramphenicol, furazolidone, trimethoprim-sulfamethoxazole, nalidixic acid, tetracycline and fluoroquinolones. Several vaccines have been developed and WHO prequalified; these vaccines constitute a Gavi-supported global stockpile for rapid deployment during outbreaks16.

Typhoid fever is a severe disease caused by the Gram-negative bacterium Salmonella enterica subsp. enterica serovar Typhi (S. Typhi). Antimicrobial-resistant S. Typhi strains have become increasingly common. The first large-scale emergence and spread of a novel extensively drug-resistant (XDR) S. Typhi clone was first reported in Sindh, Pakistan17,18, and has subsequently been reported in India, Bangladesh, Nepal, the Philippines, Iraq and Guatemala19,20. The world is in a critical period as XDR S. Typhi has appeared in densely populated areas. The successful development of improved typhoid vaccines (conjugation of the Vi polysaccharide with a carrier protein) with increased immunogenicity and efficacy including in children less than 2 years of age will facilitate the control of typhoid, in particular in XDR areas by decreasing the incidence of typhoid fever cases needing antibiotic treatment21,22.

A model of vaccine development for emerging infectious diseases

The understanding of emerging infectious diseases has evolved over the past two decades. A look back at the SARS-CoV outbreak in 2002 shows that—despite a small number of deaths and infections—its high mortality and transmissibility caused significant global disruption (see Table 1). The epidemic ended as work on vaccines was initiated. Since then, the disease has not reappeared—wet markets were closed and transmission to humans from civets ceased. Consequently, work on vaccines against SARS-CoV ended and its funding was cut. Only a whole inactivated vaccine23 and a DNA vaccine24 were tested in phase 1 clinical trials.

Following a traditional research and development pipeline, it takes between 5 and 10 years to develop a vaccine for an infectious agent. This approach is not well suited for the needs imposed by the emergence of a new pathogen during an epidemic. Figure 1 shows a comparison of the epidemic curves and vaccine development timelines between the 2014 West African Ebola outbreak and COVID-19. The 2014 Ebola epidemic lasted more than 24 months with 11,325 deaths and was sufficiently prolonged to enable the development and testing of vaccines for Ebola, with efficacy being shown for one vaccine (of several) toward the end of the epidemic25,26. What makes the COVID-19 pandemic remarkable is that the whole research and development pipeline, from the first SARS-CoV-2 viral sequenced to interim analyses of vaccine efficacy trials, was accomplished in just under 300 days27. Amid increasing concerns about unmitigated transmission during the 2013–2016 Western African Ebola outbreak in mid-2014, WHO urged acceleration of the development and evaluation of candidate vaccines25. To ensure that manufacturers would take the Ebola vaccine to full development and deployment, Gavi, the Vaccine Alliance, publicly announced support of up to US$300 million for vaccine purchase and followed that announcement with an advance purchase agreement. Ironically, there had been Ebola vaccines previously developed and tested for biodefense purposes in nonhuman primates, but this previous work was neither ‘ready’ for clinical trials during the epidemic nor considered commercially attractive enough to finish development28.

[[Figure Omitted]]

From these perceived shortcomings in vaccine development during public health emergencies arose the Coalition for Epidemic Preparedness Innovations (CEPI), a not-for-profit organization dedicated to timely vaccine development capabilities in anticipation of epidemics29,30. CEPI initially focused on diseases chosen from a list of WHO priority pathogens for EIDs—Middle East respiratory syndrome (MERS), Lassa fever, Nipah, Rift Valley fever (RVF) and chikungunya. The goal of CEPI was to advance candidate vaccines through phase 2 and to prepare stockpiles of vaccine against eventual use/testing under epidemic circumstances. CEPI had also prepared for ‘disease X’ by investing in innovative rapid response platforms that could move from sequence to clinical trials in weeks rather than months or years, such as mRNA and DNA technology, platforms that were useful when COVID-19 was declared a global health emergency in January 2020, and a pandemic in March 202031,32.

CEPI has been able to fund several vaccine development efforts, among them product development by Moderna, Inovio, Oxford–AstraZeneca and Novavax. Providing upfront funding helped these groups to advance vaccine candidates to clinical trials and develop scaled manufacturing processes in parallel, minimizing financial risk to vaccine developers. The launch of the larger US-funded Operation Warp Speed33 further provided companies with funding—reducing risks associated with rapid vaccine development and securing initial commitments in vaccine doses.

Vaccine platforms and vaccines for emerging infectious diseases

**Vaccines** are the **cornerstone** of the management of **infectious disease outbreaks** and are the **surest means** to defuse pandemic and **epidemic risk**. The faster a vaccine is **deployed**, the faster an outbreak can be **controlled**. As discussed in the previous section, the standard vaccine development cycle is **not suited** to the needs of **explosive pandemics**. **New vaccine platform technologies** however may **shorten that cycle** and make it possible for multiple vaccines to be more **rapidly developed**, **tested** and **produced34**. Table 2 provides examples of the most important technical vaccine platforms for vaccines developed or under development for emerging viral infectious diseases. Two COVID-19 vaccines were developed using mRNA technology (Pfizer–BioNTech35 and Moderna36), both showing safety and high efficacy, and now with US Food and Drug Administration (FDA) emergency use authorization (EUA)37,38 and European Medicines Agency (EMA) conditional marketing authorization39,40. While innovative and encouraging for other EIDs, **it is too early to assert that mRNA vaccines represent a universal vaccine approach that could be broadly applied to other EIDs** (such as bacterial or enteric pathogens). While COVID-19 mRNA vaccines are **a useful proof of concept**, gathering lessons from their **large-scale deployment** and **effectiveness** studies still **requires more work** and time.

[[Figure Omitted]]

While several DNA vaccines are licensed for veterinary applications, and DNA vaccines have shown safety and immunogenicity in human clinical trials, no DNA vaccine has reached licensure for use in humans41. Recombinant proteins vary greatly in design for the same pathogen (for example, subunit, virus-like particles) and are often formulated with adjuvants but have longer development times. Virus-like particle-based vaccines used for hepatitis B and human papillomavirus are safe, highly immunogenic, efficacious and easy to manufacture in large quantity. The technology is also easily transferable. Whole inactivated pathogens (for example, SARS-CoV-2, polio, cholera) or live attenuated vaccines (for example, SARS-CoV-2, polio, chikungunya) are unique to each pathogen. Depending on the pathogen, these vaccines also may require biosafety level 3 manufacturing (at least for COVID-19 and polio), which may limit the possibility of technology transfer for increasing the global manufacturing capacity.

Other vaccines are based on recombinant vector platforms, subdivided into nonreplicating vectors (for example, adenovirus 5 (Ad5), Ad26, chimpanzee adenovirus-derived ChAdOx, highly attenuated vectors like modified vaccinia Ankara (MVA)) and live attenuated vectors such as the measles-based vector or the vesicular stomatitis virus (VSV) vector. Either each vector is designed with specific inserts for the pathogen targeted, or the same vector can be designed with different inserts for the same disease. The development of the Merck Ebola vaccine is an example. ERVEBO is a live attenuated, recombinant VSV-based, chimeric-vector vaccine, where the VSV envelope G protein was deleted and replaced by the envelope glycoprotein of Zaire ebolavirus. ERVEBO is safe and highly efficacious, now approved by the US FDA and the EMA, and WHO prequalified, making VSV an attractive ‘platform’ for COVID-19 and perhaps for other EID vaccines26 although the −70 °C ultracold chain storage requirement still presents a challenge.

Other equally important considerations are **speed of development**, **ease of manufacture** and **scale-up**, **ease of** **logistics** (presentation, storage conditions and administration), **technology transfer** to other manufacturers to ensure worldwide supply, and **cost of goods**. Viral vectors such as Ad5, Ad26 and MVA have been used in HIV as well as in Ebola vaccines42. Finally, regulatory authorities do not approve platforms but vaccines. Each vaccine is different. However, with each use of a specific technology, regulatory agencies may, over time, become more comfortable with underlying technology and the overall safety and efficacy of the vaccine platform, allowing expedited review and approvals in the context of a pandemic43. With COVID-19, it meant that the regulatory authorities could permit expedited review of ‘platform’ technologies, such as RNA and DNA, that had been used (for other conditions) and had safety profiles in hundreds of people.

### 1NC – Public Enforcement

#### Text: The United States federal government should allow relevant agencies to sue to enjoin [anti-competitive behavior by defense contractors that results in market domination] and recover single damages.

#### Counterplan avoids private enforcement---private suits are an inextricable part of antitrust liability---public enforcement is sufficient

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” [https://www.lw.com/upload/pubContent/\_pdf/pub1675\_1.pdf](about:blank))

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.3 The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.4 If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.5 In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.6 Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs[’] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.7 But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.8 Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.9

The Clayton Act’s treble damages provision is not without its critics.10 Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.11 Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in Kristian v Comcast Corp12 that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.13

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.14 Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.15 If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.16

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.17 Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests18 as well as answers to questions through written interrogatories.19 Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.20 Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.21

Armed with such easy access to a defendant’s or non-party’s documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on ‘fishing expeditions’ to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs’ attorneys demand 33 per cent of the recovery as the fee.22 The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs’ attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.23 Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.24 In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.25 The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is “so numerous that joinder of all members is impracticable”, that there are “questions of law or fact common to the class”, that the “claims or defenses of the representative parties are typical of the claims or defenses of the class” and that the proposed class representatives “will fairly and adequately protect the interests of the class”.26 In addition, in most antitrust cases, the court must determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”27 Under rule 23, proposed class members are afforded the opportunity to decline to join or to ‘opt out’ of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs’ lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In Illinois Brick Co v Illinois,28 the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were ‘passed through’ from the defendant down the chain of distribution in the form of overcharges. In direct response to Illinois Brick, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.29 In these ‘Illinois Brick repealer’ states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In Conwood v US Tobacco, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.30

The jury awarded plaintiffs approximately US$350 million in damages, which, when trebled, resulted in an award that exceeded US$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.31

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in In re NASDAQ Market-Makers Antitrust Litigation, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US$1.027 billion.34 And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in In re Visa Check/Mastermoney Antitrust Litigation, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US$2 billion. Two days later, defendant MasterCard settled for approximately US$1 billion. The combined US$3.05 billion settlement has been described as “the largest antitrust settlement ever”.35 Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,36 plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of “total underdevelopment” due to various obstacles in bringing such lawsuits.37

To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.38 Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.39 In Courage v Crehan, the ECJ held that these rights include the right to damages,40 and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.41 Moreover, with the adoption of Regulation 1/2003,42 the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.43 More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a USstyle system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.44 For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.45 Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.46 The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.47 To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.48 On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).49

#### Expanding liability to private plaintiffs is bad---turns case and undermines solvency

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, [https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf](about:blank))

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

### 1NC – Judicial Economics DA

The United States federal government should substantially increase prohibitions on anti-competitive business practices by defense contractors that violates the consumer welfare standard

#### The plan and perm are rooted in a new antitrust “theory of harm” bereft of “limiting principles”. That spills over because it “provides cover” for massive “doctrinal distortion”—But the counterplans avoid it.

--\*Italics in original

Ohlhausen 15 – Commissioner, FTC

Maureen K. Ohlhausen, Federal Trade Commission, and Alexander P. Okuliar, Attorney Advisor to Commissioner Ohlhausen, COMPETITION, CONSUMER PROTECTION, AND THE RIGHT [APPROACH] TO PRIVACY, 80 *Antitrust Law Journal* No. 1 (2015), [https://www.ftc.gov/system/files/documents/public\_statements/686541/ohlhausenokuliaralj.pdf](about:blank)

B. CHOOSING THE RIGHT APPROACH Rather than expanding antitrust law as some have proposed, we instead recommend applying three screens to discern the best body of law to handle a potential privacy issue. First, we suggest that the type of harm should continue to guide the choice of law, as set out by Congress and developed by the agencies and courts for decades. That is, the application of competition law is appropriate only where the potential harm is grounded in the actual or potential diminution of economic efficiency. If there is likely no efficiency loss because of the conduct or transaction, another legal avenue for enforcement is more appropriate and efficient. Second, the scope of the potential harm also should aid in the choice of law. Antitrust laws are focused on broader macroeconomic harms, mainly the maintenance of efficient price discovery in the markets, whereas the consumer protection laws are preoccupied with ensuring the integrity of each specific contractual bargain. These are complementary, but discrete, enforcement goals. Third, and finally, the available remedies must be able to address effectively the potential harm. Enjoining a merger may do little to prevent a privacy violation if the parties can simply share the same consumer information under a contractual arrangement. 1. Focus on the Type of Harm John Locke noted, “The great and chief end [ ] of . . . government, is the preservation of [citizens’] property,” which includes their “lives, liberties, and estates.”146 As we have shown, the government has over time pursued specific laws narrowly tailored to address particular harms. This trend to more nuanced and sophisticated legal mechanisms has allowed for deepened expertise and greater analytical precision in both competition and consumer protection. Splicing them together again, and using the modern antitrust laws, which are empirically focused on economic efficiency, to remedy harms relating to normative concerns about informational privacy contradicts the specialized nature of these laws and risks distorting them in ways that would leave both the law and consumers worse off. The better approach would be to continue the measured improvement of precise legal tools directed to specific harms. A blended approach to antitrust that encompasses normative privacy concerns also would provide cover for the injection of other noncompetition factors into the analysis. As a normative matter, privacy is conceptually unsettled and, depending on who you ask, could include other rights, like property rights or human dignity.147 The introduction of these factors could shift antitrust law’s focus away from efficiency and alter its relatively predictable and transparent application. Arguments in response to this concern about doctrinal distortion posit that, for example, the merged entity will have an increased incentive to break privacy promises it made to consumers when it collected the information, making the issue cognizable under the antitrust laws.148 [Footnote 148] 148 While the Clayton Act allows for the pursuit of certain prospective violations of the law, the issues that it confronts, for example supracompetitive pricing resulting from an undue concentration of suppliers, are fundamentally different than what the consumer protection laws contemplate. Whereas the Clayton Act is quantitative and agnostic in its characterization of a merger as a violation of law, the consumer protection standards are qualitative, requiring that an “act or practice” be either deceptive or both unfair and cause substantial harm to the consumer. [End FN] Or that the aggregation of consumer data represents a reduction in quality, diminution in consumer choice, or a heightened barrier to entry.149 Although these concerns could be relevant where privacy is an actual dimension of competition, a substantial body of literature challenges application of these arguments more broadly by pointing out the lack of limiting principles for theories of harm tethered to reductions of choice and the heterogeneous consumer demand for privacy.150 But, for our purposes, perhaps the most important point is that attempting to distort the antitrust laws to pursue subjective noncompetition harms is *unnecessary* and would take us back to a less sophisticated approach to law enforcement.

#### That obliterates the U.S. economy and innovation—The key is what theories of competitive harm are legally cognizable

COC 21 – U.S. Chamber of Commerce

The Role & Responsibility of Antitrust: What antitrust is and what it is not, September 20, 2021, https://www.uschamber.com/regulations/the-role-responsibility-of-antitrust

The economic success of the United States is built on the fact that the market, not the government, maximizes economic efficiency for the benefit of consumers.

Antitrust therefore relies on competitive forces to police the market, and avoids picking winners and losers, and only acts to ensure competitive conditions. It is not a form of regulation designed to deliver a particular outcome in the market.

Antitrust IS NOT a tool for political change

Concerns over jobs, speech, income inequality, corporate political power, and other social interests, are political conversations, not antitrust matters. Antitrust does not play a role, nor do we really want antitrust playing a role.

Antitrust can protect competitive markets, but it is not designed to address the concerns above. Instead, we should look to legislatures to pass separate laws that specifically address these concerns.

Antitrust IS about protecting competition and consumers

Consumers are the sole concern of antitrust. Consumers win when there is robust competition in the market. When alleged anti-competitive activity is linked to price going up, or output going down without any counter weighting pro-competitive benefit the economics are very straight forward.

Antitrust analysis is also well suited to evaluating other forms of non-price competition such as quality, innovation, or consumer choice. Though some have claimed that antitrust is too focused on price and output, a long history of antitrust enforcement involving various forms of non-price competition shows otherwise.

Antitrust IS NOT about fairness or competitors

“Fairness” is not a legal standard. What is fair can often be highly subjective. The role of economic analysis and the consumer welfare standard in antitrust are central to making enforcement decision as objective as possible. For this reason competitor’s complaints of “unfairness” are met with skepticism by antitrust enforcers for good reason.

Inefficient competitors often attempt to seek protection from a more efficient competitor rather than competing on the merits. Where competitor complaints are turned away by enforcers, those competitors have often sought a political audience or friendlier foreign jurisdictions that conflate these complaints with market failure or seek to use antitrust enforcement as a tool for industrial policy.

Antitrust IS highly technical

Antitrust cannot be divorced from sound economic analysis. Economics is a highly technical trade that is not easily suited to the amateur enthusiast. Theories of competitive harm rise and fall on supporting economic analysis, which requires careful analysis of the market, reams of discovery, and a careful type of cost-benefit analysis, commonly known as the rule of reason.

Just because one can point to an anti-competitive harm, doesn’t mean there are not pro-competitive justifications that outweigh that harm. Economic analysis weighs these factors and only where the harms clearly outweighs the benefits does an enforcer feel the need to act.

Antitrust IS NOT political

Antitrust is not well-suited for armchair quarterbacking, rooting for the underdog, or speaking in 30 second sound bites. It is a form of law enforcement and should be conducted in a highly professional manner with due process.

Sadly, efforts to politicize antitrust efforts are all too common in foreign jurisdictions. The U.S. has had a long and proud history of largely steering clear from efforts to politicize enforcement. This tradition is well worth keeping.

Antitrust IS highly fact-specific and evidence driven (rule of reason)

Some antitrust cases can be close calls, economic analysis might not always produce a clear answer, and judgements will need to be made. This is why we have courts. Just because some cases one may or may not agree with, one should not abandon the role of economics or circumvent the rule of reason.

Antitrust does not punish those that build a successful business – even a monopoly – through competition on the merits.

#### U.S. failure to grow risks great power war

Brands 21 – Professor of Global Affairs, JHU SAIS

Hal Brands, Henry Kissinger distinguished professor of global affairs at Johns Hopkins University’s School of Advanced International Studies and a resident scholar at the American Enterprise Institute, and Michael Beckley is an associate professor of political science at Tufts University and a Jeane Kirkpatrick visiting scholar at the American Enterprise Institute, China Is a Declining Power—and That’s the Problem: The United States needs to prepare for a major war, not because its rival is rising but because of the opposite., 24 September 2021, *Foreign Policy*, https://foreignpolicy.com/2021/09/24/china-great-power-united-states/

Over the past 150 years, peaking powers—great powers that had been growing dramatically faster than the world average and then suffered a severe, prolonged slowdown—usually don’t fade away quietly. Rather, they become brash and aggressive. They suppress dissent at home and try to regain economic momentum by creating exclusive spheres of influence abroad. They pour money into their militaries and use force to expand their influence. This behavior commonly provokes great-power tensions. In some cases, it touches disastrous wars.

This shouldn’t be surprising. Eras of rapid growth supercharge a country’s ambitions, raise its people’s expectations, and make its rivals nervous. During a sustained economic boom, businesses enjoy rising profits and citizens get used to living large. The country becomes a bigger player on the global stage. Then stagnation strikes.

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

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

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

All of these cases were complicated, yet the pattern is clear. If a rapid rise gives countries the means to act boldly, the fear of decline serves up a powerful motive for rasher, more urgent expansion. The same thing often happens when fast-rising powers cause their own containment by a hostile coalition. In fact, some of history’s most gruesome wars have come when revisionist powers concluded their path to glory was about to be blocked.

### 1NC – Adv CP

#### The United States federal government should:

#### -Substantially limit arms sales to Saudi Arabia

#### -Invest in developing the nuclear triad and defense industrial base

#### -Initiate negotiations over the use of hypersonic and anti-satellite weapons

### 1NC – Anti-Domination(S)

#### Theorizing the economy in terms of neoclassical mental models of narrow causality makes it impossible to solve a slew of wicked 21st century problems. Try or die for a mission-oriented approach—We should “ask what kind of markets we want, rather than what problem in the market needs to be fixed.”

Mazzucato 21 – Professor in the Economics of Innovation and Public Value, University College London

Mariana Mazzucato, Founding Director of the UCL Institute for Innovation & Public Purpose (IIPP), MISSION ECONOMY: A Moonshot Guide to Changing Capitalism, Penguin Publisher, 2021, [https://www.penguin.co.uk/books/315/315191/mission-economy/9780241419731.html](about:blank)

This book encourages us to apply the same level of boldness and experimentation to the biggest problems of our time – from health challenges such as pandemics, to environmental challenges such as global warming, to educational challenges such as the divide in opportunity and achievement between students partly caused by unequal access to digital technology. These ‘wicked’ problems require not just technological, but also social, organizational and political innovations. They are huge, complex and resistant to simple solutions. We must solve them – not merely accommodate them – by focusing policymaking on outcomes. And this means getting the public and private sectors to truly collaborate on investing in solutions, having a long-run view, and governing the process to make sure it is done in the public interest.

The moon landing was a massive exercise in problem- solving, with the public sector in the driving seat and working closely with companies – small, medium and large – on hundreds of individual problems. It required collaboration between government and many different sectors, from computing and electrical equipment to nutrition and materials. Government used its purchasing power to develop procurement contracts that were short, clear and massively ambitious. When the private sector sometimes failed to deliver, NASA threw back the challenge and did not pay until the solution was right. If successful, companies could grow through serving the new markets that government purchases opened up and scale up through a purpose-driven strategy.

What integrated all these efforts and gave them direction was that they were part of a mission – a mission led by government and achieved by many. Today, a ‘mission- oriented’ approach - partnerships between the public and private sectors aimed at solving key societal problems – is desperately needed. Imagine, for example, using public- sector procurement policy to stimulate as much innovation as possible – social, organizational and technological – to solve problems as diverse as knife crime in cities or loneliness of the elderly at home.

Of course, lessons from the moon landing cannot just be cut and pasted onto any challenge. But they do highlight the need to resurrect ambition and vision in our everyday policymaking. This cannot just be about bold statements. We have to believe in the public sector and invest in its core capabilities, including the ability to interact with other value creators in society, and design contracts that work in the public interest. We must create more effective interfaces with innovations across the whole of society; rethink how policies are designed; change how intellectual property regimes are governed; and use R&D to distribute intelligence across academia, government, business and civil society. This means restoring public purpose in policies so that they are aimed at creating tangible benefits for citizens and setting goals that matter to people – driven by public-interest considerations rather than profit.5 It also means placing purpose at the core of corporate governance and considering the needs of all stakeholders, including workers and community institutions, as opposed to just shareholders (owners of stock in a company).

In this context, ‘moonshot’ thinking is about setting targets that are ambitious but also inspirational, able to catalyse innovation across multiple sectors and actors in the economy. It is about imagining a better future and organizing public and private investments to achieve that future. This, in the end, is what got a man on the moon and back.

But there is a catch.

Conventional wisdom continues to portray government as a clunky bureaucratic machine that cannot innovate: at best, its role is to fix, regulate, redistribute; it corrects markets when they go wrong. According to this view, civil servants are not as creative and risk-taking as the entrepreneurs of Silicon Valley, and government should simply level the playing field and then get out of the way – so the risk-takers in private business can play the game.

This book’s thesis is that we cannot move on from the key problems facing our economies until we abandon this narrow view. Mission thinking of the kind I outline here can help us restructure contemporary capitalism. The scale of the reinvention calls for a new narrative and new vocabulary for our political economy, using the idea of public purpose to guide policy and business activity.6 This requires ambition – making sure that the contracts, relationships and messaging result in a more sustainable and just society. And it requires a process that is as inclusive as possible, involving many value creators. Public purpose must lie at the centre of how wealth is created collectively to bring stronger alignment between value creation and value distribution. And the latter should not only be about redistribution (ex post) but also predistribution ex ante: a more symbiotic way for economic actors to relate, collaborate and share.

It is essential to link the micro properties of the system – such as how organizations are governed – to the macro patterns of the type of growth desired. By rethinking how the relationships between the public sector and private sector can be better governed around public purpose, we can create growth that is better balanced and resilient, with new capabilities and opportunities spread across the economy. But this means, at the start, replacing the fashionable, bland terminology of ‘partnership’ with clearer metrics as to what a symbiotic and mutualistic ecosystem looks like; that is, one in which risks and rewards are more equally shared. In our era, unfortunately, the relationship is often parasitic: public-health funding is structured so that publicly financed drugs are too expensive for citizens to buy.

I call this different way of doing things a mission-oriented approach. It means choosing directions for the economy and then putting the problems that need solving to get there at the centre of how we design our economic system. It means designing policies that catalyse investment, innovation and collaboration across a wide variety of actors in the economy, engaging both business and citizens. It means asking what kind of markets we want, rather than what problem in the market needs to be fixed. It means using instruments such as loans, grants and procurement to drive the most innovative solutions to tackle specific problems, whether those be getting plastic out of the ocean or narrowing the digital divide. The wrong question is: how much money is there and what can we do with it? The right question is: what needs doing and how can we structure budgets to meet those goals?

### Camo Adv

#### Circumvention—courts interpret the plan in the narrowest possible way to favor dominant industry

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

#### No Middle East escalation

* Proxy wars stay localized

They are cheaper to change the status quo

Gives countries the opportunity to deny conflict

Non-state actors can’t escalate because of institutional capacity

* Consensus of international scholars and data conclude

Imran 2/6/19 [Myra Imran, writer for The News International. Citing the international seminar on “Strategic Dimensions of Peace and Conflict in South Asia and the Middle East”. Seminar on ‘Strategic dimensions of peace and conflict in South Asia, Middle East’. 2/6/19, https://www.thenews.com.pk/print/428298-seminar-on-strategic-dimensions-of-peace-and-conflict-in-south-asia-middle-east]

Islamabad : There is a need to study the causes of proxy wars, and what are the potential impacts of such wars on the overall conflict. These thoughts in a daylong international seminar on ‘Strategic Dimensions of Peace and Conflict in South Asia and the Middle East,’ organised by Pak Institute for Peace Studies (PIPS), an Islamabad-based think tank, participated by prominent national and international scholars.

Prof. Shahram Akbarzadeh, Deakin University, Australia, argued there is significant gap in the literature on non-state actors. He called for empirical research, along with concrete policy suggestions, on the topic, so as to mitigate the conflicts in the region, in particular South Asia and Middle East.

Speakers grappled at the notion of non-state actors and proxy wars: PIPS director Muhammad Amir Rana said non-state actors often evoke memories of violent elements. This despite that as per definition, non-state actors include organizations working for human rights.

Prof. Syed Rifaat Hussain, Department of Government and Public Policy, NUST, said the term “proxy wars” is a contested notion. There is no universal agreement on its definition, nor on the set of circumstances behind such wars. Interestingly, he said, proxy wars are as old as the phenomena of conventional war itself.

Speakers noted proxy wars are instruments of state power. As to why states go for it, it was argued, it is because they are often cheap undertaking to change the status quo.

Participants noted over the decades, much of the conflict involves non-state actors. Interstate conflict, on the other hand, has declined. In recent times, he said tit-for-tat tactics on behalf of such actors have reduced their appeal.

Dr. Ibrahim Fraihat, Doha Institute of Graduate Studies, Doha, termed proxy war as an arms conflict between two parties, though one of them is not directly involved. This way, domestic conflicts are escalated by external power intervention. At the same time, proxy war, if unresolved, can take the shape of conventional war, the most significant example was of Vietnam War. In contemporary times, he lamented, the Middle East has been rendered a stock market of proxy organizations.

William Gueriache, Associate Professor American University in the Emirates Dubai, said on surface, all states support open diplomacy and multilateralism. Yet the survival of patronage has paved the way for foreign intervention during conflicts in the whole Middle East.

Dr. Marwan Kablan, Director Policy Analysis at the Arab Center for Research and Policy Studies Doha, also hinted multiplicity of actors involved in Syrian conflict, calling it as mother of conflicts in the region. It was said that wars cannot be ended unless patron states achieve their interests.

Dr. Shaheen Akhtar, Professor National Defence University Islamabad focused on the apprehension of Pakistan about India’s involvement in Afghanistan. She said Pakistan’s uneasy relationship with Kabul reinforces a perception of encirclement while growing US-India strategic cooperation further aggravates these apprehensions.

Dr. Muhammad Riaz Shad, National University of Modern Languages (NUML) Islamabad, said fighting through proxies gives states an opportunity of deniability.

#### Ending US complicity won’t stop the conflict

**Katulis, 18 –** Brian Katulis is a senior fellow at the Center for American Progress. Dr. Lawrence J. Korb is a senior fellow at the Center for American Progress and served as assistant secretary of defense from 1981 through 1985. (Brian, “Five Lessons from the Iraq War for What the U.S. Should Do in Yemen” 12/28, [https://nationalinterest.org/feature/five-lessons-iraq-war-what-us-should-do-yemen-39977](about:blank)

The Iraq drawdown offers an instructive lesson. The Obama administration completed a full withdrawal of U.S. troops by December 2011—and also proceeded to downgrade America’s focus and investment in Iraq. A few short years later, Iraq’s security collapsed under the rise of the Islamic State. This experience in Iraq offers five important lessons learned for how to end the war in Yemen, including: 1. There is a difference between ending America’s involvement and moral complicity in a war versus actually ending a war. Advocacy groups can often ignore the complicated realities driving conflicts—and in the case of Yemen, there are multiple conflicts, alongside Saudi bombing and Iranian meddling. Those conflicts and the resulting suffering of millions of Yemenis are not likely to end simply because Congress legislates an end to U.S. military involvement. 2. Terrorism remains an enduring threat and requires vigilance. After withdrawing from Iraq, the Obama administration was slow to respond to the mutating terrorist threats that became the Islamic State. This had a devastating effect on the people of the Middle East and almost overtook Barack Obama’s broader second-term foreign policy agenda. Fortunately, the Obama administration ultimately developed an effective response, and the Trump administration used the template to defeat the Islamic State militarily. In Yemen today, groups such as Al Qaeda in the Arabian Peninsula (AQAP), with regional and international reach, can threaten U.S. interests—and America needs to remain engaged to protect against those threats.

#### Bombings still continue.

Knights ‘18 (Michael Knights, Senior Fellow at the Washington Institute for Near East Policy, holds a D.Phil. from the Department of War Studies at King's College London (UK), 2018 (“U.S.-Saudi Security Cooperation (Part 1): Conditioning Arms Sales to Build Leverage,” The Washington Institute, November 5th, Available Online at [https://www.washingtoninstitute.org/policy-analysis/view/u.s.-saudi-security-cooperation-part-1-conditioning-arms-sales-to-build-lev](about:blank), Accessed 06-25-2019)

Precision-Guided Munitions Sales of air-delivered precision-guided munitions (PGMs) are another lightning rod issue in the bilateral security relationship. Following the 2009-2010 round of hostilities with the Houthis, the kingdom sought to refresh its stock of antipersonnel bombs with a large order of 1,300 U.S.-built CBU-105 sensor-fused weapons (a higher-reliability submunition that manufacturers say does not qualify as a cluster bomb due to its low malfunction rate). Yet by November 2015, eight months into the current war, the Saudis had used up nearly 2,600 PGMs, according to strike metrics compiled by The Washington Institute. In response, the Saudis requested a $1.29 billion package comprising around 19,000 air-delivered PGMs, an order that began delivery in July 2017. In addition to that package, the Senate narrowly approved a new $500 million commercial sale of PGMs to Riyadh in June 2017—the first installment in a mammoth $4.46 billion series of air-launched munition deals that would provide the Saudis with 104,000 U.S. PGMs in the next half decade. Riyadh may be accelerating its purchases in anticipation of a prolonged war in Yemen and the potential loss of U.S. sales down the road. According to Washington Institute data collected in Saudi Arabia and Yemen, the kingdom’s forces have used around 14,500 munitions since March 2015, almost all PGMs, with the average rate gradually declining from 333 PGMs per month in 2015 to 270 per month this year. The U.S. munitions currently arriving in Saudi Arabia were ordered in November 2015, when Riyadh recognized it might need new PGMs by 2019, but the intervening years have seen few signs of a PGM shortfall. Based on a rough sense of prewar stocks and a constant dribble of replacements, Riyadh could probably keep bombing at its current rate for several years even if all new U.S. PGM deals were rejected. Thus, while cutting off such sales may be a good way to signal U.S. displeasure or publicly distance Washington from the war, the data indicates that it would not meaningfully slow the air campaign anytime soon.

### Defense Adv

**Plan causes global war – defense mergers are critical to maintaining the US’s advantage over Russia and China**

**Marks 19** – Former Senior Policy Advisor to the Under Secretary for Security Assistance, Science and Technology at the U.S. Department of State

Michael Marks, "Strengthen US industry to counter national security challenges," American Military News, 10-10-2019, https://americanmilitarynews.com/2019/10/strengthen-us-industry-to-counter-national-security-challenges/

While U.S. defense budgets have recently been on the rise, it is likely that we will see a spending decline in the coming years as competition for non-defense federal budget dollars increases and deficits grow. The United States, therefore, must **take action** to ensure that we **maintain our technological edge** against our adversaries by **empowering the private sector** to provide cost-effective **innovation** for America’s defense.

Since the end of the Second World War the U.S. has relied on **qualitative superiority** over its potential adversaries, especially those like the Soviet Union/**Russia and China**, who enjoyed comparative quantitative advantages. These qualitative advantages were **vital** to maintaining **global stability** and helped enable our nation to become the preeminent **global economy**, but they have been eroded over the last few decades.

In 1960, the U.S. share of global research and development (R&D) spending stood at 69%. U.S. defense-related R&D alone accounted for 36% of total global expenditures. Soon thereafter other nations recognized the need to increase their R&D expenditures and build their own defense industrial bases to compete with the United States. From 2000-2016, China’s share of global R&D rose from 4.9% to 25.1% while the U.S. share of global R&D dropped to 28%. U.S. defense-related R&D meanwhile now makes up a **mere 4%** of global R&D spending.

There can be no doubt that Russia and China are **determined** **to challenge America’s qualitative advantage**. From the rebirth of Russian military power under Vladimir Putin to the ever-growing Chinese military prowess across the board, their efforts show **no sign** of slowing down.

Russia has been and continues to undergo a **major modernization** of its armed forces. For example, they are in the midst of a ten-year program to build hundreds of **new nuclear missiles** and have set a goal of modernizing 70% of the Russian Ground Force’s equipment by 2020.

One of the most frightening examples of Russia’s resurgence is its development of a **hypersonic missile** that could be ready for combat as early as 2020. Worryingly, the US is currently **unable to defend** against this type of missile. To accompany these developments came the emergence in 2017 of Russia as the world’s second-largest arms producer, ready and able to support nations hostile to US interests.

China, on the other hand, used to be a country that only manufactured cheap products and knockoffs, but that is no longer true. **Technology development** and **innovation** figure prominently in all of China’s national planning goals, with plans to make the country the **global leader** in science and innovation and the preeminent **technological and manufacturing power** by 2049, the 100th anniversary of the Chinese communist revolution.

This, of course, has huge implications for China’s military capability. The country now has the second-largest national defense budget behind the U.S. and wants to be Asia’s preeminent military power. Beijing is developing next-generation **fighter jets, ICBMs** and shorter-range **ballistic missiles**, as well as advanced naval vessels.

The People’s Liberation Army has reached a **critical point of confidence** and now feel they can **match competitors** like the United States in combat. This has implications for the **security of Taiwan, Japan, other US allies** in the region as well as to America itself. To make matters worse, there are a growing number of experts that see China developing **asymmetric technologies**, combined with **conventional and nuclear systems** that could create an **existential threat** to the U.S. pacific based assets.

It is in the wake of these growing threats to our national security American industry will likely be expected to shoulder an even **larger responsibility** concerning investment in **defense-related R&D**.

One of the ways we can empower companies to make these additional investments and lead next-generation defense innovation is to **allow commonsense mergers** between important defense and aerospace companies. Horizontal consolidation **eliminates the redundancy** of enormous fixed costs, **leading to savings** passed down to customers. Mergers can also create **economies of scale** and **existing synergies** that help the combined company realize access to **larger numbers** of engineers and innovators, while keeping cos**ts low** and **improving the timeline** for taking a product from concept to development.

A recent example of how this can work is the proposed Raytheon and United Technologies merger. The two parties project that the new combined company will employ more than **60,000 engineers**, hold over **38,000 patents** and invest approximately **$8 billion per year** in research and development. This will allow the development of **new, critical technologies** more quickly and efficiently than either company could **on its own**. Such private sector investments in innovation will be **critical** in the face of the **growing challenges** to American **military dominance**.

America’s **R&D advantage**, crucial to **maintaining military superiority**, is increasingly **at risk**. As China and Russia continue to challenge America’s military dominance and pressures on the defense budget continue to mount, the federal government will likely turn more and more to contractors and commercial companies to develop **next-generation defense capabilities**. Strengthening U.S. industry, therefore, will be **critical** to countering our **national security challenges.**

#### Space deterrence is terminally unsustainable---asymmetries

Weichert, 17 - former Congressional staff member who holds a Master of Arts in Statecraft & National Security Affairs from the Institute of World Politics in Washington, D.C

Brandon J. Weichert, "The High Ground: The Case for U.S. Space Dominance," *Orbis*, Volume 61, Issue 2, pp 227-237, [https://doi.org/10.1016/j.orbis.2017.02.006](about:blank)

Unfortunately, however, U.S. dependence on space assets for its very survival is so much greater than any other state that such a threat is unrealistic. The reason that states like China or Russia are developing counter-space capabilities is because the cost to them is extremely low, whereas the benefit for them (in the event of war with the United States) is high. For the cost of a ground-based laser or an anti-satellite (ASAT) missile launcher, China could knock out the ability of all U.S. forces in the Pacific to coordinate and adequately defend themselves from a Chinese offensive. What could the United States do to the Chinese in return? The best option for U.S. retaliation in space would be to launch some blinding attacks on the handful of China’s space assets. However, this ultimately would not deter China from escalating any future conflict since China’s investment in space is so low compared to that of the United States. In addition, since Chinese forces are designed to operate in an environment without those assets, such retaliation grounded on deterrence-based models becomes highly problematic and ineffective. Rather than serving as a stabilizing force in space, then, the defensive and reactive space superiority model would be an inducement for conflict in the strategic high ground of space. Or, rather, the direction of attack would be unidirectional: from U.S. adversaries toward essential U.S. space systems. Thus, while space confers unequivocal advantages to the U.S. forces that depend on space assets for their vital functions, it also provides adversaries with an unprecedented weakness for them to exploit.

#### Loss of space capabilities don’t undermine overall US power

Astorino-Courtois ‘18 - NSI’s Chief Analytics Officer (CAO) and Executive Vice President, tenured Associate Professor of International Relations at Texas A&M University

Dr. Allison Astorino-Courtois, Dr. Robert Elder former Commander, 8th Air Force, Commander, Barksdale Air Force Base, Louisiana, and Commander, Joint Functional Component Command for Space and Global Strike, Dr. Belinda Bragg is Principle Research Scientist at NSI, “Contested Space Operations, Space Defense, Deterrence, and Warfighting: Summary Findings and Integration Report,” July 2018, [https://apps.dtic.mil/dtic/tr/fulltext/u2/1066708.pdf](about:blank)

Absolute space dominance is not a necessary prerequisite for success in other domains

Space is a crucial domain without which the US currently may be unable to “win” a serious conflict because a loss or extreme degradation of space services also affects military capability in other domains. While loss or degradation of space capabilities can significantly affect capabilities in other domains, achieving space superiority or dominance in space is not always critical to US and ally defense (ViTTa Q17). Not only is absolute space superiority infeasible, policy and force postures intended to assure it could reduce rather than enhance US security (ViTTa Q14; Q17; Q18). Specifically, experts argued that the US could “lose” in one domain—even if that domain is space—and yet succeed overall. However, there are important caveats. While the US can lose space dominance and prevail, given the degree of domain interdependence, the US cannot lose its entire capability in space and still prevail. The US must retain the ability to maneuver through space and other domains. This suggests that the US will need to become more agile overall, including ensuring that there are appropriately robust plans and infrastructure in place to enable continued operation, whether conditions are ideal or suboptimal.

#### Hypersonics are all hype – newest and best physics proves they’re still susceptible to missile defense AND they fly slower than ICBMs – top experts agree

Broad ’21 – science journalist and senior writer at The New York Times, citing David Wright, a physicist at the Massachusetts Institute of Technology, and tons of other experts

William Broad, “Hypersonic Superweapons Are a Mirage, New Analysis Says” New York Times, January 15, 2021, [https://www.nytimes.com/2021/01/15/science/hypersonic-missile-weapons.html](about:blank)

Military experts [call hypersonic warheads](about:blank) the next big thing in intercontinental warfare. They see the emerging arms, which can deliver nuclear or conventional munitions, as zipping along at up to five miles a second while zigzagging through the atmosphere to outwit early-warning satellites and some interceptors. The [superfast weapons](about:blank), experts say, lend themselves to surprise attacks.

President Trump [has bragged](about:blank) about his “super-dupers,” even [referring to the planned weapon](about:blank) as “hydrosonic,” [a brand](about:blank) of electric toothbrush. Last year, his budget [asked the Pentagon](about:blank) to spend $3.2 billion on hypersonic arms research, up $600 million from the previous year’s request. And as President-elect Joseph R. Biden Jr. takes command of the nation’s military, he will have to consider whether to sustain the defense work undertaken in the Trump years.

Now, independent experts have studied the technical performance of the planned weapon and concluded that its advertised features are more illusory than real. Their analysis [is to be published this week](about:blank) in Science & Global Security.

In an interview, [David Wright](about:blank), a physicist at the Massachusetts Institute of Technology and an author of the new analysis, called the superweapon a mirage.

“There’re lots of claims and not many numbers,” he said. “If you put in the numbers, you find that the claims are nonsense.”

Military officials called the paper insubstantial, saying it was based on outdated data. But they declined to disclose new findings.

“Due to the classified nature of hypersonics technologies, we are not at liberty to publicly discuss current capabilities,” Jared Adams, chief spokesman for the Defense Advanced Research Projects Agency, or Darpa, said in an email.

Richard L. Garwin, a physicist and longtime adviser to the federal government, called the paper “very good and important.” He added that he had provided his own similar criticisms of hypersonic warheads to defense officials.

James M. Acton, a nuclear analyst at the Carnegie Endowment for International Peace, called the paper “a serious, credible and important piece of work.”

Dr. Wright is affiliated with M.I.T.’s Laboratory for Nuclear Security and Policy and did the analysis with Cameron L. Tracy, a materials scientist at the Union of Concerned Scientists, a private group based in Cambridge, Mass., that often backs arms control.

By definition, hypersonic vehicles fly at more than five times the speed of sound — or up to dozens of times faster than jetliners. The warheads rise into space atop a traditional long-range missile but then descend quickly into the atmosphere to bank, careen and otherwise maneuver. They’re basically stubby gliders. The curved upper surfaces of their wedge-shaped bodies give them some of the lifting power of an airplane wing.

Dr. Wright and Dr. Tracy based their analysis on the Hypersonic Technology Vehicle 2 — an experimental warhead developed by the Air Force and Darpa. Their findings, they say, also apply to other American prototypes, as well as devices being developed by China, Russia and other countries.

The computer simulations drew on the physics of moving bodies and public disclosures about the Hypersonic Technology Vehicle 2 in order to model its most plausible flight paths. The team zeroed in on signature phases of hypersonic flight — when the vehicle zooms through the atmosphere and then plunges to hit a target.

The two experts say their computer modeling fills in public gaps on the weapon’s overall performance as well as its potential interactions with existing military systems for detecting and defeating weapons launched from distant sites.

In their paper, they see the weapon as essentially failing to outwit early-warning satellites and interceptors. For instance, current generations of space-based sensors, they report, will be able to track the weapon’s fiery twists and turns during most of its flight through the atmosphere.

And surprisingly, given the weapon’s speedy reputation, they say their analysis shows it will fly intercontinental distances more slowly than ballistic missiles and warheads fired on low flight paths known as depressed trajectories. In war, such tactics are seen as a good way for attackers to evade interceptors and lessen warning time.

Dr. Wright and Dr. Tracy conclude that the envisioned new weapon is, at best, “evolutionary — not revolutionary.”

In their paper, the authors contrast their findings with military claims. For instance, they quote the 2019 Senate testimony of Gen. John E. Hyten, the Air Force officer then in charge of U.S. Strategic Command, which controls the nation’s nuclear missiles. The time it would take a hypersonic warhead to complete an attack, General Hyten said, “could be half” that of a standard missile. “It could be even less,” he added.

The clashes between public views of hypersonic warheads and their actual abilities, the two experts conclude, arise from overstated official claims meant “to justify the expenditure necessary” for their development and deployment.

The American military is currently researching a half dozen hypersonic arms. Dr. Wright said the limited amount of public information on their workings and flight data made the better-known Hypersonic Technology Vehicle the best available window into the current status and future potential of the prototype arms.

The team’s analysis, he noted, focuses on an underlying issue of physics that he said casts doubt on the new class of weapons in general.

It’s what aeronautical engineers call the lift-to-drag ratio. The esoteric term is a measure of lifting power versus drag. Lift pushes a speeding aerodynamic body up and atmospheric drag tries to counteract the forward motion, at worst prompting a stall.

Dr. Wright said the team’s analysis of the hypersonic vehicle used a lift-to-drag ratio of 2.6. In contrast, jetliners and some birds have a ratio approximately eight times higher. In other words, the warheads at best are unimpressive fliers.

The limited power of the curved, blistering hot surfaces to generate a substantial lifting force without also producing lots of drag undermined claims that the weapon can fly long distances on complex trajectories, he said.

“Unless they’ve found some magical way to keep these systems up,” Dr. Wright said, “they’re going to have problems.”

Policy experts expect the Biden administration to focus on fostering arms control, and it seems likely that the Trump administration’s plans for hypersonic warheads will get close scrutiny. Hypersonic arms are among the topics that defense experts see administration officials as addressing in early talks with Russia and China, including the possibility of finding ways to impose restraints.

Ned Price, a spokesman for the Biden transition team, declined to comment on the issue of hypersonic warheads.

“President-elect Joe Biden will have an experienced team to sort through these complicated issues,” Hans Binnendijk, a former National Security Council official, wrote last month in suggesting ways to reinvigorate arms control. “But it will take time and creativity to be successful.”

## 2NC

### T Expand Scope

**But all restraints of trade not under immunities are currently under the scope of antitrust laws**

**Sack 21** – J.D., Duke Law School, Class of 2022, B.S. University of Michigan, 2019

John Sack, "Interstate Burdens and Antitrust Federalism: A Re-Examination Of Parker Immunity," Scholarship.law.duke, 2021, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1196&context=djclpp\_sidebar

A. General Overview

The Sherman Act **prohibits unreasonable restraints on trade**, whether by a single individual or a combination of competitors.14 Analysis of possible Sherman Act violations typically **proceeds on a case-by-case basis**, employing the “**rule of reason**” to determine whether a restraint of trade is unreasonable or if it has **sufficient procompetitive effects** to be ruled **valid**.15 **All restraints on trade fall under the purview of the Sherman Act**, as long as the restraint affects interstate commerce and **does not** otherwise **qualify for immunity**.16

**The ONLY things outside are immunities**

**Pratt 75** – United States District Judge, District Court for the District of Columbia

John Helm Pratt, "Proctor v. State Farm Mut. Auto. Ins. Co.," 406 F. Supp. 27, United States District Court for the District of Columbia, 12-18-1975

While several other motions are pending, this Memorandum concerns only the two motions for summary judgment filed on behalf of the five insurance company defendants on the ground that **their activities**, **whether or not otherwise constituting Federal antitrust violations**, are **outside the scope** of the Federal **antitrust laws** [\*\*2] because of the **antitrust exemption** for insurance companies provided by the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. (hereinafter referred to as the "McCarran Act"). HN1 This Act, passed in response to the Supreme Court's decision in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944) holding that insurance transactions were subject to Federal regulation under the commerce clause and that the antitrust laws were particularly applicable to such transactions, exempts the insurance business from regulation under the Federal antitrust laws provided that two criteria are met: (1) that the "business of insurance" is involved, and (2) that there is state regulation of the business of insurance.

The McCarran Act does not apply to the acts of "boycott, coercion and intimidation." For the reasons which are set forth, **we agree** that the McCarran Act exemption **insulates the activities complained** [\*29] of and that the five insurance company defendants are entitled to summary judgment.

**The key question is whether complaints can even allege violations of antitrust law---dismissal is coterminous with the scope of antitrust laws**

**Hartigan 60** – Circuit Judge, United States Court of Appeals, First Circuit

John Patrick Hartigan, "Atlantic Heel Co. v. Allied Heel Co.," United States Court of Appeals for the First Circuit, 284 F.2d 879, 12-15-1960, accessed via Nexis Uni

Defendants filed a **motion to dismiss** the action under Rule 12(b)(6) F.R.Civ.P., 28 U.S.C. for **failure to state a claim** under Title 15 U.S.C.A. 1, 15 or 26 upon which relief could be granted by the district court. The district court in a brief memorandum decision held that 'the **allegations are deemed insufficient** to bring the case **within the scope of the federal antitrust laws'** and a **judgment of dismissal was entered** on June 8, 1960.

**The question** presented on this appeal is whether or not the complaint **sufficiently** [\*\*6] **alleges a violation** of Section 1 of the Sherman Act, 26 Stat. 209 as amended, 15 U.S.C.A. 1.

#### The plan does not expand the scope of antitrust law, even if it increases prohibitions---the distinction is critical

**Bazelon 70** – Chief Judge, United States Court of Appeals for the District of Columbia Circuit

David C. Bazelon, "Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Sch.," United States Court of Appeals for the District of Columbia Circuit, 432 F.2d 650, 6-30-1970, accessed via Nexis Uni

That appellant's objectives, both in its formation and in the development and application of the restriction here at issue, are not commercial is not in dispute. [14 [\*\*8]](https://advance.lexis.com/document/documentlink/?pdmfid=1516831&crid=aec32147-a6a4-46e3-a6c4-53d200c9d278&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KRJ0-0039-X2TW-00000-00&pdpinpoint=PAGE_655_1102&pdcontentcomponentid=6397&pddoctitle=Marjorie+Webster+Junior+College+v.+Middle+States+Ass%27n+of+Colleges+and+Secondary+Schs.%2C+432+F.2d+650%2C+655+(D.C.+Cir.+1970)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=rswvk&prid=ee55c9b2-18bc-4bf4-b547-33485ca7b563) Of course, [HN1](https://advance.lexis.com/document/documentlink/?pdmfid=1516831&crid=aec32147-a6a4-46e3-a6c4-53d200c9d278&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KRJ0-0039-X2TW-00000-00&pdpinpoint=PAGE_655_1102&pdcontentcomponentid=6397&pddoctitle=Marjorie+Webster+Junior+College+v.+Middle+States+Ass%27n+of+Colleges+and+Secondary+Schs.%2C+432+F.2d+650%2C+655+(D.C.+Cir.+1970)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=rswvk&prid=ee55c9b2-18bc-4bf4-b547-33485ca7b563) when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality. [15](https://advance.lexis.com/document/documentlink/?pdmfid=1516831&crid=aec32147-a6a4-46e3-a6c4-53d200c9d278&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KRJ0-0039-X2TW-00000-00&pdpinpoint=PAGE_655_1102&pdcontentcomponentid=6397&pddoctitle=Marjorie+Webster+Junior+College+v.+Middle+States+Ass%27n+of+Colleges+and+Secondary+Schs.%2C+432+F.2d+650%2C+655+(D.C.+Cir.+1970)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=rswvk&prid=ee55c9b2-18bc-4bf4-b547-33485ca7b563) But the proscriptions of the Sherman Act were "tailored . . . for the business world," [16](https://advance.lexis.com/document/documentlink/?pdmfid=1516831&crid=aec32147-a6a4-46e3-a6c4-53d200c9d278&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KRJ0-0039-X2TW-00000-00&pdpinpoint=PAGE_655_1102&pdcontentcomponentid=6397&pddoctitle=Marjorie+Webster+Junior+College+v.+Middle+States+Ass%27n+of+Colleges+and+Secondary+Schs.%2C+432+F.2d+650%2C+655+(D.C.+Cir.+1970)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=rswvk&prid=ee55c9b2-18bc-4bf4-b547-33485ca7b563) not for the noncommercial aspects of the liberal arts and the learned professions. [17](https://advance.lexis.com/document/documentlink/?pdmfid=1516831&crid=aec32147-a6a4-46e3-a6c4-53d200c9d278&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KRJ0-0039-X2TW-00000-00&pdpinpoint=PAGE_655_1102&pdcontentcomponentid=6397&pddoctitle=Marjorie+Webster+Junior+College+v.+Middle+States+Ass%27n+of+Colleges+and+Secondary+Schs.%2C+432+F.2d+650%2C+655+(D.C.+Cir.+1970)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=rswvk&prid=ee55c9b2-18bc-4bf4-b547-33485ca7b563) In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, [18](https://advance.lexis.com/document/documentlink/?pdmfid=1516831&crid=aec32147-a6a4-46e3-a6c4-53d200c9d278&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-KRJ0-0039-X2TW-00000-00&pdpinpoint=PAGE_655_1102&pdcontentcomponentid=6397&pddoctitle=Marjorie+Webster+Junior+College+v.+Middle+States+Ass%27n+of+Colleges+and+Secondary+Schs.%2C+432+F.2d+650%2C+655+(D.C.+Cir.+1970)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=rswvk&prid=ee55c9b2-18bc-4bf4-b547-33485ca7b563) is not sufficient to warrant application of the antitrust laws.

#### And there are 16 thousand mergers a year – they could ban any of them

Statista 21 – Stats Website.

Statista, “Number of merger and acquisition transactions in the United States from July 2019 to June 2021, by deal value,” https://www.statista.com/statistics/245977/number-of-munda-deals-in-the-united-states/

As of June 2021, there were 583 M&A transactions valued at more than one billion U.S. dollars in the United States which were completed over the past year. The overall number of M&A deals in the 12 months ending June 30, 2021 amounted to 16,672, up from 13,446 in the previous year.

#### Scholarly consensus – the ABA has found that the scope is defined by exemptions

**ABA 7** (American Bar Association, ABA Section of Antitrust Law, Monograph 24, “Chapter 1 Introduction,” *Federal Statutory Exemptions from Antitrust Law*, American Bar Association, 2007, ISBN: 978-1-59031-864-5, pp.4-7)

A. Background: The Broad **Scope of Antitrust**, and an Introduction to Statutory Exemptions

Because this monograph concerns statutory constraints on the reach of antitrust law, a word is in order about the broad scope of antitrust principles.

**Sherman** Act sections 1 and 2 apply to “trade or commerce among the several States, or with foreign nations,”11 but the act leaves that phrase undefined. The **Clayton** and **F**ederal **T**rade **C**ommission **A**cts both define the “commerce” to which they apply,12 but give it only a jurisdictional meaning similar to that under the **Commerce Clause** of the federal Constitution.13 The courts have thus been left to decide just how broadly antitrust applies. Despite some uncertainty in the first half of the twentieth century,14 and with **one** lingering **exception**,**15**

**[FOOTNOTE 15]**

**15**. Namely, neither the Court nor Congress has ever overruled the Court’s sui generis 1922 rule that professional **baseball** is not “commerce.” See Fed. Club. 259 U.S. at 209.

**[/FOOTNOTE 15]**

modem **courts define this scope very broadly**. The inclusive modem definition is perhaps the natural culmination of the Supreme Court’s long-held belief that “Congress intended to strike as broadly as it could in Section 1 of the Sherman Act,”16 a view it developed because “[l]anguage more comprehensive” than that in Section 1 “is difficult to conceive.”17

This view probably also reflects the broad definition given to the terms “trade” and “commerce” for various purposes at common law, as some courts have explicitly held that antitrust was meant to incorporate those ideas." Thus, the courts have held generally that any exchange of money for a good or service, between any persons, is in ‘trade or commerce,”19 and the Supreme Court itself has described “commerce” to include any “exchange of...a service for money.’00 Indeed only in very limited, and sometimes exotic, circumstances have modem courts found conduct to be outside the scope of antitrust.**21**

**[FOOTNOTE 21]**

**21**. See. e.g., Dedication & Everlasting Love to Animals v. Humane Soc’y of the U.S., 50 F.3d 710 (9th Cir. 1995) (holding that solicitation of gratuitous charitable donations is not trade or commerce).

**[/FOOTNOTE 21]**

Therefore, **in the absence of an explicit statutory exemption or a judicially created immunity**, and so long as it is in the interstate or foreign commerce of the United States, the giving of essentially **anything** in return for money or barter **is subject to federal antitrust**.

Understanding the **scope** of modem antitrust also requires recognition of contemporary developments that **affect** **enforcement** of antitrust and its **substantive reach**. The United States is one of the few of more than 100 nations with competition laws that permit private antitrust suits.22 U.S. antitrust has permitted those suits dating from the initial adoption of the Sherman Act in 1890,23 and they comprise by far the largest component of antitrust enforcement.24 However, recent caselaw developments may increase barriers to the private lawsuits on which U.S. enforcement heavily depends. During the past thirty years or so, the federal courts have gradually raised doctrinal barriers to private enforcement of federal antitrust law, particularly through the rule of antitrust injury and the developing doctrine of antitrust standing.25 Partly as a result of these developments, private enforcement has declined.26

[[End FN 258]]

#### If the practices in question have to be evaluated on pro-competitive merits, then they are not immunities or exemptions

**Hovenkamp 3** – Ben V. & Dorothy Willie Professor of Law and History, University of Iowa

Herbert Hovenkamp, "Antitrust Violations in Securities Markets," Journal of Corporation Law, Vol. 28, No. 4, pp. 607-634, Summer, 2003, https://heinonline.org/HOL/Page?handle=hein.journals/jcorl28&div=35&g\_sent=1&casa\_token=&collection=journals

Logically, the question of immunity arises prior to consideration of the antitrust merits-that is, once immunity is found then the merits need not be resolved. Practically, however, the best road to resolution is the simplest one and in some cases the immunity question need not be resolved at all because it seems quite clear that there is no antitrust violation. This road may be the preferred one because the question of "implied" antitrust immunity has become unnecessarily complex.

**We have offered a predictable line in the sand, which you should take---provides a finite limit on aff proliferation**

**Pensyl 6** – J.D. Candidate, University of Toledo College of Law, 2006. B.A. in Political Science, Denison University, 2003

Tyler Pensyl, "Note & Comment: Let Clarett Play: Why the Nonstatutory Labor Exemption Should Not Exempt the NFL’s Draft Eligibility Rule From The Antitrust Laws," 37 U. Tol. L. Rev. 523, 2006, accessed via Nexis Uni

In Radovich v. National Football League, the Supreme Court held that the NFL **is subject** to the Sherman Act. [18](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Radovich involved a challenge by a former NFL player who claimed that the NFL had monopolized professional football in the United States. [19](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) The NFL argued that since professional baseball had been held to be **outside the scope of the antitrust laws**; [20](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) consequently, stare decisis compelled professional football **to be exempt** from antitrust liability as well. [21](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) The Court disagreed. [22](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Specifically, the Court reasoned that the cases exempting baseball from antitrust liability could not be used as authority for exempting other sports from antitrust laws, as those opinions were limited to the business of organized professional baseball. [23](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Because no precedent immunized football from antitrust [[\*526]](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) laws, the Court found the sport could not be held outside the scope of the laws. [24](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Thus, Radovich makes clear that football is not immune from antitrust laws.

The consequence of this decision is that football must enact rules **with antitrust liability in mind**. Unlike baseball, every provision the NFL enacts **must pass antitrust scrutiny** **or** it will be **found invalid** under the Sherman Act.

**Which violates the cardinal rule of interpretation because it assumes the resolution is redundant**

**Hanna 18** – US Magistrate Judge, W.D. La.

Patrick J. Hanna, opinion of the US District Court for the Western District of Louisiana, Lafayette Division, Batiste v. Quality Constr. & Prod. LLC, 327 F. Supp. 3d 972, decided 9 July 2018, Lexis

**Any other interpretation** of indemnity provision would **require the words** "the vessel, its owners, operators" **to be ignored**. Doing so would **violate a cardinal rule** of contract **interpretation**, which **requires that all terms used** in the contract **should be given meaning and**, consistently, that **no terms used** in the contract **should be rendered superfluous**. The **only** way to read the indemnity provision **without ignoring** the words "the vessel, its owners, operators, master, and crew," is to find that Arena owes indemnity to Alliance because it was both the owner and operator of the vessel at the time of the plaintiff's alleged injury.

**Courts would find their interp impermissible**

**Hurwitz 14** – Assistant Professor of Law, University of Nebraska College of Law

Justin Hurwitz, "Chevron and the Limits of Administrative Antitrust," University of Pittsburgh Law Review, vol. 76, Winter 2014, https://www.researchgate.net/publication/281199570\_Chevron\_and\_the\_Limits\_of\_Administrative\_Antitrust

[[Begin FN 258]]

This would be a jurisdictional question that would likely be granted Chevron deference, given that the distinction between “methods” and “acts or practices” is ambiguous. See City of Arlington v. FCC, 133 S. Ct. 1863 (2013). But common canons of statutory construction **require** that **all terms** in a statute **be given meaning**. Thus, a court is **likely to insist** that there is a **coherent distinction** between “methods” and “acts and practices” to **deem a construction** of either **permissible**."

#### Doesn’t overlimit---here’s a caselist

**Bona 21** – founder and CEO of Bona Law PC

Jarod Bona, "What are the Available Exemptions to Antitrust Liability?," The Antitrust Attorney Blog, 11-7-2021, https://www.theantitrustattorney.com/what-are-the-available-exemptions-to-antitrust-liability/

Congress and the federal courts have—over time—created several exemptions or immunities to antitrust liability.

The US Supreme Court in National Society of Professional Engineers v. United States explained that “The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.” 435 U.S. 679, 695 (1978). And “[t]he heart of our national economy long has been faith in the value of competition.” Id.

National Society of Professional Engineers holds, effectively, that those that think that they should not be subject to competition—for whatever reason—don’t get a free pass.

But there are several situations that do create limited exemptions to federal antitrust liability. Importantly, however, the US Supreme Court has repeatedly emphasized that courts should narrowly interpret these exemptions.

Here are the primary antitrust exemptions created by Congress and the federal courts:

State-Action Immunity. State-action immunity comes up a lot at Bona law, as we work hard to enforce the federal antitrust laws against anticompetitive state and local conduct. This exemption allows certain state and local government activity to avoid antitrust scrutiny. Lately, the US Supreme Court has narrowed the doctrine, including for state licensing boards that seek its protection when sued under the antitrust laws (North Carolina State Board of Dental Examiners v. Federal Trade Commission). Bona Law also advocates a market-participant exception to state-action immunity, but the courts are split on that issue. We expect that this exemption will continue to narrow over time.

Filed-Rate Doctrine. The filed-rate doctrine is a defense to an antitrust action that is premised on the regulatory rates filed with a federal administrative agency. In many regulated industries (like insurance, energy, shipping, etc.), businesses must, generally, file the rates that they offer to customers with federal agencies. The filed-rate doctrine eliminates antitrust liability for instances in which, to satisfy the antitrust elements, a judge or judge must question or second guess the level of these filed rates (i.e. that they included overcharges resulting from anticompetitive conduct). So a business filing rates with a regulator is not, by itself, sufficient to create an exemption from antitrust liability. There are nuances.

Business of Insurance. The McCarran-Ferguson Act exempts certain acts that are the business of insurance and regulated by one or more states from antitrust scrutiny. You can read more about the McCarran-Ferguson Act and its requirements here.

Baseball. That’s right—there is a baseball exemption to antitrust liability. This is a judge-made doctrine developed long ago. The other sports don’t have an antitrust exemption and the question of whether baseball should have one comes up periodically. If you want to learn more, you should read the five-part series on baseball and antitrust that Luke Hasskamp authored.

Agricultural Cooperatives. The Capper-Volstead Act provides a limited antitrust exemption to farm cooperatives. Under certain circumstances, this Congressional Act allows farmers to pool their output together and increase their bargaining power against buyers of agricultural products. You can read more about this in Aaron Gott’s article on the Capper-Volstead Act. And you can read about production restraints here.

The Noerr-Pennington doctrine. The Noerr-Pennington immunity—named after two US Supreme Court cases—is a limited antitrust exemption for certain actions by groups or individuals when the intent of that activity is to influence government actions. The Noerr-Pennington doctrine can apply to actions that seek to influence legislative, executive, or judicial conduct. There is, however, an important sham exception to Noerr-Pennington immunity that often comes up in litigation.

You can learn more about the Noerr-Pennington doctrine and antitrust liability here.

Statutory and Non-Statutory Labor Exemptions. The statutory labor exemption allows labor unions to organize and bargain collectively in limited circumstances, including requirements that the union act in its legitimate self-interest and that it not combine with non-labor groups. The non-statutory labor exemption arrives from court decisions that further exempt certain activities that make collective bargaining possible, like joint action by employers that is ancillary to the collective bargaining process.

You can read more about both the statutory and non-statutory labor antitrust exemptions here.

Implied Immunity. Implied immunity occurs in the rare instances in which there is no express antitrust exemption, but the anticompetitive conduct falls into an area of such intense federal regulatory scrutiny that antitrust enforcement must yield to the pervasive federal regulatory scheme.

The typical area where this comes up is with the federal securities laws, which is a good example of pervasive federal regulation. The US Supreme Court case to read for this antitrust exemption is Credit Suisse Securities (USA) LLC v. Billing, from 2007.

Keep in mind that courts do not easily find implied immunity of the antitrust laws—there must be a “clear repugnancy” or “clear incompatibility” between the antitrust laws and the federal regulatory regime. A broad interpretation of this immunity could create massive antitrust loopholes because even a regulator with a heavy hand on an industry may not consider anticompetitive conduct as part of its command and control. And regulation itself creates barriers to entry in a market that is more likely to lead to less competition.

Export Trade Exemptions. A little-known exemption involves export trade by associations of competitors. This antitrust exemption arises primarily from the Webb-Pomerene Act and the Export Trading Company Act. These FTC and DOJ guidelines provide more information about this antitrust exemption.

**Exemptions are also the core of debate around the topic**

**Abbott 5** – Associate Director for Policy and Coordination, Bureau of Competition, Federal Trade Commission

Alden F. Abbott, "Prepared Statement of Alden F. Abbott Before the Antitrust Modernization Commission on Statutory Immunities and Exemptions," Federal Trade Commission, 12-1-2005, https://www.ftc.gov/sites/default/files/documents/public\_statements/ftc-staff-testimony-antitrust-modernization-commission-concerning-statutory-immunities-and/051202statutory.pdf

Congress over the years has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. The AMC has compiled an extensive list of these provisions, some of which involve industries and products and services that are very familiar to us, while other provisions deal with more obscure matters.3 Collectively, these sectors of the economy cover a substantial volume of commerce.

It is not my purpose today to argue about the original merits of Congress's decision to displace the antitrust laws in certain industries.4 Nor do I intend to comment on how well (or poorly) particular exemptions serve the public interest. Many of these exemptions involve industries that the FTC does not monitor on an ongoing basis (because the exempted activities are beyond our jurisdiction), and we would have to undertake considerable study before we could comment on them with any specificity. I do believe, however, that it is important to consider whether the continued existence of these exemptions in their current form fosters the goal of a strong, innovative, growing American economy – or, rather, undermines it. The AMC, charged with examining how the antitrust laws can or should be modernized to benefit the American economy, is an appropriate forum for a study of that important question. What I would like to do today is to offer some basic observations on why it is

### CP Offsets

#### Not increase

PAPUC 7 – Commissioners, Pennsylvania Public Utility Commission

PA Public Utility Commission Decisions, 2007 Pa. PUC LEXIS 2, 255 Pub. Util. Rep. 4th (PUR) 209, Lexis

The OTS states that the timing of revenue receipts and interest payments has long been recognized as an appropriate "offset" to the CWC requirement. In fact, Webster's Dictionary defines offset as "to place over against something or to serve as a counterbalance for." The point being that interest has long been recognized as an offset and that an offset by definition works in the opposite direction of the claim. An offset by regulatory practice or by definition has not constituted, nor should it constitute, an increase or enhancement to the Company's claim. (OTS Exc. at 7).

#### Nor expand

Lexico 22 – powered by Oxford English Dictionary

Lexico, “Narrow,” updated 2022, <https://www.lexico.com/en/definition/narrow>

Narrow, verb

Become or make more limited or restricted in extent or scope.

#### Expand requires enlargement to a greater dimension (which means that the plan requires net-more things fall within the category of “scope”)

White 07 – United States District Court, California Northern

Jeffrey S. White, Medtronic, Inc. v. W.L. Gore & Assocs., 2007 U.S. Dist. LEXIS 80038, United States District Court for the Northern District of California, October 2007, LexisNexis

8. "Expand" and variations.

Medtronic contends that the Court should construe this term, and its variations, to mean "enlarge from a first to a second larger dimension." Medtronic's proposed construction is in accord with the plain meaning of the term "expand." See, e.g., Webster's Ninth New Collegiate Dictionary at 436 ("to open up; to increase the extent, number, volume or scope of'). Gore, in contrast, argues that the Court should construe this term, and its variations, to require that the device expanded is a "low memory metal stent," which is expanded by a balloon rather than by its own resilience. For the reasons previously stated, the Court rejects Gore's proposed construction.

The Court finds further support for its conclusion from the claims of the '062 Patent, which do not contain the "balloon-expandable" limitation proposed by Gore. In contrast, dependent claim 2 of the '219 Patent does contain such a limitation, whereas independent claim 1 of that patent, does not. (See Bianrosa Decl., Ex. 6 ("219 Patent, 8:2-I 1.) Similarly, dependent claim 15 of the '828 Patent requires the use of a balloon, whereas claim 14 of the '828 Patent, from which claim 15 depends, contains no such limitation. ('828 Patent, 8:29-59.) Moreover, the use of the balloon in the dependent claims is the only meaningful distinction from the independent claims. Thus, the presumption of claim differentiation weighs against Gore's proposed construction. See SunRace Roots, 336 F.3d at 1303.

Accordingly, the Court construes the term "expand" (and its variations) to mean: "to enlarge from a first to a second larger dimension."

#### Scope is extent of application

Kelly 13 – Judge, Michigan Circuit Court, Third Judicial Circuit

Mary Beth Kelly, Petipren v. Jaskowski, 494 Mich. 190, Court of Appeals of Michigan, June 2013, LexisNexis

Again, MCL 691.1407(5) provides that, to claim absolute immunity, the highest appointive executive official must "act[] within the scope of his or her . . . executive authority." We begin our analysis of the phrase "executive authority" by examining the term's plain and ordinary meaning.38 "Authority" is defined as "a power or right delegated or given," and "scope" is defined as the "extent or range of view, outlook, application, operation, effectiveness . . . ."39 [FOOTNOTE 39 STARTS] Random House Webster's College Dictionary (2001); see also Backus v Kauffman (On Rehearing), 238 Mich App 402, 409; 605 NW2d 690 (1999). [FOOTNOTE 39 ENDS] Taken together, the words indicate that a highest appointive executive official's scope of authority consists of the extent or range of his or her delegated executive power.

#### That means the plan mandates that a net-greater amount of things be covered

Sleet 99 – Judge, United States District Court, Delaware

Gregory M. Sleet, Scriptgen Pharms., Inc. v. 3-Dimensional Pharms., Inc., 79 F. Supp. 2d 409, United States District Court for the District of Delaware, December 1999, LexisNexis

Noting that the term "extent" is not defined in either one of the patent specifications, 3-DP contends that the ordinary meaning of the word should control. See, e.g., Zelinski, 185 F.3d at 1315; Desper Prods., 157 F.3d at 1336. Because "extent" in this instance would appear to serve as synonym for "amount" or "degree," 3-DP purports to advance this interpretation.3 While Scriptgen appears to take issue with this proposed definition, it fails to provide an alternate construction. After reviewing the language of the representative claim, which discusses "the extent to which the target protein occurs in the folded state, the unfolded state or both in the test combination and in the control combination," the court will afford the term "extent" its ordinary meaning, i.e., as meaning "amount" or "degree."

#### The direct object of ‘increase’ is prohibitions on anticompetitive business practices, which means that the noun that the plan mandates become net-greater is the complete category of practices. The counterplan increases antitrust applicability to the defense contractors, but it does NOT increase prohibitions writ large, which is what the plan explicitly requires!

Academic Discourses 14

Prepositions, <http://www.academicdiscourses.com/content/Prepositions.html>

A preposition is a word that **makes the position of different things clear in a sentence**, particularly Nouns. The word "preposition" means, that which is placed before. Therefore, prepositions are words which are put before a noun or pronoun to show its relation with some other noun or pronoun, most often in terms of location, direction, or time. The noun or pronoun which comes after the preposition is called its object. The book is on the table. **Here "on" is a preposition and it shows us the relation between "book" and "table".**

#### Required by ‘increase’

Yecies 2k – Director, Mergers & Acquisitions Group in the National Tax Department of Ernst & Young

Mark L. Yecies, Partner in the D.C. office of Ernst & Young, LLC, SECTION 338(H)(10), ALI-ABA COURSE OF STUDY MATERIALS, 2000, Lexis

The same provisions as apply to contingent payments (Temp. Reg. § 1.338-5T(b)(2)(ii),-7T apply to contingent liabilities. Thus, if AGUB is redetermined, under general principles of tax law, because liabilities originally excluded from basis under Temp. Reg. § 1.338-5T(e) are subsequently taken into account, that increase is allocated as described above. As noted, the regulations make clear that the basis increase occurs when the economic performance requirement is met, not when (as under the prior regulations) the liability becomes fixed and determinable. Temp. Reg. § 1.338-5T(b)(2)(iii), Example (2). See generally Temp. Reg. § 1.338-7T, Examples (1) and (2).

#### And ‘substantial’

Slotnick 15 – Chair of the Arbitration Board, Labour Arbitration Awards

Lorne Slotnick, Decision: IN THE MATTER OF AN ARBITRATION BETWEEN: St. Joseph’s Healthcare Hamilton -and- Canadian Union of Public Employees Local 786, Labour Arbitration Awards: St. Joseph’s Healthcare Hamilton v Canadian Union of Public Employees, Local 786, 2015 CanLII 18978 (ON LA), 2015

The union points to the definition of “similar” in the online Oxford English Dictionary as “having a marked resemblance or likeness; of a like nature or kind,” and in Black’s Law Dictionary as “nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference.” In addition, “substantially” is defined in the Oxford English Dictionary as “in all essential characters or features; in essentials, to all intents and purposes, in the main,” and in Black’s [Law Dictionary] as “essentially; without material qualification; in the main; in substance; materially; in a substantial manner.” The fact that the collective agreement uses both words together must mean that the two shift rotations have to be essentially corresponding or resembling each other in all essential respects for the conditions to be met, the union argues.

#### Increase means make larger in number

MacMillan ND

“increase definitions and synonyms,” MacMillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/increase\_1

TRANSITIVE to make something become larger in amount or number

We have managed to increase the number of patients treated.

Sunbathing increases your risk of getting skin cancer.

#### The court says THAT requires that the starting point be LESS than the END RESULT.

Goldberg 19 – U.S. District Court for Delaware

Opinion by Mitchell S. Goldberg, United States District Court for the District of Delaware, Shire ViroPharma, Inc. v. CSL Behring LLC, 2019 U.S. Dist. LEXIS 198992, November 18, 2019, Lexis

Defendants quote a dictionary definition of "increase" from Webster's Collegiate Dictionary, noting that the term "increase" is defined as "to make greater." (Defs.' Opening Claim Constr. Br., Ex. 20.) Defendants then posit that, to "make greater" requires that the starting point be less than the end result.

#### Offsets don’t do that

Miller 7 – Judge, U.S. Court of Federal Claims

Opinion by Christine Odell Cook Miller, United States Court of Federal Claims, Salman Ranch Ltd. v. United States, 79 Fed. Cl. 189, November 9, 2007, Filed, Lexis

Defendant deems this series of transactions, undertaken by plaintiffs, to be a "variant of the Son of BOSS tax shelter described in Notice 2000-44." Id. at 10 (citing I.R.S. Notice 2000-44, 2000-2 C.B. 255). 5Link to the text of the note Defendant condemns such transactions for "refus[ing] to properly treat the partnership's assumption of the partners' liability to close the short sale" by decreasing the partners' basis in the partnership according to the partnership's assumption of the liability. Id. at 10-11. Thus, according to defendant, the "basis adjustments from the proceeds and obligation contribution would have essentially offset each other providing no increase in basis." Id. at 11. Defendant insists that this improper treatment resulted in an understatement of the "gain from the sale of the ranch in the amount of $ 4,567,946[.00]," a position echoed in the FPAA. Id. at 5,11. The partnership and William J. Salman, its Tax Matters Partner ("plaintiffs"), filed [\*\*8] the instant lawsuit in response to the FPAA.

#### That proves we’re a PIC

IRS 87 – US Internal Revenue Service

1987 PLR LEXIS 1882, Private Letter Ruling 8743071, July 30, 1987, Lexis

The company established a qualified plan with a 401(k) arrangement. This would constitute an increase in liabilities under section 412(f)(1) of the Code and section 304(b)(1) of ERISA. However, the defined benefit plan was amended so that future accruals are offset by all benefits provided [\*3] under the plan with the 401(k) arrangement. The total cost of the two plans after the transactions does not exceed the cost of the defined benefit plan prior to the transactions. Accordingly, the establishment of the 401(k) arrangement does not constitute an increase in liabilities described in section 412(f)(1) of the Code and section 304(b)(1) of ERISA.

#### Can’t permute it

WIPS 20 – Commissioners, Wisconsin Public Service Commission

WI Public Service Commission Decisions, December 23, 2020, Dated, 2020 WISC. PUC LEXIS 733, Final Decision on the Application of Wisconsin Power and Light Company for Authority to Adjust Electric and Natural Gas Rates, Lexis

WP&L's application proposed that electric and natural gas rates remain the same and not increase. To secure that result, WP&L's application proposed that any changes that would trend toward a rate increase be offset by reductions in fuel costs and the utilization of unprotected EDIT. Clean Wisconsin and Sierra Club argued that, despite the fact that WP&L's proposal would not constitute an increase in rates to consumers, that a hearing under Wis. Stat. § 196.20(2m) was nonetheless required.

Clean Wisconsin argued that Wis. Stat. § 196.20(2m) requires a hearing any time that [\*18] there is an increase in "base revenue or base rates, regardless of any concurrent fuel cost plans, adjustments, or refunds under Wis. Stat. § 196.20(4)." (PSC REF #: 394711.) Sierra Club similarly argued that a hearing was required under Wis. Stat. § 196.20(2m) because "the Proposal amounts to an increase in rate revenus, just deferred to later years." (PSC REF #: 394715.)

The Commission rejects these arguments because both Clean Wisconsin's and Sierra Club's interpretations of the applicable statute fails to give meaning to each of the words in the statute. First, WP&L's proposal does not include a change in schedules. Second, the words of Wis. Stat. 196.20(2m) explicitly differentiate between a "change in schedules" and a "change in schedules which constitutes an increase in rates to consumers." (Emphasis added.) Giving meaning to each the words of the statute entails viewing any given proposal from the standpoint of a consumer and then determining the effect of a proposed change on the consumer. If the effect of a change is that the amount to be collected from a consumer will increase, a hearing is required. If the opposite is true, no hearing is required under Wis. Stat. § 196.20(2m).

### Camo

#### Clarity can’t solve—courts brazenly misinterpret clear commands—1nc says that’s true empirically, and it’s inevitable

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation?

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

#### Empirics go neg

Kevin Drum, Staff Writer for the Washington Monthly, 9/9/’7

(<http://www.washingtonmonthly.com/archives/individual/2007_09/012029.php>)

Having admitted, however, that the odds of a military success in Iraq are almost impossibly long, Chaos Hawks nonetheless insist that the U.S. military needs to stay in Iraq for the foreseeable future. Why? Because if we leave the entire Middle East will become a bloodbath. Sunni and Shiite will engage in mutual genocide, oil fields will go up in flames, fundamentalist parties will take over, and al-Qaeda will have a safe haven bigger than the entire continent of Europe. Needless to say, this is nonsense. Israel has fought war after war in the Middle East. Result: no regional conflagration. Iran and Iraq fought one of the bloodiest wars of the second half the 20th century. Result: no regional conflagration. The Soviets fought in Afghanistan and then withdrew. No regional conflagration. The U.S. fought the Gulf War and then left. No regional conflagration. Algeria fought an internal civil war for a decade. No regional conflagration.

#### And the powers fueling the conflict will work to deescalate

Blake, IBT, citing Hossein Amir-Abdollahian, Iran's deputy foreign minister for Arab-African affairs, 8/3/’15

(Eben, “Iran-Saudi Arabia Relations: Diplomatic Ties Could Resume Despite Yemen Conflict, Iranian Official Says,” http://www.ibtimes.com/iran-saudi-arabia-relations-diplomatic-ties-could-resume-despite-yemen-conflict-2036236)

A deputy foreign minister in Iran spoke Monday about resuming ties with the nation's long-standing regional rival, following the Iran nuclear deal that has begun warming relations between world powers and Tehran. While both Iran and Saudi Arabia were engaged in what many see as a proxy-war in Yemen, Hossein Amir-Abdollahian, Iran's deputy foreign minister for Arab-African affairs, said that the government hopes to **ease tensions with Riyadh**. Relations between Saudi Arabia, which is predominately Sunni and holds broad Western support, and Iran, which is Shia and has difficult relationships with the West, soured amid the Syrian Civil War as Iran backed the reigning Assad regime. They continued to deteriorate after the outbreak of fighting in Yemen, during which each country took opposing sides. However, Amir-Abdollahian said Monday that **despite the conflict of interest in Yemen and Syria, the country hoped to resume ties with Saudi Arabia in order to promote regional stability.** "Although Iran does not approve of Saudi Arabia's approach to use pressure to resolve regional problems, especially in Yemen, we believe that Tehran-Riyadh relations should be turned into ordinary and acceptable levels," Amir-Abdollahian told the Islamic Republic News Agency Monday, according to Azerbaijan newspaper Trend. The July 14 deal between global powers -- including the United States, Russia, China and the United Kingdom -- and Iran, which halted Iranian nuclear developments

MARKED

in exchange for easing economic sanctions, has helped open up the possibility of **broader international relations with the Middle Eastern nation**. Saudi Arabia and other Gulf countries have previously been wary of the nuclear deal with Iran, suggesting that the country has caused some of the unrest in the Middle East.

## 1NR

### DA Judicial Economics

#### The link turns the first advantage because move away from CWS kills enforcement – empowers political actors to undermine antitrust regimes

Shapiro 21 – Professor of the Graduate School, UC-Berkeley

Carl Shapiro, prepared for the Chair's Showcase at the ABA Antitrust Law Section Spring Meeting, ANTITRUST: WHAT WENT WRONG AND HOW TO FIX IT, Reporter, 35 Antitrust ABA 33 (Summer, 2021), Nexis

Many people look to antitrust to reverse these changes in the structure of the American economy. After all, the body of law intended to control monopolies is a natural place to look to solve problems caused by concentrated private power. Looking to antitrust is all the more tempting once one recognizes that these problems have noticeably worsened over the past 30 to 40 years, roughly the period during which antitrust law shifted markedly in favor of antitrust defendants. However, antitrust is not a cure-all. For example, while stronger antitrust enforcement tends to lessen income inequality, the primary policies for that purpose are the tax system and government programs that help lower-income households obtain various goods and services, including nutrition, education, and health care. Those who over-promise what antitrust can realistically deliver are doing a disservice to the very people they profess they are trying to help. They also threaten to breed skepticism regarding the value of antitrust policy and enforcement if antitrust fails to deliver the broader social and economic transformation that has been promised.

#### And, conflicting objectives mean it will be unreliable and ineffective—Aff means antitrust is perceived as arbitrary

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighing inequality or political power, on the one hand, against economic welfare, on the other.98 There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary. That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than 100 years old. It is not an accident that populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

#### That either zeroes the case or triggers our impacts

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

If antitrust law is perceived as arbitrary, it will provide a far less certain guide to business conduct. The effect might be disregard of antitrust law in circumstances in which it seems unpredictable. More likely, the effect will be excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition. The effectiveness of antitrust law in promoting competition and economic welfare will be seriously impaired.

#### AND—It’s literally likely to cause *net-harm*.

Schrepel 20 – Professor of Law, Utrecht & Professor of Sciences, Po Paris

Dr. Thibault Schrepel, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris Panthéon-Sorbonne and Invited Professor at Sciences Po Paris, ARTICLE: Antitrust Without Romance, 13 NYU J.L. & Liberty 326 (2020), Nexis Uni

The Legal Vagueness Surrounding Moral Concepts. The second risk created by the moralization of antitrust law is the creation of legal errors, whether type I or II. 250 More broadly, it risks the destabilization of all antitrust rules. Indeed, as I have argued above, antitrust law is ineffective and counterproductive when it does not pursue objectives that can be quantified and assessed. The same goes [\*392] when it is enforced to protect a morality whose outlines are necessarily drawn from personal experience. 251 In other words, moralizing antitrust law leads to more damage, through government failures, than it solves by addressing market failures, because such moralization prevents data from getting in the way of a good story. 252

#### CP solves – CWS is best at resolving harms – problem is enforcement, not legal standards

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

Antitrust law should retain its singular focus on economic welfare. To do so

effectively, it must remain faithful to its common law-like tradition of adapting in light of new learning and new experience. Antitrust law, and the executive and judicial institutions that enforce it, must grapple seriously with

worthy and empirically based ideas of the mainstream progressives; those of

the conservatives; and, to the extent they are focused on promoting competition and economic welfare, those of the populists as well.

#### Link to the plan is massive and unprecedented – the consumer welfare standard has been the lodestar of antitrust enforcement that’s been unchanged since Reagan was in office – that’s Ohlhausen, and…

Graham 21 – Analyst, Investor’s Business Daily

Jed Graham, FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court, 16 September 2021, https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/

The Supreme Court's June opinion rejecting NCAA limits on educational benefits for student-athletes reads like a celebration of noninterventionist antitrust law, William Kovacic, who chaired the FTC under President George W. Bush, told IBD.

"Markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare," Justice Neil Gorsuch wrote. Courts examining business dealings should take care not to "set sail on a sea of doubt," he added, elevating William Howard Taft's warning of the danger of a "shifting, vague and indeterminate" antitrust standard.

The words seemed to carry a not-too-subtle message for the Biden team, Kovacic says. "Until the Congress changes the law, we will continue to endorse the approach we have taken for the last 40 years," he said.

#### The legal decisionmaking is exclusively grounded in economics now and will remain so in the future absent plan

Meriwether 18 – Director, American Antitrust Institute & Lecturer, the George Mason Institute of Law and Economics for Judges

litigation partner with Cafferty Clobes Meriwether and Sprengel LLP with a role in many high-profile, high-stakes antitrust litigation, and co-chair of the Editorial Board of ANTITRUST, a publication by the Antitrust Law Section of American Bar Association, Editor’s Note: Antitrust in the Supreme Court, *Antitrust*, Vol. 33, No. 1 (Fall 2018)

Future Trends in Supreme Court Antitrust Jurisprudence Unmistakably, a key characteristic of the Court’s decision in Amex is its discussion of and reliance on economics and economic literature as the basis for its legal analysis. Alden Abbott and Bruce Hoffman view Amex as a “welcome continuation” of the long-standing trend in the Supreme Court to look at “prevailing economic doctrine” in forming anti - trust jurisprudence.36 These authors applaud the Court’s focus on the “economics of vertical agreements and the welfare-enhancing efficiencies that often flow from restrictive clauses inserted into such contracts.”37 They believe its application of a “well-accepted applied economic methodology” will “enrich and improve judicial rule of reason evaluation.”38 And while noting the dissent’s disagreement with how these economic principles were applied, they also point out that the dissenting opinion “was rooted in sound economics.”39 Reliance on economics and economic principles appears to be here to stay. It bears noting that the decision was 5-4, issued along ideological lines with the five conservative justices in the majority. Some authors question the opinion for relying too heavily on a handful of conservative-leaning economists, with no real consideration of other points of view.40 For Brunell, the decision appears result-driven, a consequence of “the power of conservative ideology over vertical restraints.”41 With a new conservative majority now firmly ensconced on the Court, however, there is little reason to expect any fundamental shift in the way the Court views vertical restraints in the future.

#### However they want they want to try and distinguish the plan its irrelevant. ANY shift away from a consumer welfare analysis undermines innovation and growth

Brennan 18 – Surrey Professor of Law, Harvard and Professor of Public Policy & Economics, UMD

Timothy J. Brennan, Ph.D. & A.M. in Mathematics from Harvard & JD from Harvard Law, and Senior Fellow, Resources for the Future, his research uses mathematical tools and financial economic theory to analyze tax law and develop ideas for tax policy reform, former Visiting Professor of Law at Columbia Law School, Professor of Law at Northwestern University School of Law, where he also held a courtesy appointment and taught in the Finance Department at the Kellogg School of Management, and Visiting Scholar at the MIT Sloan School of Management, where he was part of the Laboratory for Financial Engineering, Should Antitrust Go Beyond “Antitrust”?, *The Antitrust Bulletin* 63(1): 49-64, 2018, https://doi.org/10.1177/0003603X18756143

Nevertheless, the idea that something other than static economic efficiency is and should be the motive for antitrust enforcement has been around for some time. Robert Bork advocated the view that economic efficiency was the motivation for antitrust, but not without objection from Robert Lande, who viewed antitrust as preventing “theft” from consumers when firms exploit their market power to raise price.11 Decades before, Richard Hofstadter articulated the view that the purpose of antitrust enforcement was to limit the political power that would otherwise accrue to large businesses.12 Objections to that static view have not necessarily been in the direction of more active antitrust enforcement. Going back at least to Joseph Schumpeter, one view has been that antitrust should be guided and perhaps tempered by the view that dynamic efficiency, that is, innovation, is driven by the prospect of monopoly profit.13 On the other hand, others take the view that competition, not monopoly profit, encourages innovation.14

Within the last few years, however, the idea that currently unorthodox considerations should be incorporated into antitrust enforcement has become widespread. Including what has been mentioned above, my dozen considerations—some seemingly similar but with important differences—include:

Fairness15

Inequality16

Labor share of income17

Jobs18

Effect on competition (apart from consumer welfare)19

Consumer choice20

Promoting democracy; concentration of political power21

Anti-globalization; domestic control over resources22

Media veracity23

Environmental protection24

Managerial competence25

Mitigating consumer error26

This list does not include regarding innovation and dynamic efficiency as a potential counter to promoting static efficiency through increased competition.27

This is an impressive list of options. Although different factors come into play in assessing each of them, some generic arguments against their incorporation into antitrust policy apply to all of them. Those generic arguments will be described more fully in the subsequent section; following that will be a discussion of factors specific to each of these alternatives to the efficiency approach. Before getting to that, however, it is crucial to note that, by and large, this critique is not based on the merits of these concerns. Reducing equality, promoting democracy, employment opportunity, and environmental protection, among others on this list, are all worthy policy objectives. The question is not so much whether they are meritorious policy goals, but whether they should be objectives of antitrust enforcers and relevant considerations for antitrust courts.

This last point is crucial. It is one thing to say that antitrust enforcement should be stronger because it would lead to these other benefits. It is another to say that the decision in any individual case should change because these other considerations should be taken into account. However, if individual case decisions do not change, then the effects of antitrust enforcement do not change, regardless of the power of these platitudes. Those who believe antitrust should reflect these other considerations need to propose ways in which judges in antitrust cases should apply a standard other than, if perhaps along with, economic efficiency, in deciding when a merger should be blocked or a practice be proscribed.

That principle colors the discussion to come.

#### Even just a single case not based on the CWS will spill over

--Tethers every individual case to econometric analysis—Plan disrupts that, spills over, and facilitates arbitrary and politically motivated enforcement

Wright 18 – former FTC Commissioner; now University Professor & Executive Director of the Global Antitrust Institute, Scalia Law School

Joshua Wright, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, Senior Associate, Freshfields, Bruckahus Deringer LLP, Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 2018, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>

The adoption of the consumer welfare standard as antitrust’s lodestar has come with numerous benefits that have reoriented antitrust jurisprudence over the last 50 years to more effectively protect competition. At its core, the consumer welfare standard provides a coherent, workable, and objective framework to replace the multiple, and often contradictory, vague social and political goals that governed antitrust prior to the modern era. By providing a disciplined framework for antitrust analysis, unified under a singular objective, the consumer welfare model fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions. Similarly, promoting the use of the consumer welfare approach by competition authorities worldwide reduces the opportunity for enforcers to use their domestic competition laws to pursue non-economic objectives, including a protectionist agenda that targets U.S. and other foreign businesses.215

But if clarity and consistency were the only virtues offered by the consumer welfare standard we could identify any number of plausible alternatives. The most significant feature of the consumer welfare standard thus is that it tethers competition analysis, and therefore the outcome in any particular antitrust case, to modern economic learning and evidence. In doing so, the consumer welfare approach rejects the simplistic focus on market structure and concentration as a proxy for identifying anticompetitive effects. Indeed, courts and enforcers today use a broad set of economic tools to examine a variety of factors in assessing whether a specific transaction or business arrangement is likely to harm consumers. Despite claims by opponents to the contrary, consumer welfare analysis is robust and scrutinizes market factors beyond just a narrow focus on short-term price effects, including quality and innovation. The consumer welfare model also has the added benefit of allowing antitrust analysis to evolve alongside developments in economics to address new types of business models and emerging industries. As our understanding of the economics of a business arrangement improves, so too does the antitrust analysis.

### Defense

#### Space dominance fails – other countries would follow weaponization and deny US capabilities and just use ASATs

**Mutschler 13**

Max Mutschler, German Institute for International and Security Affairs; “Arms Control in Space Exploring Conditions for Preventive Arms Control” Published 2013 by Palgrave Macmillan, pg.171-173

The U.S. has the most to lose from the weaponization of space due to the huge amount of debris created by the use of a space weapons, and because of the fact that less advanced states could cheaply acquire the means to attack U.S. space systems; for example, by using ‘space shrapnel’. Because of the possibility of using such asymmetrical means, dominance in space is very hard to achieve (DeBlois 1998; Krepon et al. 2007; Johnson-Freese 2007b). In reaction to the report of the Space Commission, the Federation of American Scientists (FAS) established a Panel on Weapons in Space, which was comprised of eminent experts from the field. This panel issued its report entitled Ensuring America’s Space Security in 2004 (Federation of American Scientists 2004). According to this report, the panel concluded that ‘it was not in the security interests of the United States to place weapons in space in the next five years’ (Federation of American Scientists 2004: 1). While the report agrees that American space systems are vulnerable, it makes the point that space weapons are not an effective means of defending against potential threats. 10 Instead, other measures, such as improving the protection of satellites and the capacities to replace them; and the establishment of international rules for space are more efficient in this regard. The American Academy of Arts and Sciences became active in this field too, when it started its Reconsidering the Rules of Space project, which resulted in a series of papers that dealt with the issue of space security. 11 For example, in 2005, The Physics of Space Security by David Wright, Laura Grego, and Lisbeth Gronlund from the Union of Concerned Scientists – which has produced several interesting and critical analyses of the option of U.S. space weapons – was published in this series (Wright et al. 2005). Wright and his colleagues present a number or arguments against the weaponization of space. They make two major points: first, they show that space weapons are not suited for many of the tasks designated to them, such as ground-attack or Ballistic Missile Defense. This analysis casts doubts on such space weapon concepts as, for example, the ‘Rods from God’ or space-based missile defense interceptors. 12 Second, they point out that the U.S. cannot expect to have a monopoly on ASAT technology. Every space-faring nation has the inherent capability to develop ASATs. Even countries that have only short- or medium-range missiles can reach satellites in Low Earth Orbit. They may not have the capacity to develop homing interceptors, but they could release clouds of pellets into the path of a satellite; or, if they do have that capacity, they could explode a nuclear weapon in Low Earth Orbit. The radiation released would destroy unshielded satellites in Low Earth Orbit within sight of the explosion. And besides ASAT technology that damages or destroys satellites, there are other, much less demanding technologies capable of jamming satellite communications via ground-based transmitters, for example. Wright and colleagues conclude that, since other countries have the technical capabilities to follow on the path to the weaponization of space; instead of unleashing an offensive arms race in space, the U.S. should better improve the resilience of its satellites. In another paper from the Reconsidering the Rules of Space series, Nancy Gallagher and John D. Steinbruner (2008) discuss the feasibility and desirability of U.S. space dominance. According to them, space dominance is an unrealistic prospect. It cannot be achieved – even if the U.S. government was ready to invest a lot more funds than it actually does – due to the limits set by the physics of space, and because other countries would challenge this dominance. While the U.S. could sustain its technological leadership in space, other states could make substantial advantages in military space technologies with much less spending. So, instead of making the U.S. more secure, striving for space dominance would result in the opposite. In short, the prospects for establishing decisive U.S. military control of space are too poor for that to be a reliable basis for security, and the provocation emanated to the rest of the world is too serious for unrestrained exploration to be indefinitely tolerable. Unrealistic zealotry on this topic promises to induce threats to U.S. space assets that otherwise would not exist. (Gallagher and Steinbruner 2008: 74)

#### Tit for tat retaliation on satellites lacks credibility – China knows they will always be less reliant on space assets which makes threats hollow and ineffective

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Forrest Morgan, Chapter 4 “DETERRING CHINESE ATTACKS ON US SPACE CAPABILITIES” in CROSS-DOMAIN DETERRENCE IN US–CHINA STRATEGY, <https://www.jhuapl.edu/Content/documents/CrossDomainWeb.pdf>

How Does the United States Prevent China from Attacking US Space Capabilities?

Both threats of punishment and efforts to demonstrate US ability to deny military success have problems. Threats of punishment suffer from defects in potency and credibility. Efforts to deny China’s success are hindered by US system vulnerability. Both are hampered by US disproportionate dependence on space.

Punishment

It is hard to make threats of punishment sufficiently potent. Tit for tat probably would not work, given greater US dependence on space assets. For example, the threat of retaliating against Chinese reconnaissance or communications satellites if China attacks US space assets could be perfectly acceptable to China. Although Chinese forces are becoming increasingly dependent on space capabilities, even if you project decades into the future, it is unlikely that China will become as dependent on space capabilities as the United States, at least for conflicts in the western Pacific, where China can rely on terrestrial assets for the same purposes for which the United States uses space.

What about going after anti-satellite launchers (with stealth fighters or bombers) if China attacks US satellites? (Some even propose nuclear reprisals, but that is not going to happen.) The problem is that US chances of catching and knocking out mobile anti-satellite launchers are not high, even if it can fly in unopposed. Also, China will likely be launching from western China. Will US political leaders be willing to escalate a localized conflict on the Chinese coast to fight its way in and strike targets deep into Chinese territory and kill Chinese citizens because China attacked an unmanned piece of machinery? For deterrence, can you make these threats credible?

What about threatening the fixed infrastructure that enables tracking and targeting of space systems? Reversible-effects attacks may be conducted using assets that are close to the area of combat. However, the United States will likely have higher-priority targets than, for example, a communications satellite jammer. Attacks on space assets in geosynchronous orbit are likely to be supported by redundant infrastructure spread out across China. Much of the infrastructure for tracking and command and control (C2) is in Chinese cities, including Beijing, which raises proportionality concerns.

When the war escalates to a high level, the threat of punishment becomes largely irrelevant.

#### Symmetric retaliation insufficient for deterrent cred – adversaries know we have a critical vulnerability gap that makes US threats ring hollow

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David A. Koplow, “Deterrence as the MacGuffin: The Case for Arms Control in Outer Space” SSRN, August 14, 2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436311&download=yes>.

A. Limitations on Deterrence by Threat of Symmetric Retaliation in Space

The primary factor that renders symmetric retaliation less suitable in space is the profound asymmetry in the use of space by the United States compared to its rivals. As noted above, the United States owns and operates more satellites than any other country and derives more benefit from them.150 However, that peacetime comparative advantage could quickly morph into a wartime vulnerability. The American military and economy have succeeded in exploiting space more extensively than others and have concomitantly become more heavily reliant upon satellite services; our relative potential exposure is therefore immense. If U.S. customers were suddenly denied access to now-ubiquitous space-borne functions, the results would be catastrophic – far more so than for our potential adversaries, who have not yet invested so comprehensively in space.

In strategic terms, the asymmetric exposure in an ASAT war – what some have labeled a “vulnerability gap” -- would result in the United States lacking “escalation dominance”; 151 as the hostilities accelerated, we would suffer more than our opponents. Put more crudely, even if our ASAT capabilities were superior to others’, we would run out of satellite targets to shoot at long before our opponents did.152

Moreover, if the percolating space battle were conducted by kinetic means and resulted in significant accumulations of additional orbital debris, that increased space pollution would redound distinctly to the U.S. disadvantage, too. As the leading user of satellites, the United States has the most to lose if large swaths of space become uninhabitable, especially if the hazards could persist for years or decades after the conflict had ended.153 That exposure would – and should – inhibit any U.S. resort to a reciprocal kinetic ASAT retaliation, and would likewise undercut deterrence.

It is true that Russia and China, among others, are now moving toward space with increasing alacrity, mimicking the United States in pursuit of similar military and civilian benefits. But for the foreseeable future, the lack of congruent investment will remain – their ASATs could inflict more pain on the United States than our ASATs could inflict upon them. Threats of symmetric retaliatory uses of force in space cannot therefore accomplish the same deterrent effect traditionally available in other theaters.154