# R1 Texas Disclosure

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T Prohibition---

**Prohibition requires completely ending a practice**

**Feldman 86** – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the **prohibition** and **regulation** of the sale of liquor are **entirely different things**: "To **prohibit** the liquor traffic implies the **putting a stop** to its sale as a beverage, to **end it fully**, **completely**, and **indefinitely**." In contrast, regulation "implies that the sale of intoxicating liquor shall go on **within the bounds** of **certain prescribed rules**, **restrictions**, and **limitations**." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are **analytically distinct**. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

**Increasing resources results might result in increased penalties, but that’s distinct from prohibition**

**Craco et al. 92** – Attorney for American Institute of Certified Public Accountants

Louis A. Craco, Brief of American Institute of Certified Public Accountants as Amicus Curiae in Support of Respondent, Reves v. Ernst & Young, 1992 U.S. S. Ct. Briefs LEXIS 452, Supreme Court of the United States, June 1992, LexisNexis

The **Senate Report** also notes that, by "effectively remov[ing] the criminal figure from the particular corrupt organization[,]" the "**prohibition is not a penalty against any individual**[,]" but "instead a **protection** of the public **against parties engaging in certain types of businesses** after they have shown that they are likely to run the organization in a manner detrimental to the public interest." S. Rep. No. 91-617, supra, at 82 (emphasis added).

**Vote neg---**

**[A]---Limits---allowing affs that change punishments for certain actions explode limits and doubles the size of the topic**

**[B]---Grounds---core neg generics are predicated on increased prohibitions, not changes to how those prohibitions operate**

**1NC---CP**

Regulations CP---

**The United States federal government should, without expanding the scope of its core antitrust laws, substantially increase prohibitions on domestic export cartels by imposing ex-ante regulations prohibiting export cartels that operate in foreign nations without protections for export cartels.**

**Ex-ante regulation creates clarity and deters violations before they occur---avoids enforcement proceedings**

**Posner 10** – Judge in the U.S. Court of Appeals for the Seventh Circuit, Senior Lecturer at the University of Chicago Law School

Richard A. Posner, “Regulation (Agencies) versus Litigation (Courts): An Analytical Framework,” Regulation vs. Litigation: Perspectives from Economics and Law, National Bureau of Economic Research, Inc., 2010, https://ideas.repec.org/h/nbr/nberch/11956.html

**Ex ante regulation** can, as I said, be **judicial** as well as **administrative**, as in preventive detention, injunctions, and regulatory decrees, and ex post regulation can be administered by agencies as well as courts, such as the Federal Trade Commission and the National Labor Relations Board, which **operate mainly by trial-type proceedings** conducted **after a violation of the laws** administered by the agency has occurred.

Ex ante: pros. The ex ante approach **promotes clarity of legal obligation** and therefore presumably **better compliance** (fewer inadvertent violations) by **laying down rules in advance of the regulated activities**. Ex ante regulation is activated before there is a loss, unlike a lawsuit; it can be **centrally designed** and **imposed** (for example, by a **single agency** such as the **Food and Drug Administration**, as opposed to a **decentralized judicial system**); and it is enforceable by means of **light penalties**, because the optimal penalty for creating a **mere risk of injury** is **normally lighter** than the **optimal penalty** for causing an **actual injury**. This means, however, that ex ante and ex post regulation actually are inseparable; because compliance with rules is never 100 percent, there must be a machinery for punishing violators, though the machinery may involve penalties meted out by the regulatory agency itself, with judicial involvement limited to judicial review of the penalty proceeding. But while rules involve heavy fixed costs (i.e., designing the rule in the first place), if they are **very clear** and **carry heavy penalties** compliance may be **achieved without frequent enforcement proceedings**, so **marginal costs may be low**. Rules are therefore **attractive** when the **alternative** would be **vague standards**, resulting in **frequent actual** or **arguable violations** and **hence frequent enforcement proceedings**.

As this discussion shows, ex ante regulation and rules have an affinity. Ex ante regulation enables **exploitation** of the **economizing properties of rules** as **preventives**. With vague standards, the regulatory emphasis shifts to seeking deterrence by proceedings to punish violators.

**1NC---CP**

Section 5 Counterplan---

**The United States Federal Trade Commission should:**

* **determine that, under Section 5 of the Federal Trade Commission Act, “unfair methods of competition” includes domestic export cartels that operate in foreign nations without protections for export cartels.**
* **issue cease and desist letters to companies engaging in the aforementioned conduct, stating that their conduct constitutes a violation of Section 5 of the FTC Act.**

**Broad FTC authority means the counterplan solves**

**Vaheesan 17** – Regulations Counsel, Consumer Financial Protections Bureau

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could **resurrect antitrust law** as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority **grant the FTC expansive power** to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to **police “unfair methods of competition**” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the **FTC contradicted Congress’s political economic vision in 1914**, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the **FTC adopted a convoluted test** that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the **FTC should anchor Section 5 in the expansive** political economic **vision** of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—**three principal harms** from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt **presumptions of illegality** for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and **restraints on retail competition**; and **challenge monopolies and oligopolies** that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the **FTC should pursue simple structural remedies over complicated behavioral fixes.**

**Section 5 expansion and clarification is critical to preventing international protectionism**

**Nam 18** – Distinguished Practitioner, Center for East Asian Studies, Stanford University; former Visiting Professor of Law at UC Davis School of Law; former Visiting Fellow at Columbia Business School Center on Japanese Economy and Business; former antitrust attorney at Jones Day

1. Interpretive Latitude in the FTC Act

A **dearth of clarity** on standards and criteria has been part and parcel of the **FTC Act’s considerable normative influence** abroad,66 especially with respect to areas of **regulator discretion** in enforcement. Within two years of the statute’s enactment, President Wilson would confess candidly of the new FTC: “It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business.”67 While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its **versatility and breadth**. The FTC Act’s purview over any “unfair methods of competition”68 per its **Section 5** granted the agency **wide berth** in pursuing both ongoing and incipient antitrust violations **beyond** the Sherman Act’s reach, **instead of limiting the FTC** to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, “then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute,” while permitting dialogues “with business to facilitate compliance with the law (those emphasized by Wilson).”69 As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”70 This invocation of the public interest **without further elaboration** has left open a sizable margin for **interpretive license**,71 not the least a presumption that the public referenced is the domestic public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”72 Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes **could not** transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”73 Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”74 Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a **comparable array of participant actors** beyond the executive branch.75 When acting in a relative vacuum of precedent and checks, **protectionist administrations** abroad encounter **less resistance** to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”76 Wilson was quick to rely on Section 6,77 and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the **language easily could be construed** overseas as an affirmation of the **FTC’s subservience** to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be **unable** to find any **undergirding support** for agency **independence in Section 5** or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.78 The originators of the legislation would not have had it any other way.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is **disintegrating**.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the **antagonistic protectionist politics** that defined a bygone era that ended with **World War I** — suggesting that today’s protectionist revival threatens **not just** the global economy, but **world stability and peace.**

Leading liberal democracies have **turned their back** on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This **widespread fear** of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to **halt** the forces of **globalization**. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned **against trade liberalization**. **Trade wars**, **colonialism** and **closed markets** became the name of the **geopolitical game**.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the **Franco-Italian trade war**, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy **ever closer** to Austria-Hungary and Germany — the Triple Alliance — in the years before the **First World War**.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered **international stability and peace**, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how **protectionism fomented geopolitical rivalry and conflict.**

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds **dire consequences** for the liberal economic order by pitting nations **against one another** and breeding **suspicion, distrust** and **conspiratorial thinking**. The **ultranationalism**, **militarism** and **tariff wars** of the late 19th century spilled over into the 20th century, and ended in **world war** — suggesting a return to the protectionism of old could **damage far more than national economies**.

**1NC---DA**

Innovation DA---

**Frenzy of M&A now because Biden’s executive order won’t be implemented for years**

David **French and** Sierra **Jackson**, Reuters, July 12, 20**21**, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown, https://www.reuters.com/business/dealmakers-see-ma-rush-then-chills-bidens-antitrust-crackdown-2021-07-12/

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.

**Immediately expanding scope of antitrust liability brings mergers to a halt---undermines dynamism and global competitiveness**

**Thierer 21** – Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: **discouraging the sort of vibrant innovation and consumer choice** that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

**The most important feature** is the proposed **change to the legal standard by which regulators approve business deals**. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like **simple**, **semantic tweaks**, but – much like some of the other policy ideas currently circulating – **they would upend decades of settled law and create a sea change in U.S. antitrust enforcement**. **This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.**

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated **how dynamic media and technology markets** can be with firms constantly searching for **value-added arrangements** that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that **government bureaucrats are better suited to make these calls than businesspeople** and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – **are remarkably open-ended and could be easily abused**. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for **cronyism and economic stagnation.**

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

**Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership**

**Lee**, senior lecturer at the University of Hong Kong Faculty of Business and Economics, **‘19**

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- **effective** antitrust measures could **stifle** the ability of American tech companies to **compete with their Chinese challengers**. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing **consumer welfare**, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But **the wider the antitrust authorities reach**, the more likely they are to **damage the tech giants' global competitiveness**. This applies **especially in the key field of artificial intelligence**, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, **lots of data**. Such data can **only be collected at scale**, which conflicts with hipster antitrust **notions of size**. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a **disadvantage** to China.

The idea of **size** is one of many **fundamental differences** separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed **so-called "super apps"** that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, **that lead is shrinking**, and if China does overtake the U.S. in artificial intelligence, it will likely be a result **of advantages in data and government policy**.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have **broader implications** beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able **to close the growing competitive chasm**.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to **shape user privacy norms,** establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that **aggressive antitrust sanctions** would risk **inhibiting American companies** from **maintaining the scale necessary to compete with their Chinese rivals**.

**AI supremacy will be a defining feature of superpower status**. And if future researchers one day examine how the U.S. **lost the war for artificial intelligence**, the hindsight of history may show that **the current antitrust debate was the fatal turning point**.

**Tech innovation prevents nuclear conflict---US leadership is key**

**Kroenig and Gopalaswamy 18** – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

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

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

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

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

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

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

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

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

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

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

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

**1NC---DA**

Exemption Spillover DA---

**The aff’s application of antitrust to a previously exempted area causes future limitations in immunities---courts perceive shifts in legislative opinion and adapt accordingly**

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Steven Pearlstein, "Facebook and Google cases are our last chance to save the economy from monopolization," The Washington Post, 12-18-2020, <https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/>

**Keeping a close eye** on both the antitrust cases and the legislative debate will be the members of the Supreme Court, including six conservative justices who have a well-documented hostility to government regulation of business. The century-old Sherman and Clayton acts are remarkably spare and concise statutes, which has meant that most antitrust law has been judge-made, based on the precedents laid down in individual cases**. Any antitrust reform that might come out of Congress**, however, is certain to be much more detailed and prescriptive than those earlier laws. Not only would such legislation **erode** the **power** and **discretion** of the court, but it **would also likely overturn a number of recent precedents** that have made it much **more difficul**t for regulators to **limit** the **size** and **business practices** of dominant firms.

All that could well be playing out in Congress just as the court considers the inevitable appeals in the cases of U.S. v. Google and FTC v. Facebook. And it would hardly be unprecedented if some members of the Supreme Court were to consider the **political and legislative consequences** as they decide the fate of two companies with whom most Americans interact on a daily basis.

A similar dilemma faced Judge Learned Hand of the U.S. Court of Appeals in 1945 as he considered U.S. v. Alcoa. After the longest federal trial in history — two years — a district court judge had ruled against the government’s request to break up Alcoa, declaring that the company had legally obtained its 90 percent share of the aluminum market. Hand himself was an antitrust skeptic. But in a memo to his fellow appeals court judges, Hand recognized that the public would not accept a highly technical ruling that any such monopoly was benign.

“If we hold that [Alcoa] is not a monopoly, deliberately planned and maintained,” Hand wrote, “everyone who does not get entangled in the legal niceties … will quite rightly, I think, write us down as asses.”

In the end, the appeals court ruled that Alcoa had illegally monopolized the market for aluminum, and Hand’s opinion **became one of the most influential**, and controversial, **in the history of antitrust**. The cases against Google and Facebook will be no less consequential or contentious.

**Specifically spills over to limit implied immunity---that disrupts the stability of IPO regulation and discourages going public**

**Denniston 7** – Independent contractor reporter covering the Supreme Court for fifty-eight years

Lyle Denniston, "Analysis: Antitrust "mistakes" and the IPO process," SCOTUSblog, 6-18-2007, https://www.scotusblog.com/2007/06/analysis-antitrust-mistakes-and-the-ipo-process/

Federal officials who regulate the stock markets **do not have to fret** that **antitrust law** will **get in their way** as they oversee the process of **bringing new stocks** to the **public exchanges**. The Supreme Court, worried that judges and juries sitting in antitrust cases lack the sophistication about the markets necessary to avoid making “unusually serious mistakes,” opted on Monday to **exempt** much — though perhaps not all — of the “initial public offering” (**IPO) process** from federal **antitrust laws**. The Court was even unwilling to accept a suggestion by U.S. Solicitor General Paul D. Clement that would have salvaged some role for antitrust.

Although Justice Stephen G. Breyer’s opinion for the majority in the 7-1 decision stressed that it was confined to “the conduct alleged in this case,” the language and rationale of the ruling was broad enough to immunize syndicates bringing new shares to market from many and probably most potential antitrust complaints by investors. It thus appears that the **Securities and Exchange Commission** will mainly have the duty of monitoring what is **allowed or prohibited in IPOs.**

Here is the specific assignment the Court said it was leaving to the SEC: the task, using its securities expertise, of drawing a “complex, sinuous line separating securities-permitted from securities-forbidden conduct” so as to assure that the process of bringing new stocks to market by underwriting syndicates continues to function quite freely. (A “sinuous line” would be one that is wavering.)

The decision was a **very broad victory** for 16 of the nation’s largest **underwriters of stock** — the major investment banking houses that were challenging a Second Circuit Court decision that had cleared the way for a trial of the antitrust claims of 60 investors joined in two class-action lawsuits. The investors had sued under the Sherman Act, Clayton Act and state antitrust laws, claiming that the investment banking houses had joined in syndicates to control the initial issuance and **post-IPO trading** in the stocks of several hundred **high-tech companies**.

The lawsuits complained of a pact among the underwriters not to sell shares of popular tech stocks unless a buyer agreed to buy added shares of that securities in the after-market at higher prices — so-called “laddering”; to pay very high commissions on later stock purchases from the underwriters, or to buy from those underwriters other, less desirable stocks (so-called “tying.”

The targeted activity of joint underwriters’ promotion and sale of new securities, Justice Breyer wrote on Monday, “is **central** to the **proper functioning** of **well-regulated capital markets**.” The antitrust complaints, he went on, “concern practices that lie at the very heart of the securities marketing enterprise.”

In the end, the Court reversed the Second Circuit, concluding that “the **securities laws are clearly incompatible** with the application of the antitrust laws in this context.” Justice John Paul Stevens joined in the result only, concluding that the challenged conduct did not violate the antitrust laws; he did not join, he said, in a “holding that Congress has **implicitly granted** [the underwriters] **immunity** from those laws.” Justice Clarence Thomas dissented alone, relying on “savings clauses” in federal securities laws “that preserve rights and remedies existing outside of the securities laws.”

The Court’s main opinion did not specifically declare that each of the challenged practices was, in fact, legal under securities laws. “In the present context,” Breyer wrote, there is “only a fine, complex, detailed line” that separates activity that the SEC permits or encourages from activity that the SEC “must (and inevitably will) forbid” — the latter being the very kind of activity that the investors here were trying to attack under antitrust laws.

Exploring further the perceived difficulty in such line-drawing, Breyer said that “evidence tending to show unlawful antitrust activity and evidence tending to show unlawful securities marketing activity may overlap, or prove identical.”

But, in sentiment as well as in logic, **much of the reasoning** of the Court in reaching its conclusions against a joint securities-antitrust regulatory regime could be **attributed to its perceptions about** the inability of **antitrust** lawsuits to avoid serious disruption of the securities markets. “The factors we have mentioned make mistakes unusually likely” in the antitrust regime, Breyer said. “Antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries…[T]here is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect.”

**A robust and secure IPO process for young companies is critical to productivity growth**

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Geraldine A. Wu, "The Effect of Going Public on Innovative Productivity and Exploratory Search," Organization Science, Vol. 23, No. 4, pp. 928-950, 7-27-2011, https://www.jstor.org/stable/23252442?seq=1#metadata\_info\_tab\_contents

Introduction

The **rapid pace of innovation** in high-technology firms has been an **important determinant** of **economic growth** and **productivity**. Good ideas by themselves, however, **cannot ensure continued success** at innovation. A **critical component** of corporate research and development (R&D) efforts is **access to funding**, particularly for the resource-constrained entrepreneurial ventures that have proved to be vital sources of innovation in technology based industries. Yet the **financing events** that are **crucial** to **continued innovation** may subsequently shape the very **innovative** **activities** they are funding. These transactions are not merely short-term events that infuse capital into firms with promising innovations; rather, they delineate distinct stages in the evolution of high tech ventures. Funding events like venture capital (VC) investments, minority equity investments, and initial public offerings (**IPOs**) are often imbued with **broader meanings** that affect subsequent **access to resources** and involve significant governance changes—being a VC backed company, having an affiliation with an established firm in the industry, and being a publicly traded entity **imply certain levels of success**. Therefore, they can have **long-term effects**, not only on organizational structures, but also on organizational processes, most notably the search processes that **drive technological innovation**. This paper focuses on the IPO context to explore the inherent tension between financing and innovation: flows of funds to firms that are intended to support R&D shape subsequent innovation efforts.

An **IPO is a milestone event** in the life cycle of a business organization. The impetus for going public is typically a **desire** to build a platform for **continued growth**. By going public, firms can **improve their access** to **financial capital** and their ability to **attract other resources** that **contribute to growth**, such as high-quality employees and alliance partners. In addition, the concomitant increase in the liquidity of firm equity enhances the ability to pursue acquisitions, mergers, and licensing agreements (Brau and Fawcett 2006). Alongside these benefits, however, come potential drawbacks and substantial organizational change; in particular, the transition to public ownership subjects firms to a multitude of new requirements that leads to decreased management flexibility and an increased need to manage shareholders' earnings expectations. The short-term bias of public markets and its implications for firm innovation were highlighted in Google's well-publicized IPO prospectus from August 2004, in which the founders wrote, "As a private company, we have concentrated on the long term, and this has served us well. As a public company, we will do the same. In our opinion, outside pressures too often tempt companies to sacrifice long-term opportunities to meet quarterly market expectations We will not shy away from high-risk, high-reward projects because of short-term earnings pressure" (Google Inc. 2004, pp. 27-28). Although there has been substantial anecdotal evidence of entrepreneurs being considered about how taking their companies public might affect long-term innovation, this paper is, to my knowledge, the first to **empirically investigate** the impact of going public on **firm innovation**. The importance of understanding these potential consequences is underscored by the **critical role** that IPOs have played in the **growth of young ventures** in high-tech industries and by the fact that these firms' **innovative capabilities** are their most **valuable assets** and **key sources of competitive advantage.**

**Floundering productivity causes great power conflict**

**Baru 9**

(Sanjaya, Visiting Professor at the Lee Kuan Yew School of Public Policy in Singapore Geopolitical Implications of the Current Global Financial Crisis, Strategic Analysis, Volume 33, Issue 2 March 2009 , pages 163 – 168)

The management of the economy, and of the treasury, has been a vital aspect of statecraft from time immemorial. Kautilya’s Arthashastra says, ‘From the strength of the treasury the army is born. …men without wealth do not attain their objectives even after hundreds of trials… Only through wealth can material gains be acquired, as elephants (wild) can be captured only by elephants (tamed)… A state with depleted resources, even if acquired, becomes only a liability.’4 Hence, economic policies and performance do have strategic consequences.5 In the modern era, the idea that strong economic performance is the foundation of power was argued most persuasively by historian Paul Kennedy. ‘Victory (in war),’ Kennedy claimed, ‘has repeatedly gone to the side with more flourishing productive base.’6 **Drawing attention to the interrelationships between economic wealth, technological innovation**, and the ability of states to efficiently mobilize economic and technological resources for power projection and national defence, Kennedy argued that nations that were able to better combine military and economic strength scored over others. ‘The fact remains,’ Kennedy argued, ‘that all of the **major shifts in the world’s military-power balance have followed alterations in the productive balances**; and further, that the rising and falling of the various empires and states in the international system has been confirmed by the outcomes of the major **Great Power wars**, where victory has always gone to the side with the greatest material resources

**1NC---DA**

Jurisprudence DA---

**The aff’s disruption of antitrust distorts the principles that guide judicial decision-making and upsets developing coherence**

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John O. McGinnis and Andrew M. Meerkins, "Dworkinian Antitrust," Iowa Law Review, Volume 102, Issue 1, November 2016, https://ilr.law.uiowa.edu/print/volume-102-issue-1/dworkinian-antitrust/

VIII. Conclusion

Antitrust law is written in such **broad term** that the **language alone** **does not appear to determine outcomes**. Yet it would **not be fair** to describe antitrust jurisprudence today as reflecting **broad judicial discretion** to make policy judgments to fill in the interstices of the law. Thus, legal positivism does not provide a very good description of antitrust jurisprudence.

Today, antitrust reflects a **consistent focus** on a **single principle**, and that principle is realized in individual cases by operation of a series of subprinciples **derived from microeconomics**. Thus, a better description of antitrust is found in Dworkin’s jurisprudence. Dworkinian integrity also explains unusual features, like antitrust law’s relative **disregard of precedent** and judicial reliance on Department of Justice guidance to inform analysis.

Besides offering a good explanation of antitrust, Dworkinian jurisprudence turns out to be a relatively attractive one for the subject. Unlike other areas where a Dworkinian jurisprudence has been pushed, the **principle at issue** here is one that **reflects consensus** in the community and is **capable of practical application**. It may seem ironic given Dworkin’s political leanings that a subject area so greatly influenced by classical economics provides perhaps the best example of his legal philosophy in action. But it is not surprising. **Economics** provides a series of principles for achieving this goal that **command consensus** in the community and can provide a **normative basis** for preferring efficiency. **Antitrust shows that judges can be better trusted with more than a legislative text** **when they have other, objective sources of discipline.**

**Successful and coherent judicial piloting of antitrust spills over to other areas of governance---specifically, judicial review of cost-benefit analyses (CBAs)**

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John O. McGinnis and Andrew M. Meerkins, "Dworkinian Antitrust," Iowa Law Review, Volume 102, Issue 1, November 2016, https://ilr.law.uiowa.edu/print/volume-102-issue-1/dworkinian-antitrust/

VII. Integrity’s Province

**Antitrust’s** **increasing coherence** under the **stewardship of the courts** could conceivably **lead to calls for increased judicial piloting** of other substantive areas of the law. But judges will rarely face the Dworkinian-style restraints on discretion that they do in antitrust law. Thus, in this Part, we briefly outline and generalize the factors that have made a Dworkinian approach attractive in antitrust law. This Part concludes with the tentative hypothesis that **other areas relying on microeconomic principles** are the **most likely candidates** for Dworkinian jurisprudence, and that **judicial review of administrative agency cost-benefit analyses may be one promising area**. Integrity is plausible jurisprudence not within the entire empire of law, but only in a few small areas.

A. Requirements

The first prerequisite for **appropriate** and **successful judicial policymaking** is the presence of a **single guiding principle** or purpose of the law. Barring that, multiple goals that are almost universally consistent could be suitable as well. This possibility helps to explain why antitrust remains an acceptable subject for **integrity jurisprudence**, despite the lingering academic debate about whether the law should maximize consumer surplus or total surplus. In almost all cases, a judge could promote both goals with the same decision.

Consistency of principle, however, is not enough to curtail judicial discretion. Judges are entrusted with antitrust law not just because of the **exclusivity of the consumer-welfare principle**, but also because of the **ubiquity of economic analysis** to reach the goal. These economic subprinciples are capable of **progressive reticulation**. They are useful to judges in deciding the specific case before them, because they provide a **toolbox of methods** that can **predict the consumer welfare consequences** of the agreement or practice before the court. As in antitrust, the applicable subprinciples should derive from an **independent**, relative **objective** **discipline**, like **microeconomics**. Independence denies judges the ability to manipulate the principles to reach a preferred outcome. Moreover, the objective standing of the subprinciples seems crucial, insofar as they must be continually tested and revised to reflect the most current data and reality. Thus, integrity ultimately requires **ascertainable** and **consistent guiding principles** and accompanying subprinciples capable of reliably and consistently resolving live cases.

B. Areas Likely Suitable for Integrity

Given the requirements of singular or consistent guiding principle and independently established and practically useful subprinciples, we next consider which types of substantive law are the most fruitful candidates for increased judicial caretaking under an integrity regime. Our purpose here is modest, and we do not seek to definitively establish or defend any specific substantive areas of the law. Rather, we identify a few of the likely characteristics of the type of law suitable for our integrity jurisprudence, and conclude with a possible suggestion that could warrant further exploration.

The first place to turn for a suitable candidate is the **underlying language** from **which the law arises**, be it statute, regulation, or constitution. Recall that the antitrust laws are remarkable for their brevity, and are much less detailed than other statutes or regulations. This sort of abstract language is likely a prerequisite for Dworkinian jurisprudence. In the presence of a detailed regulatory or statutory scheme, there is far less room for doubt on what Congress or the promulgating administrative agency meant to accomplish. A judge dealing with a concrete scheme is more likely to find herself guided to the answer by the formal text itself, and is less likely to be forced to venture beyond it except in hard cases. Moreover, even when faced with difficult questions, she is likely to have a wealth of traditional legal materials to help guide her analysis. Thus, there is little need for the Dworkinian jurisprudence outlined above.

But abstract language alone does not necessarily make judicial shaping of the law desirable. First, the presence of abstract language does not necessarily tell us whether an **underlying guiding principle** or general aim of the law **exists**. A judge faced with an abstract provision must therefore **analyze the law** to ensure that the **underlying principle** or principles are **ascertainable and consistent**. An abstract provision with inconsistent guiding principles is **inappropriate for integrity**, as we have seen from antitrust’s troubled past. And even where the underlying principle or purpose of the law is clear, if there are only indeterminate analytical tools or subprinciples to guide analysis, the judge remains unconstrained. Thus, Dworkinian jurisprudence is only likely to be appropriate if the guiding principle of an abstract provision is **readily ascertainable**, and there are **formal subprinciples** to **guide judicial decision-making.**

In light of our criteria, we suspect that those areas of the law that rely on **economic analysis** are the **most likely candidates** for fruitful integrity jurisprudence. It is not immediately apparent which other set of subprinciples could exhibit the independence and objective bona fides necessary for meaningful constraints. Economic analysis alone is insufficient, however, if there is no agreement on the aims. For example, **judicial review of agency cost-benefit analysis** conducted in promulgating regulations is an area likely to **feature economic analysis prominently**. Yet if a reviewing court were forced to make distributional decisions—to decide which group should receive a benefit or cost—then it would be acting in the same way as earlier antitrust courts. Only if the structure of the law ignored distributional outcomes could courts then **improve** the direction of the law by **employing economics** to **shape regulations** while being meaningfully constrained and not impinging on the province of the legislature.

**Lack of judicial review creates a moral hazard for faulty and manipulated CBAs---opens the floodgates to widespread deregulation**

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Rachel Augustine Potter, "How the Trump administration can use benefit cost analysis to justify deregulation," Brookings, 8-1-2017, https://www.brookings.edu/research/how-the-trump-administration-can-use-benefit-cost-analysis-to-justify-deregulation/

The Trump administration recently released its regulatory blueprint for the next several months. Unsurprisingly, the plan centers on the administration’s **deregulatory agenda**. Benefit-cost analysis (**BCA**) will **inevitably play an important role** in this process.[1] This is because, as required under Executive Order 12,866, agencies will have to show quantitatively that the benefits of repeal justify the costs.

Many of the rules the Trump administration will be targeting were put into place—and justified **through BCA**—just a few years ago during the Obama administration. To repeal them, the very same agencies (and often even the same personnel) that put the rules in place will have to use the same **analytical techniques** to demonstrate that these rules are no longer warranted

One might reasonably think that having gone through this analytical process the first time would have created a safeguard against removing these rules. This post explains why **that’s not the case.**

Quantitatively Justifying Deregulation

Because it is only required for a subset of the most important rules,[2] BCA **does not** constrain all regulations. For those rules that do require analysis, agencies looking to pare back existing regulations will need to conduct BCA de novo. There are at least three avenues by which an agency’s **new BCA** could come to the conclusion that **deregulation is justified**.

First, agencies can choose to rely on **different data sources** to show that an existing rule is no longer quantitatively justified. For regulations that have been in effect for a while, agencies may, for instance, be able to use new data to show that expected benefits never materialized.

Second, agencies may choose less costly or **less intrusive regulatory approaches**. For example, an agency might propose to substitute an information disclosure provision for a regulatory mandate, which still accomplishes the same policy goal. Reducing the cost term in that way makes it relatively straightforward for agencies to demonstrate the value of a new approach.

Third, BCA is built upon a series of assumptions about how the world works, and agencies may rely on **new** and **different assumptions** that yield different conclusions. Some assumptions are specific to particular rules, and agencies revisiting old rules may choose to rely on new assumptions that were not used in previous BCAs. The Trump administration might also choose to alter across-the-board assumptions that apply to all of an agency’s rules or to all agencies in the executive branch.

Where Politics Comes Into Play

Each of these approaches (or some combination of the three) can be used to **justify deregulation through BCA**. In some cases, the deregulatory changes that occur will streamline existing regulatory burdens. Such rollbacks might happen under any administration, regardless of ideology. For instance, the Obama administration—which pursued a very different regulatory vision from Trump’s—pushed agencies to look back at their regulations and remove any that were outdated or ineffective. Trump, however, envisions deregulatory changes on a broader scale. And just as past administrations have done, the new administration can **stack the analytical deck** in ways that favor a particular outcome—in this case, deregulation.

The Trump administration has already made one **broad analytical change** that effectively lowers the bar for agencies to roll back climate-related regulations by changing how agencies calculate the benefits of CO2 emission reductions. The Obama administration established administration-wide estimates of the “social cost of carbon,” which agencies were to include in their analyses. These estimates were determined via an **interagency review process**, which was influenced by two key considerations. First, the estimates included the global benefits (i.e., the benefits to the rest of the world) of emissions reductions achieved within the U.S. Second, they relied on a lower discount rate—the rate at which agencies calculate the present value of future actions—than used for other environmental emissions. The Trump administration’s withdrawal of the carbon calculation allows agencies to revert to assessing just the domestic benefits of their climate regulations, using the same discount rates typically used for other (non-climate) regulations. The net effect is that climate regulations, which have near-term costs and long-term benefits, will yield lower estimated net benefits.

Other assumptions could potentially be **changed to favor deregulation**. For instance, agencies rely on estimates of the Value of a Statistical Life (VSL) to calculate the benefits of regulations that result in reduced mortality. Each agency has its own VSL calculation, which they can adjust to reflect societal changes. Trump’s agencies could conceivably adjust VSLs downward, making regulations **appear less beneficial** than they might otherwise. Such changes have been politically controversial before: the Environmental Protection Agency was accused of biasing the VSL downward during the Bush years and biasing it upward during the Obama years.

Finally, agencies may **face pressure** from the administration to **deemphasize regulatory benefits** when conducting BCA. As critics have noted (see here and here), Trump’s “2-for-1” executive order, which requires agencies to repeal two regulations for every new one they enact, references regulatory costs 18 times but omits any mention of regulatory benefits.

In general, costs are easier to quantify than benefits, since it can be difficult to put monetary values on things like human dignity and equity. While it is not unreasonable for agencies to discuss such benefits qualitatively—and is even envisioned in BCA guidelines—doing so may **open the door** to **manipulation or misuse**. If one side of the ledger (costs) is tangible and the other (benefits) is not, determining whether the former exceeds the latter is inevitably a judgment call. Consider, for example, a rule that is projected to cost $250 million each year for the next 10 years. On the benefits side of the ledger, the agency only partially quantifies the rule’s benefits at, say, $100 million annually and then indicates that the rule will enhance privacy for the affected population, but provides no monetary value of that benefit. Overseen by an office that is headed by a deregulation-focused Trump appointee and under **considerable political pressure** to deregulate, an agency can **easily make the case** that the benefits of privacy do not justify the costs of the rule.

Regulatory Analysis Is Still Valuable

BCA is not immune to political influence, but the **baby should not be thrown out with the bath water**. Just because BCA can be manipulated doesn’t mean it isn’t valuable. Regulation invariably creates societal winners and losers; conducting regulatory analysis forces an agency to be **more transparent** regarding its assumptions. In other words, the practice provides a departure point for an informed discussion among experts and stakeholders.

Nonetheless, to the extent that agencies do inappropriately manipulate BCA in their pursuit of regulatory or deregulatory goals, **there is an additional backstop. Courts** have recently turned a **more critical eye** towards agency regulatory analyses that are **insufficiently rigorous**.[3] **Given this trend** and the Obama-appointee-heavy makeup of the DC Circuit, agencies are **not guaranteed a free pass** on their analyses. **Using the courts as a way to check the quality of BCA** is imperfect, since it requires vigilance and resources, but it **may well be the stage upon which future battles over deregulation will be fought.**

**Unchecked deregulation collapses society---enforceable rules are a cornerstone of effective civilization**

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Steve Cohen, "The Dangers of Deregulation," State of the Planet, 12-2-2019, https://news.climate.columbia.edu/2019/12/02/the-dangers-of-deregulation/

From unsafe Boeing 737 Max jets to exploding chemical plants in Houston, we are seeing some **visible** and **dramatic impacts** of decades of **deregulation**. This trend did not start under President Donald Trump but has **picked up momentum** and **increased legitimacy** since his inauguration. Regulation is simply another word for policing. Cops inspect behavior for illegality and when they find it, turn it over to courts for adjudication. Rules and their enforcement are a **requirement of civilization.** Without it, we must all protect ourselves **in a war of all against all**. Only anarchists oppose all rules and it is difficult to find any pure anarchists. The issue of deregulation is not one of freedom versus tyranny, but simply how many rules we need and what behaviors we need protection from. A secondary issue relates to the method and style of regulation. Opponents of New York City’s police practice of stop, question and frisk did not favor deregulation of the rules of weapon possession, they objected to the method the NYPD used to enforce those rules.

In a world of **growing technological complexity**, the average person is in no position to understand, evaluate and prevent the **potential dangers** they might face. About 1 percent of us work on farms and all of us eat food produced by people we don’t know working for companies that are organized to achieve financial profit. We don’t really know much about the food we are eating. The capitalist form of organization provides great incentives for efficiency and creativity as companies seek financial gain. A food company that poisons its customers will find little market advantage in that behavior, and so you might argue that self-regulation is all that is needed, and government policing is unneeded. But we have a Food and Drug Administration and rules on food safety because we worry that the drive for short-term profit might encourage a company to **seek short-cuts** around food safety requirements. We believe that defining poisoning customers as criminal behavior provides an additional disincentive to take food safety short-cuts beyond the long-term self-interest of a food company. Remove the rule and threat of punishment and the **probability** of more poisoned consumers **increases**.

The idea that all regulation inhibits capitalism and that the freer the market the better is part of the ideological perversion of the idea of regulation. The opposite view that all regulation is good and only the state is capable of protecting us from harm is an equally ideological perversion of the idea of regulation. We need rules to ensure that the **game is fair** and that the players and bystanders are **protected** from the **negative impacts of competition**. But it is possible to over-regulate and under-regulate. Regulation can stifle production and creativity, but deregulation can harm us and kill us. Regulation, like policing, is necessary but not self-justifying. I accept the idea that risk is necessary for reward. But I want to calculate the risk and quantify the reward. In the case of **highly complex technologies** like jet planes and chemical plants, an analysis of **risk and reward** requires scientific **observation, analysis**, projection and debate. That can’t be done when **anti-regulatory ideologues** are blindly moving to dismantle science, **rules and enforcement**.

Deregulation **by definition** leads to **increased danger**. In place of deregulation, I would like to see more effective and scientifically sophisticated rules, enforced with humility and greater government-industry communication. I’d like to reduce the role of lobbyists and ensure that when self-policing is permitted, it always be subject to random and unannounced inspection.

What we have instead in Washington is **actually worse** than pure deregulation, but an effort to **delegitimize the idea of government regulation** of business. The danger of this approach is the same as taking the New York Police Department off the streets of New York City. It’s an invitation to **lawlessness and dangerous behavior**. Most of us don’t live on acres of land in the wild west, but in cities, whereas Paul Simon once wrote, “one man’s ceiling is another man’s floor.” Our actions almost inevitably impact others, and the behavior of others affects us.

Of course, rules, crime and punishment are not the only methods for encouraging socially responsible behavior. Positive role models, economic incentives, moral suasion, education and technical assistance can have equally positive results. But they require a foundation of law and correct behavior. Socially responsible behavior needs to be **defined by law**. Reducing **greenhouse gasses** **is difficult** to achieve if these emissions are **not defined as pollutants**. Once they are defined as pollutants, reductions can be achieved through tax incentives, technical assistance, or direct grants-in-aid. They can also be achieved through command-and-control regulation. The issue for policymakers should be: What would be more effective, incentives or disincentives? Or should there be a mix of both? Regulated parties are too often defined as criminals that have not yet been caught. That approach makes little sense if we want to achieve the benefits of production while minimizing the costs.

Two recent examples of under-regulation illustrate the danger of deregulation: The regulation of the **Boeing 737 Max** jet plane and the **explosion of chemical plants** in Texas. There are sadly many other examples we could examine.

The regulatory failure of the U.S. federal government and Boeing over the 737 Max is obvious. Due in part to budget cuts and in part to anti-regulatory ideology, the Federal Aviation Administration (FAA) delegated some of the regulatory process to Boeing which was in a hurry to bring its new plane to market. David Gelles and Natalie Kitroeff summarized the findings of a federal task force probing this regulatory process in the New York Times this past October. According to their piece:

“The Federal Aviation Administration relied heavily on Boeing employees to vouch for the safety of the Max and lacked the ability to effectively analyze much of what Boeing did share about the new plane, according to the report by a multiagency task force. The system of delegation is now being scrutinized by lawmakers in the wake of the tragedies. Boeing employees who worked on behalf of the F.A.A. faced “undue pressures” at times during the plane’s development because of “conflicting priorities,” according to the report.”

To Boeing senior management, regulation was just a **little check-off process** on the way to the market. The FAA has been **hollowed out of technical capacity** by decades of **anti-regulatory ideology** which was ineffectively countered by eight years of the Obama presidency. Once the Tea Party took over the budget process, the Obama White House was never able to restore capacity to regulatory agencies. The Environmental Protection Agency lost over 2,000 staff during the Obama years. The FAA did not have the ability to understand and assess the safety of the jet’s technology. Instead of preventing death and destruction, it took two tragic crashes to ground the plane and begin the assessment that should have taken place before the plane was allowed to fly.

And then we have last week’s **massive fire** and **explosion** at a **chemical plant** in Port Neches, Texas. The danger of additional explosions and toxic emissions forced the temporary evacuation of thousands of nearby residents and was **not an** **isolated or rare occurrence**. According to Merrit Kennedy of NPR:

“The explosion is the latest in a string of industrial incidents in the region. The Houston area saw three fires at chemical facilities in a month-long span in March and April — including an explosion at the KMCO plant in Crosby that killed a worker, as Houston Public Media’s Florian Martin reported. In July, more than 30 people were treated for minor injuries after a fire at an Exxon Mobil refinery in Baytown… A search of Texas Commission on Environmental Quality records shows that this year, TPC Group [owner of the plant] has been ordered to pay more than $378,000 in fines over multiple environmental violations at two facilities, in Port Neches and in Houston.”

Texas prides itself on its free market-focused, lightly policed approach to business policy, and so along with jobs and growth, they get blown out windows and toxic fumes. A well-managed factory controls its emissions and has enough safety protocols in place to avoid blowing up. But the people who work at the plant that might want to spend a little more time and money to make the place safer and cleaner are delegitimized by the absence of effective government oversight. The only good news is that the first explosion was at 1 AM and not 1 PM or the impact on workers and residents could well have been greater.

The **danger of deregulation** is that without **adequate policing** of **complex technical processes**, the public is left to the **mercy of the market**. Most businesses are well run and pay attention to safety and emissions. But clearly, some are poorly run and place short-run profits **over** health and safety. Regulation reinforces correct behavior and justifies investment in safety. Deregulation **reinforces a Wild West mindset** that is **inappropriate** for the crowded planet that we all live on.

**Adv 1**

**US protectionism is high, inevitable, and thumps.**

---Biden will continue Trump’s protectionist policies (he just conducted an 8-month review of trade policy and concluded more tariffs are good) which triggers protectionist tariffs from China and every other nation

---its part of a sea change in US policy which sees the international as zero sum and guarantees the US will continue to engage in protectionist measures

---our evidence is structural and predictive – prefer it to neg evidence that is snapshot or about previous policies

**Zakaria 10-7** [Fareed Zakaria writes a foreign affairs column for The Post. He is also the host of CNN’s Fareed Zakaria GPS and a contributing editor for the Atlantic, “Opinion: Candidate Biden was right on trade. President Biden is wrong.”, October 7, 2021, https://www.washingtonpost.com/opinions/2021/10/07/biden-is-wrong-on-trade-with-china/] IanM

After an **eight-month review** of the **U**nited **S**tates’ **trade policies** toward China, the **Biden** administration has **concluded** that Donald **Trump** was **right** and Joe Biden was wrong. On the campaign trail, Biden relentlessly attacked Trump’s tariffs on Chinese goods, [calling them](https://www.cnbc.com/2020/09/08/bidens-hands-may-be-tied-on-trumps-china-tariffs-trade-experts-say-.html) “disastrous.” Now, he has adopted those same “disastrous” policies.

**But** candidate Biden was right: **Trump’s tariffs did not work**. China’s behavior did not change, high-wage jobs did not come back, and while the U.S. deficit with China decreased, this caused the overall U.S. [trade deficit](https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/) to go up. **Beijing responded in kind**, **slapping its own tariffs on American goods**. One **2020 study found** that “approximately **100 percent” of the costs** of the U.S. tariffs against Chinese goods were **paid for by American consumers** and **businesses**. A **2021 study** **found** that the **tariffs** **cost** the U.S. economy up to **245,000 jobs.**

**Trade policy** in Washington has **become** an **encrusted**[**bipartisan ideology**](https://www.theatlantic.com/international/archive/2021/10/perils-washingtons-china-consensus/620294/), **driven by** a set of **unquestioned assumptions**. But as Adam S. Posen, president of the Peterson Institute for International Economics, points out in a brilliant [Foreign Affairs essay](https://www.foreignaffairs.com/articles/united-states/2021-04-20/america-price-nostalgia), every one of these assumptions is wrong. We have embraced the dogma that over the past two decades, America opened up its economy to the world and that American workers suffered as a result. But the facts show the opposite. Posen writes, “[The United States] has increasingly insulated the economy from foreign competition, while the rest of the world has continued to open up and integrate.” He adds, “The country suffers from greater economic inequality and political extremism than most other high-income democracies — countries that have generally increased their global economic exposure.”

Much of **the impetus for protectionism in general and toward China** in particular has **come from claims** that **trade** with China was **responsible** for about **2 million** U.S. manufacturing **jobs lost** — the “China shock.” That sounds like a huge number until you put it into context. The number is for the period 2000 to 2015, so the average number of jobs lost each year was around 130,000.

How many jobs do American workers lose in a typical year through the normal churning of the U.S. economy? Sixty million. Of those, a third are voluntary and a third can be attributed to causes not related to foreign trade, such as an employer closing or relocating — leaving a third, 20 million, caused by external shocks. “In other words,” Posen writes, “for each manufacturing job lost to Chinese competition, there were roughly 150 jobs lost to similar-feeling shocks in other industries.”

Posen points out that only about 16 percent of non-college-educated workers are employed in the manufacturing sector. And much of the [decline](https://conexus.cberdata.org/files/MfgReality.pdf) in manufacturing jobs, if not most of it, can be attributed to changes in technology rather than trade. The United States’ manufacturing output [keeps rising](https://data.worldbank.org/indicator/NV.IND.MANF.CD?locations=US), even as the number of workers it takes to produce those products has [fallen](https://fred.stlouisfed.org/series/MANEMP) over time.

This is not just a U.S. trend. Posen’s institute produced a [chart](https://www.piie.com/research/piie-charts/despite-germanys-trade-surplus-manufacturing-employment-share-total-employment) tracking manufacturing employment in Ohio over the past three decades and compared it to Germany’s North Rhine-Westphalia (a similarly important manufacturing region). Unlike the United States, Germany has a [trade surplus](https://tradingeconomics.com/germany/balance-of-trade). It provides much [governmental assistance](https://www.dw.com/en/germany-to-pump-additional-3billion-in-ailing-automotive-industry/a-55641102) for manufacturing, which is seen as the heart of the German economy. Yet the job losses are even more pronounced in Germany. Even China has overall been [losing manufacturing jobs](https://www.piie.com/blogs/china-economic-watch/chinas-manufacturing-job-losses-are-not-what-they-seem) as its economy branches into software and services.

It is also worth noting that manufacturing jobs in the United States are mostly held by workers who are [male and White](https://www.foreignaffairs.com/articles/united-states/2021-04-20/america-price-nostalgia). A policy that obsessively focuses on them devalues the many good jobs in other sectors, which have more women and minorities in them. These groups, being poorer, are also disproportionately affected by the higher cost of tariffed goods. More protectionism means [more economic pain](https://www.washingtonpost.com/us-policy/2019/06/07/repeat-after-me-tariffs-are-bad-economy/?itid=lk_inline_manual_14) for the vast majority of middle-class workers.

Posen points out that the chief reason for many of the United States’ economic inequities and discontents is not open trade but stingy domestic spending. He argues that all workers would gain from a more secure safety net, one in which benefits such as health care are “portable,” meaning not tied to employment. That is where misguided market economics have distorted public policy. More and better benefits — of the kind President Biden is proposing — would help displaced workers, reduce inequality and improve job readiness.

**Writing** all **this** sometimes **feels pointless**. **Protectionism** has **become** one of those **zombie ideas** that **continue to move forward despite all the evidence showing them to be wrong.** **Most worryingly**, it is part of a **sea change** in the **U**nited **S**tates’ **basic outlook**. From an **optimistic** and confident **view** that we can **thrive in a world** in which **others also do well** — a view borne out by the data — **we are now retreating to a cold, curdled view of international life**, one that is **dark** and **zero-sum**, in which we search for villains to blame for our problems. It’s a world in which **we try to gain** some **narrow benefit** for ourselves **by cheating everyone else.** **In other words, it is the** Donald **Trump way.**

**OR it’s resilient.**

**Gros 21** – member of the board and a distinguished fellow at the Centre for European Policy Studies

Daniel Gros, "The Great Lockdown and Global Trade," Project Syndicate, 6-8-2021, https://www.project-syndicate.org/commentary/how-globalization-and-trade-survived-the-pandemic-by-daniel-gros-2021-06

BRUSSELS – **Trade is recovering robustly** alongside the upticks in growth in major economies. This good news deserves more attention. Less than 12 months ago, many observers were predicting an end to globalization. The pandemic disrupted supply chains, and governments, suddenly confronted with the resulting vulnerabilities and dependencies, encouraged “reshoring” production of critical goods.

Today, the **outlook is much brighter**. There is **little indication** of a sustained movement away from global supply chains. And many governments have realized that trade is **more of an opportunity** **than a threat** to national sovereignty. As a result, the World Trade expects the volume of **global trade to increase** by **8%** in 2021, more than offsetting last year’s 5.3% decline.

True, foreign direct investment (FDI) still lags, having plummeted 42% in 2020. Europe actually recorded a negative flow. But the pandemic’s differential impact on trade and investment is not surprising. Transporting goods around the world requires little physical human interaction. Giant cranes, often remotely operated, load and unload containers, and supertankers pump oil ashore.

In contrast, acquiring a firm or establishing a new production facility in another country requires travel to meet potential partners, and in many cases close contact with foreign governments to obtain permits. Pandemic-induced border closures and travel restrictions obviously made this much more difficult.

But FDI is notoriously volatile, often plunging one year and recovering the next, so it could still bounce back strongly in 2021. In fact, the OECD has already detected signs of a recovery.

Moreover, global supply chains have proved to be **less vulnerable** than many had feared. The notion of a “supply chain” conjures up an image of a fragile arrangement, with each enterprise depending on inputs from the adjacent link. And a chain is only as strong as its weakest link.

The global trading system’s vulnerability to choke points seemed to be driven home in March, when a single large freighter blocked the Suez Canal, after sandstorms restricted visibility and transformed the huge stack of containers on board into sails. But this incident, which was resolved relatively quickly, is not representative of how global trade works.

It is more accurate to talk of interrelated networks of suppliers than supply chains. Most enterprises have more than one supplier of key components, and multinational companies with operations in many countries source supplies from many other countries. The pandemic has **reinforced multi-sourcing**, rather than triggering a retrenchment from the division of labor.

Yes, governments almost everywhere have interfered with trade during the pandemic to address acute shortages of key products, such as personal protective equipment in 2020 and COVID-19 vaccines during the first few months of 2021. But both of these products, while vital in the context of the pandemic, play only a **marginal role** in the wider economy. The rich countries could vaccinate the entire world for less than a dollar a week from each citizen.

**The main danger** is that governments, fearing similar dependence on foreign suppliers for many other key products, **introduce protectionist measures**. Prompted by the EU’s concern that such dependence could leave the bloc vulnerable to political pressures from hostile governments, the European Commission has recently completed a fascinating study of strategic dependencies and capacities.

The Commission examined more than 5,000 products and found only 137 in the most sensitive sectors, accounting for about 6% of all EU imports by value, for which the EU is highly dependent on imports from outside the bloc. For 34 of these products, constituting only 0.6% of all imports, the EU could be more vulnerable, owing to the low potential for further import diversification or substitution through EU production.

In other words, for the overwhelming majority of products, large economies like the EU have a sufficiently diversified supply base to make them independent of any single supplier. And broad protectionist measures like tariffs or quotas would have little impact on the few goods for which only a single source may exist.

Moreover, most of the 137 sensitive products that the Commission identified are raw materials and related commodities that are easy to store. It would thus be relatively straightforward for the EU to build up strategic stockpiles of those goods.

In the end, governments **do not** appear to have **resorted to protectionism** in response to the COVID-19 crisis. Although precise data on new trade barriers erected last year are not yet available, the **strong expansion of trade** in 2021 implies that the use of such measures **must have been limited.**

In fact, some governments have been **eager** to create **more trade opportunities** to help foster the recovery. A group of 15 Asia-Pacific countries, accounting for 30% of the global economy, has signed the Regional Comprehensive Economic Partnership, a new free-trade agreement. Meanwhile, the EU has concluded two important pacts: a so-called Comprehensive Agreement on Investment with China and a free-trade deal with Mercosur bloc in Latin America. The ratification of both agreements is in doubt, but not because of concerns about the economy.

What emerges overall is that global supply chains have **weathered the pandemic intact**, and the deep recession has **not unleashed** a **wave of** **protectionism**. **That is good for global trade**, and probably for FDI, too, and suggests that predictions of globalization’s demise were premature.

**There’s no internal link to protectionism---export cartels can theoretically cause trade barriers, but no empirical evidence exists**

**Martyniszyn 12** (Dr. Marek, Senior Lecturer in Law at Queen’s University Belfast, PhD, University College Dublin, Export Cartels: Is it Legal to Target Your Neighbour?, Journal of International Economic Law, 3-29, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>, y2k)

It is acknowledged in the literature that **empirical data** on export **cartels** is **lacking**.16 This state of affairs seriously handicaps attempts to **analyze** this issue. It may well be that the greatest significance of export cartels, as seen through the lens of free trade, is symbolic. The principles underlying trade liberalization have been the antithesis of mercantilism, which is characterized by beggar-thy-neighbour policies. The fact of tolerance or even encouragement of **export cartels** may be seen, as Sweeney puts it, as a form of neo-mercantilism17 and thus contrary to the efforts of trade liberalisation. **At the same time**, Sokol rightly cautions that due to the **lack of empirical data** solutions to the issue of **export cartels** may be **too reliant on theory** with all the risks connected with the acceptance of various **assumptions**, which may be **misguided**.

**Trade doesn’t solve war – latest studies.**

**van de Haar 20** [Edwin van de Haar, formerly a visiting fellow and lecturer in political theory at John Tomasi’s Political Theory Project at Brown University, a lecturer in international relations and political economy at the Institute of Political Science at Leiden University, and a lecturer in international relations at the European Studies Program at Ateneo de Manila University, “Free trade does not foster peace,” 2020, *Economic Affairs*, Vol. 40, Issue 2, pp. 281-286, https://doi.org/10.1111/ecaf.12405, EA]

Trade is **unable to foster peace**, because it is **unable to overcome** many **causes of war**. Think about **cultural** and **religious** **differences, geopolitical causes** such as the fight for **natural resources**, including increasingly **rare** raw **materials**, or more **traditional wars between great powers** or their proxies over a border dispute. States may also act against their economic interest for **some** perceived **higher goal** (Coker, 2014). The causes of war are often **multifaceted** and **complex**. Wars happen because people have reasons to fight, in the form of goals and grievances, and possess enough resources and resolve (Ohlson, 2009). Trade relations are **just one factor** in the mix of causes of war, which include such **coincidental** **factors** as chance, luck, or reckless behaviour by individuals who happen to influence public policy. International commerce is **simply not a “perfectly effective antiwar device”** (Suganami, 1996, pp. 153–210). The best one can say is that the protection of trade relations is sometimes one of the factors in the decision not to wage war. Nothing less, nothing more.

To sum up, many of Adam Smith's arguments still stand, and are confirmed or complemented by modern research. There is **no** solid **ground** for the expectation that trade **promotes**, **fosters**, or **leads** **to** **peace**. Generally, international economic interests are **not** the **crucial factors** in decisions over war and peace. **Too many other factors** come into play. To believe that trade fosters peace was folly even hundreds of years ago. To still think so is to believe in fairy tales, to be ~~blinded~~ by the correlates computed by limited yet available datasets, or both.

**Adv 2**

**High food prices solve rural poverty in India – reject other studies, they don’t assume wage adjustment**

**Jacoby**, Agriculture and Rural Development Unit, Development Research Group @ The World Bank, **13**

(Hana, Food Prices, Wages, and Welfare in Rural India, The World Bank Development Research Group Agriculture and Rural Development Team)

Aside from direct income effects for consumers and producers, as in the textbook partial equilibrium analysis (e.g., Singh, Squire, Strauss, 1986, Deaton, 1989), higher agricultural prices, in principle, induce three types of indirect, or general equilibrium, effects concomitant with higher wages: (1) **higher labor income**; (2) **lower capital** (land) income due to higher labor costs; (3) higher prices for nontradables. To account for these channels in a manner that is both theoretically coherent and transparent, I integrate a standard three-sector, specific factors, general equilibrium model of wage determination (Jones, 1971,1975) into an otherwise conventional (first-order) household welfare change calculation.4 I use this generalization of Deaton (1989) to examine the distributional impacts of higher agricultural prices in rural India. Appealing to the widely noted geographical immobility of labor across rural India,5 I apply the specific factors model at the district level, treating each of these administrative units for theoretical purposes as a separate country with its own labor force but with open commodity trade across its borders.6 Thus, I allow that the elasticity of the rural wage with respect to an index of agricultural prices is not a single number for India as a whole, but varies with the structure of the particular (district) labor market. Moreover, under certain assumptions on the technology and preferences, I obtain a readily interpretable closed-form solution for this elasticity as a function of parameters that I can easily calculate from microdata. My empirical analysis shows that nominal wages for manual labor across rural India respond **elastically** to **higher agricultural prices.** In particular, **wages rose faster** in the districts growing relatively more of the crops that experienced comparatively large run-ups in price over the 2004-5 to 2009-10 period. Moreover, **the magnitude** of these wage responses is broadly consistent with a **specific-factors model** in which labor is perfectly mobile across production sectors. Indeed, I also explore a version of the theoretical model in which labor markets are segmented so that workers cannot shift from agriculture to the services or manufacturing sectors. This alternative labor market assumption turns out to have significantly different welfare implications in the Indian context than the unsegmented case. Fortunately, it has different empirical implications as well: Under labor market segmentation, nonagricultural wages (for manual labor) respond to changes in agricultural prices with a **relatively low elasticity**, as intersectoral spillovers are muted, if not nugatory. The evidence, however, is inconsistent with this strong form of segmentation. Existing studies of the relationship between agricultural commodity prices and rural wages are based on aggregate time series data from countries that were effectively autarkic in the main food staple (pre-1980s Bangladesh in Boyce and Ravallion, 1991, and Rashid, 2002; the Philippines in Lasco et al., 2008), thus raising serious endogeneity concerns. A closely related and much larger literature based on micro-data considers the labor market effects of trade liberalization (see Goldberg and Pavcnik, 2007, for a review).7 My estimation strategy follows the “differential exposure approach” employed in studies of the local wage impacts of tariff reform (most recently in Topalova, 2010, McCaig, 2011, and Kovak, 2011). Instead of considering the interaction between changes in industry protection rates and local industry composition (as in these papers), I exploit the huge variation across Indian districts in the crop composition of agricultural production coupled with differences in the magnitude of wholesale price changes across crops. Of course, price changes observed in local domestic markets cannot be treated as exogenous and must be instrumented for. In rural India, the elastic rural wage response to changes in agriculture’s terms of trade has striking distributional implications. Higher food prices, rather than reducing the welfare of the rural poor as indicated by the conventional approach, **which ignores wage impacts**, **would actually benefit both rich and poor alike**, even though the latter are typically not net sellers of food.8

**Rural poverty drives the Naxal rebellion**

**Ismi**, CCPA Monitor’s international affairs correspondent, **13**

(Asad, Maoist Insurgency Spreads to Over 40% of India. Mass Poverty and Delhi’s Embrace of Corporate Neoliberalism Fuels Social Uprising, <http://www.globalresearch.ca/maoist-insurgency-spreads-to-over-40-of-india-mass-poverty-and-delhis-embrace-of-corporate-neoliberalism-fuels-social-uprising/5362276>)

Since then, the insurgency has **spread like wildfire** over 40% of India’s land area, encompassing 20 of the country’s 28 states, including 223 districts (up from 55 in 2003) out of a total of 640. The seven most affected Indian states in terms of fatalities are Chattisgarh, Jharkhand, West Bengal, Maharashtra, Orissa, Bihar, and Andhra Pradesh, in that order. **These regions comprise the “Red Corridor.”** **About 10,000 people have been killed in the expanding civil war since 1980.** The Maoists wield about 20,000 armed fighters and another 50,000 supporters. The Indian government complains that the insurgency has crippled economic activity in Central and Eastern India. The long-term objective of the Maoists is the armed overthrow of the Indian state and the creation of a socialist-communist government. The Maoists term this a “democratic revolution, which would remain directed against imperialism, feudalism, and comprador bureaucratic capitalism.” The insurgents do not consider the Indian electoral system and governments to be democratic, but rather tools that benefit the landlord and capitalist classes. The insurgency stems from the Indian government’s **turn to neoliberal capitalism** that began in 1991 and which has massively **increased poverty and inequality** in the country, especially **to the detriment of farmers** and Adivasis (Indigenous tribal Indians). At the same time, this economic strategy has enriched a small élite such as the Tata, Ambani, and Jindal families, which is why India is depicted by the Western mainstream press as an economic superpower, the poster child of globalization and successful capitalism. Seven hundred and fifty million Indians, **about 75% of the country’s population**, live in poverty while the top 5% of Indian families hold 38% of total assets. India has the third highest number of billionaires in the world, after the U.S. and China. According to the prominent Indian author and ecologist, Dr. Vandana Shiva, “Four of the top billionaires of the world are now Indian, and I work at the other end of how they became billionaires because I work with the communities whose land is grabbed, city dwellers whose water bills or electricity bills jumped to ten times more. These few billionaires that have emerged, we never had this scale of billionaires — they now control one-third of the Indian economy, which means someone else lost their part of the economy. The Tatas and the Ambanis are using armed might. I think everything that happened in Latin America and Central America with the creation of Contras, the arming of society, dividing of society, is being tried in India.” The Indian capitalist class, in league with Western multinational corporations and governments, is continuing the rapacious legacy of Western colonialism (the British ruled and exploited India for 200 years) by looting the country’s land and mineral resources to increase its wealth, while driving most of the population to destitution. As Dr. Shiva says, the Indian élite is using armed might to maximize its wealth, which is mainly the military might of the Indian state that has been thoroughly corrupted by neoliberalism both at the national and provincial levels

**Warming doesn’t rise to extinction – it’s limited to at most 3 degrees of warming**

**Nordhaus 20** Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. [Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816]//BPS

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is **a real climate debate** bubbling along in **scientific journals**, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But **most pessimists** do not believe that **runaway climate change** or **a hothouse earth** are plausible scenarios, **much less** that **human extinction** is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. **A richer world** will also likely be **more technologically advanced**, which means that energy consumption should be **less carbon-intensive** than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that **global economic growth** over the last decade has **reduced** climate mortality by **a factor of five**, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But **recent forecasts** also suggest that many of **the worst-case climate scenarios** produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also **very unlikely**. There is **still substantial uncertainty** about how sensitive global temperatures will be to higher emissions over the long-term. But **the best estimates** now suggest that the world is on track for **3 degrees of warming** by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

**Adv 3**

**No U.S. modelling---inaction on Big Tech thumps, and the E.U. is the global leader.**

**Alden 21**, "The new US antitrust administration," Concurrences, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

8. **The United States has been AWOL from the antitrust world**. Once the leader, it has donned a see-no-power mantle. US antitrust has lost resonance in the world. The European Union has taken up the slack. It has asserted leadership, launching, for example, international conversations on how to control the power of Big Tech. The US should come to the table. Competition rules for Big Tech platforms are under the consideration of Europe’s Directorate-General for Competition (and other agencies as well). Europe’s Competition Commissioner Vestager has invited the US to help formulate an “EU-US ‘common vision’ on platform competition policy,” [113] a view subsequently formalized in an announcement that that “the EU will propose a new transatlantic dialogue on the responsibility of online platforms, which would set the blueprint for other democracies facing the same challenges.” [114]

**Convergence now proves aff has no impact**

**Lopez-Galdos 17** – Global Competition Counsel at the Computer & Communications Industry Association

Marianela Lopez-Galdos, "Antitrust in 60 Seconds: Is the Consumer Welfare Standard Appropriate?," Disruptive Competition Project, 11-17-2017, https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/

What do other competition systems do?

In the **rest of the world**, including the European Union, most competition systems were put in place in the post-war periods. As such, the pursuit of pluralistic goals guided by public interest concerns through the competition system was a method by which these toddling democracies sought to boost and defend their nascent democratic process. That being said, competition systems have **evolved**, and mature ones have **narrowed the antitrust analysis** to focus on **consumer welfare.**

In this context, it is noteworthy that the UN and OECD have separately concluded that many competition systems **pursue consumer welfare** as the **primary competition goal**. In 1995, UNCTAD concluded that “There has in fact been an **increasing convergence** in the provisions or the **application of competition laws** over the laws two decades. Competition systems in many countries are now placing relatively **greater emphasis** upon the **protection of competition**, as well as upon efficiency and competitiveness criteria, rather than upon **other public interest goals**”.

**2NC**

**Exemption Spillover DA**

**The aff represents the largest substantive antitrust change in decades---that signals to the courts that immunities are no longer intended to be broadly interpreted**

**Tracy 21** – Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

What would the changes mean?

Even if Congress acts on only a couple of **middle-of-the-road** proposals, it could **mark the biggest substantive changes in decades**, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, **“that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,”** said Wayne State University law professor Stephen Calkins.

**That new calculus specifically impacts implied immunity---it’s judicially constructed, ambiguous, and is open to change**

**Lacour 8** – J.D. Candidate, June 2009, St. John's University School of Law

Justin Lacour, "Unclear Repugnancy: Antitrust Immunity in Securities Markets After Credit Suisse Securities (USA) LLC v. Billing," St. John's Law Review, Vol. 82, No. 3, Summer 2008, https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1084&context=lawreview

Introduction

For over a century, American antitrust laws have sought to promote competitive conduct in the market place and to protect consumers from price discrimination, price fixing, and other ill effects of monopolistic behavior.1 The application of antitrust laws to industries subject to federal regulation presents a **difficult issue**, since an activity otherwise prohibited by the antitrust laws may be permitted or even required when Congress has spoken by passing a regulatory statute. 2 A **court** must determine whether a regulatory statute-either **expressly** or **by implication**-repeals the antitrust laws, and whether jurisdiction over the particular conduct lies with the **regulatory agency**, **rather than the court**.3 When Congress has **remained silent**, a court **may determine** that implied immunity exists if maintaining an antitrust action would "**thwart the regulatory scheme** created by Congress." 4 Although both securities regulation and antitrust laws seek to promote efficient markets,5 the SEC, in regulating securities markets, must consider additional issues, such as "the economic health of the investors, the exchanges, and the securities industry," unlike antitrust law, which is concerned solely with competition. 6 The parallel application of antitrust laws and securities regulation could therefore **potentially interfere** with regulatory controls and "could undercut the very objectives the antitrust laws are designed to serve. ' 7 The Securities Act, the Securities Exchange Act, and the Investment Company Act,8 like **most** regulatory statutes, are **silent on the issue** of antitrust jurisdiction, 9 **leaving courts to determine whether implied immunity exists.**'0

While the Supreme Court has stated that the general principles applicable to antitrust immunity are "well established,"11 commentators have opined that "'[tjhe case law of implied immunity is... a **quagmire**.'"12 Courts have **differed greatly** on when implied immunity is necessary. 13 Despite this confusion, courts have developed two distinct approaches, treating implied immunity largely as a question of authority. Most courts have looked at whether the challenged conduct fell under the jurisdiction of the regulatory agency.14 If the challenged practice fell under the agency's jurisdiction, and the agency has exercised its authority over the practice, then a finding of implied immunity may be appropriate. Courts have **differed**, though, as to the **extent** to which the agency must **exercise its authority** over the practice in question before finding implied immunity.1 5 A second approach is to base a finding of implied immunity solely on the presence of a pervasive regulatory scheme. Courts have found implied immunity appropriate when the agency controls every aspect of the industry's conduct, 16 or when "'Congress must be assumed to have foresworn the paradigm of competition'" in creating the regulatory scheme. 17 Implied immunity, however, has rarely been established solely on the presence of pervasive regulation. 18

Steady throughout these differing approaches to implied immunity in the case law is the long-held standard that, for implied immunity to apply, there must be "'a convincing showing of clear repugnancy between the anti-trust laws and the regulatory system.' "19 Most courts have held that a repugnancy exists when the application of both antitrust laws and the regulatory scheme would produce conflicting standards for the regulated industry.20 Gordon v. New York Stock Exchange, Inc.21 provides a clear example of this traditional implied immunity analysis. In Gordon, the SEC had approved a system of fixed commission rates, a practice that would be a per se violation of antitrust laws. Since the practice fell under the SEC's authority and there was a direct conflict between the two laws, the Supreme Court found implied immunity. 22 Other courts have also viewed repugnancy, not in terms of a conflict between two laws, but as a conflict of authority: Application of antitrust laws would conflict with the authority Congress has granted to regulatory agencies. 23

Still, courts have applied even this **seemingly simple rule** in **different ways**. Courts have **differed** as to the effect agency approval or disapproval of the activity has on the question of implied immunity. **Some courts** have been willing to find implied immunity even when the challenged conduct has been disapproved of by **both** antitrust laws and the regulatory agency. 24 **Many courts, however**, have chosen to treat agency disapproval of the challenged practice as **refuting any claim** of implied immunity since, in such cases, there would be no conflict between antitrust laws and the regulatory scheme. 25 In short, the "clear repugnancy" standard appears as muddled as the other areas of implied immunity case law.

**Independently, the aff causes regulators to perceive that antitrust exemptions will be limited in the future, limiting SEC regulatory flexibility**

**Kling 11** – Yale Law School, J.D. 2010, Brown University, A.B. 2007

Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

This Part argues that a broad implied immunity standard predicated on the SEC's jurisdiction over, and active review of, a particular activity is efficient. But whereas in Billing the Court justified its implied immunity analysis by reference to the chilling effects of erroneous antitrust judgments ex post, this Part shifts the focus to ex ante regulatory action by the SEC. It argues that, from an ex ante perspective, the **principal concern** with a **narrower implied immunity doctrine** is that it might **distort** the SEC's **regulatory decisions.** In particular, if the SEC has three regulatory choices- **prohibit** a class of conduct **entirely**, **permit it entirely**, or **adopt a nuanced rule** that permits some forms of the conduct but prohibits others - and if a nuanced approach is optimal but a blanket authorization is preferable to a complete prohibition, then under either a some regulation standard or an affirmative approval standard the SEC **might opt** to permit the conduct **in its entirety** simply in order to **preempt antitrust suits**.167

[[Begin Footnote 167]]

167. Because the SEC did in fact adopt a fairly nuanced approach to the laddering and tying arrangements at issue in Billing, the arguments presented below might seem inapplicable to the facts of the case. But the SEC **presumably expected** that antitrust actions **would be preempted** **given** the **precedents** discussed in Part I. Thus, it might in fact be **precisely** **because** of the Court's **broad implied immunity** doctrine that the SEC was able to **issue finely drawn guidance** with respect to the conduct challenged in Billing.

[[End Footnote 167]]

The SEC can be expected to choose such a **second-best solution** in two situations. First, the SEC might opt for such a rule if it believes that it will **not have time** to study the activity at issue **before** an **antitrust suit is resolved** and that an antitrust court, if left to its own devices, might prohibit too much conduct or impose excessive liability for antitrust violations. Second, the SEC might choose to permit the entire class of conduct if it believes that, even if it were able to adopt a nuanced rule in time, a **court might misapply that rule** and **prohibit conduct** that the SEC would permit or **award excessive damages** for activities that the SEC prohibits. In combination, these two scenarios, which are modeled in the following Sections, suggest that an active review standard is optimal because it enables the SEC to regulate without solicitude for the possibility of erroneous decisions in antitrust cases.168

[[Begin Footnote 168]]

168. In practice, the SEC would not justify its regulatory choices by reference to the possibility of erroneous antitrust decisions. Nevertheless, such concerns might have a **subtle** and even **unacknowledged influence** on the **form of regulation ultimately adopted**.

[[End Footnote 168]]

**Limiting applied immunity shatters the walled garden of securities markets, causing massive upheaval**

**Tyler 21** – Legal analyst for Bloomberg Law

Eleanor Tyler, "ANALYSIS: Securities Markets Face Scrutiny Under Antitrust Bill," Bloomberg Law Analysis, 3-24-2021, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-securities-markets-face-scrutiny-under-antitrust-bill

Under the proposed Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), conduct in **regulated securities** and commodities markets that has **enjoyed a complete pass** from antitrust scrutiny for decades would be **subject to lawsuits** seeking treble damages.

That could be a **bigger shift** **than some are expecting**. While much of the analysis of CALERA to date has focused on its likely impact on technology markets and merger enforcement, the **potential impact** **on** **securities markets is profound**. Financialization has meant that markets regulated by the securities acts have an **outsized impact** on the **overall economy**, and the **impact** of **permitting full antitrust** enforcement in those areas likely **would be sizeable.**

Narrowing the Antitrust Exception

With CALERA (S 225), Sen. Amy Klobuchar (D-Minn.) has proposed sweeping changes to antitrust law. Among CALERA’s provisions are new legal standards that would radically change merger enforcement and reinvigorate enforcement against dominant companies.

But also tucked into CALERA are sections that would all but end a fairly obscure judicial doctrine called “implied immunity.” The doctrine currently disallows antitrust complaints about conduct that is regulated under another complex federal statutory framework. In other words, where Congress is silent on the issue of antitrust law overlapping with another statute, courts have occasionally stepped in to close off areas from antitrust scrutiny.

The defense of “implied immunity” doesn’t come up that often, and it is **mostly successful in securities markets**. Defendants have long argued that applying antitrust law to conduct that is legal under the securities laws infringes on the regulatory authority of the Securities and Exchange Commission and harms financial markets. **Core functions** of the securities market, like participating in exchanges and listing and selling stocks and options, **should only be subject to one set of rules**, they argue.

Right now, if the securities acts apply to conduct related to core securities market functions—and the SEC doesn’t explicitly forbid that conduct—then that conduct can be immune from antitrust claims. CALERA would greatly **narrow** that rule: Instead, **implied immunity** could only attach to conduct that other laws “explicitly require or authorize.” In short, conduct within the vast gray areas of the securities law wouldn’t qualify for implied immunity under CALERA; only conduct that the securities laws “explicitly require or authorize” would.

Furthermore, CALERA says that the antitrust laws “shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments.” That language counters a Supreme Court statement in Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP that a regulatory framework designed to deter anticompetitive harm probably doesn’t warrant the addition of antitrust scrutiny, even if Congress explicitly preserved the application of the antitrust laws to that regulatory framework.

Together, these provisions **mean** that **courts** can’t **second-guess** whether the antitrust laws should apply to conduct in regulated markets, or water down the antitrust laws when applying them to that conduct. Unless the regulator explicitly permits or requires the conduct, market participants can challenge it under the Sherman Act.

What Conduct Is at Risk?

In practice, few antitrust defendants have successfully pleaded implied immunity from the federal antitrust laws in court. Nevertheless, a wide variety of defendants have argued that their conduct should be immune from the antitrust laws.

Cases in which the defense was raised have included not only antitrust claims against financial market conduct, but also complaints about anticompetitive conduct in, patent infringement, horse racing, merging hospitals, and seeking FDA approval for a generic drug.

Most **successful cases** have been in the securities or commodities context. The current test for implied immunity comes from Credit Suisse Securities (USA) LLC v. Billing, a 2007 Supreme Court decision that dismissed claims that underwriters colluded to drive up prices for initial public offerings (**IPOs**). Specifically, the plaintiffs complained about underwriting contracts that required them to buy shares at prearranged escalating prices in the aftermarket in order to get access to an IPO, a practice called “laddering.” Laddering isn’t currently permitted under Regulation M (and was at best disfavored in 2007 when the Court decided Credit Suisse); however, the Supreme Court held that it can only be addressed by the SEC and not by those harmed by inflated share prices under the Sherman Act.

Other financial markets practices shielded under the doctrine have included underwriting contractual provisions prohibiting “flipping” (immediately reselling) of IPO shares, restricting trade in stock options, charging fixed commission rates for stock trades, and restricting trade in mutual funds on the secondary market.

In short, if the **myriad kinds of restrictive conduct** that are **explicitly intended to boost prices** for stocks and derivatives become subject to the antitrust laws, **many practices**, at **all levels** of the financial system, are likely to **come under scrutiny**. That scrutiny could include enforcement actions by federal or state regulators or private actions for treble damages under the Sherman Act.

Narrow Wedge, Big Shift

For **decades**, the markets around the offering and listing of stocks have been **largely a walled garden**, **protected from pruning** by the Sherman Act. There is likely **a lot** that would **interest plaintiffs** in that overgrowth. That’s an issue that investment bankers, brokers, compliance professionals, and lawyers may **need to assess**.

**Antitrust application harms stabilizing regulatory efforts by the SEC, limiting appeal of IPOs**

**Kling 11** – Yale Law School, J.D. 2010, Brown University, A.B. 2007

Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

Second, relative to SEC regulation, antitrust analysis is **comparatively narrow** in scope. Whereas antitrust courts focus **exclusively** on the effect of an activity on **competition**/8 SEC regulation takes into account, **in addition** to competition, the effect of a potential rule on the **volatility** of the **capital markets**, the **accuracy of securities pricing**, **fraudulent practices** by broker- dealers, and the **health of regulated companies**.79 To the extent that these goals might, at times, **conflict** with the **paradigm of unfettered competition**,80 the SEC is in a better position to strike the right balance among them than are antitrust courts.81 In particular, because antitrust courts can be expected to undervalue the non-competition-related benefits of a given activity, they are likely to **prohibit some conduct** that should be permitted. For example, **price stability**, a policy which is **germane to securities regulation**,82 is potentially **in tension** with **traditional antitrust principles**.83 As such, antitrust courts may **impose liability** for **concerted action** **designed to stabilize securities prices** even if such action is **on balance beneficial**.84

**Turns the economy---effective and unilateral SEC regulation is critical**

**Allen**, Associate Professor, Suffolk University Law School, **‘18**

(Hillary, “The SEC as Financial Stability Regulator,” 43 J. Corp. L. 715)

After the financial crisis of 2007-2008 (the “Crisis”), regulators around the world adopted the pursuit of “financial stability” as one of the foremost goals of financial regulation.2 However, the ubiquity of the goal belied a lack of consensus about how regulators should approach financial stability, and that lack of consensus persists today. This Article takes an expansive view of financial stability regulation, arguing that such regulation should seek to prevent disruptions to both financial institutions and markets, if such disruptions would have negative consequences for the broader economy. Because the Securities and Exchange Commission (the “SEC”) has much more experience with the securities markets than other US financial regulators, the SEC is the agency best positioned to **ensure the robustness of those markets**. The SEC can therefore make a significant contribution **as a market-oriented financial stability regulator** – even if other forms of financial stability regulation might be best left to prudential regulators, like the Federal Reserve.

Private participants in the securities markets have neither the **incentives** nor the **ability** to promote **financial stability** (a collective good),3 and so **only a government body** can work to ensure that the securities markets are **robust to shocks**, and minimize the likelihood of shocks occurring in the first place. **If the SEC fails** to take on this role, we **cannot expect any other government agency to fill the lacuna**. While the Financial Stability Oversight Council (“FSOC”) was created to address threats to the stability of the financial system, it is, at its core, a committee that is designed to leverage the expertise of its member agencies rather than performing extensive regulatory functions itself. Other than the SEC, there is no regulatory agency represented on the FSOC that has extensive experience with the securities markets.4 And there are certainly developments in the securities markets that raise financial stability **concerns** – this Article will focus in **particular** on the increasing prevalence of **high frequency trading** (“HFT”) in the equity markets.

HFT is an umbrella term for a variety of different automated trading strategies; their common characteristic is that the computer algorithms that make the trading decisions are designed to hold assets for only a very short period of time. HFT now accounts for **more than half of all trading** in the US equity markets,5 and while the practice certainly affords benefits in terms of reducing the time and cost of executing trades, it also increases the **complexity**, **interconnectedness** and **opacity** of the equities markets.6 Events such as the **“Flash Crash”** in May 2010 have alerted regulators to HFT’s potential to both generate and transmit shocks through the financial system: the potential **threats** that HFT **poses to financial stability** (as well as to **investors** and **capital formation**) will be explored in detail in this Article. Of course, high frequency traders do not trade exclusively in the equity markets (i.e. the secondary trading market for listed stocks): 7 there is an almost limitless list of assets that HFT firms will trade, including a multitude of derivatives instruments. However, this Article will focus on the equity markets.

The SEC is **currently considering** how to **reform its regulation of the equity markets** in light of HFT and other developments, a project that began in earnest with the issuance of a “Concept Release on Equity Market Structure” on January 14, 2010 (the “Concept Release”).8 Although some reforms have been implemented since that time, the project of market structure reform is nowhere near complete. To the extent that the SEC is planning to promulgate further rules addressing HFT and the equity market structure more generally, **such rules can be said to be in the “preproposal period”** (i.e. the time prior to the proposal of any rule in the Federal Register). As Krawiec notes, the preproposal period is “a time period about which little is known, despite its importance to policy outcomes. . . the need to produce a proposed rule that is ready for comment pushes much regulatory work to this early stage of the rule development process.”9 This Article seeks to provide some insight into the preproposal stage of the market structure reform project by considering the testimony, public statements, speeches and press releases that have been disseminated on the subject of HFT by the SEC, its Commissioners, and its staff.10

**No possibility the NCAA decision spills over---the Court upheld the current market theories and even Kavanaugh’s opinion limited analysis to solely the NCAA**

**Nylen and Jr. 21** – antitrust reporter for POLITICO Pro; education reporter for POLITICO Pro

Leah Nylen and Juan Perez Jr., "Supreme Court rules in favor of athletes in NCAA compensation case," POLITICO, 6-21-2021, https://www.politico.com/news/2021/06/21/supreme-court-ncaa-antitrust-ruling-495319

Justice Brett Kavanaugh, in a scathing concurring opinion, **lambasted the NCAA** for its arguments that it was **immune** from **antitrust scrutiny**.

“Nowhere else in America can businesses get away with agreeing not to pay their workers a **fair market rate** on the theory that their product is defined by not paying their workers a fair market rate. And under **ordinary principles of antitrust law**, it is not evident why college sports should be **any different**. The NCAA is not above the law,” Kavanaugh wrote.

In its majority decision, the high court clarified that it was **only ruling** on the NCAA's limits on education-related benefits. But Kavanaugh went further, suggesting that more of the **NCAA's player restrictions** could be struck down.

"The NCAA must supply a **legally valid procompetitive justification** for its remaining compensation rules," Kavanaugh wrote. "As I see it, however, the NCAA may lack such a justification."

For now, though, the immediate consequences of Monday’s decision will fall onto individual colleges and athletic conferences.

“University presidents and conference commissioners will need to play an even larger role because the NCAA’s role is weakened here,” said Amy Perko, CEO of the Knight Commission college sports reform group.

Athlete benefits may expand on a conference-by-conference basis and some universities may start to offer graduate degrees as part of recruiting athletes, she said. The high court's ruling could also expand medical benefits available to players, such as disability insurance, by striking down existing limits on what institutions can pay, Perko said.

B. David Ridpath, an Ohio University sports business professor and past president of the Drake Group higher education think tank, called the court’s decision "another nail in the coffin of a broken system.”

“We are the only country in the world that has a significant portion of **elite athlete development** in the education system," he said. "We cannot hold on to the old system anymore. It’s over."

**Everyone expected the outcome**

**Brockway et al. 21** – Lawyers for Saul Ewing Arnstein & Lehr LLP

Andrea P. Brockway, James Morsch, and Amy L. Piccola, "NCAA v. ALSTON Debrief: After Unanimous Supreme Court Sinks NCAA’s Limit on Educational Benefits for College Athletes, What Lies Ahead?," JD Supra, 6-28-2021, https://www.jdsupra.com/legalnews/ncaa-v-alston-debrief-after-unanimous-1840345/

This week, in **NCAA v. Alston**, the U.S. Supreme Court, in a rare 9-0 decision, held that restrictions imposed upon National Collegiate Athletic Association (“NCAA”) member institutions limiting the educational benefits they can provide to student-athletes violate Section 1 of the Sherman Antitrust Act. Writing for the Court, Justice Gorsuch reviewed in detail the district court’s careful analysis, which had concluded that the NCAA and participating athletic conferences enjoyed no special immunity from the antitrust laws with respect to restrictions on the provision of education benefits. The Court rejected the NCAA’s numerous arguments as to why its decisions as a joint venture should be given deference despite their anticompetitive effect on student-athletes. In a separate concurrence, Justice Kavanaugh suggested that the NCAA should pause and consider before enforcing other compensation-related restrictions and called into question whether the key distinguishing feature of NCAA competition is that the athletes are not paid a salary for their services.

The outcome in Alston is **likely of little surprise** to those who have followed the case[2] or to **antitrust practitioners**. The district court compiled a huge record, rejected many of the plaintiffs’ challenges to NCAA restrictions, and ultimately decided that the plaintiffs had **met their burden** of showing that the multi-party arrangements between the NCAA and the so-called power conferences **unduly restrain competition** in the market for the services of college athletes. The NCAA appealed the district court’s injunction to the Ninth Circuit and lost. The NCAA then petitioned for Supreme Court review arguing, among other things, that Court precedent immunized it from the usual rule of reason analysis applicable to legitimate competitor-organized joint ventures. The Court **rejected that novel argument** and held that because the NCAA and college athletic conferences **clearly possess monopoly power** over the services of top-tier student-athletes in Division I revenue sports, they cannot collectively **fix the price** of educational benefits offered to those student-athletes.

**Trade Adv**

**Concerns about the cartels have existed since the 50s---it’s massively denied and there’s no actual uniqueness**

Dr. Brian **Ikejiaku 21**, Senior Lecturer in Law at Coventry University, PhD from the Research Institute of Law, Politics, & Justice (RILPJ) at Keele University, and Cornelia Dayao, LL.M in International Business Law, “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US”, Utrecht Journal of International and European Law, Volume 36, Issue 1, http://doi.org/10.5334/ujiel.513

It is suggested that **concerns** regarding **the link** between **competition policy** and **trade policy** have been around **since the pre-GATT period**. There have also been attempts to integrate the competition policy with the WTO framework. Nonetheless, studies linking **competition law** and **protectionism** remained **scant**. While the **protectionist tendencies** of EU merger regulation enforcement have been explored empirically, little or **nothing** has been found in the US context. Furthermore, studies that relate **export cartels** to protectionism are mainly based on **theoretical assumptions** given the lack of **empirical data** to establish the **economic effects of export cartels**.

**Trade doesn’t stop wars – causes populism and their studies lack causation.**

**Gonzalez-Vincente ‘20** [Ruben; University Lecturer in Global Political Economy @ Leiden University, PhD in Geography @ University of Cambridge; “The liberal peace fallacy: violent neoliberalism and the temporal and spatial traps of state-based approaches to peace,” *Territory, Politics, Governance* 8.1, p. 100-116; AS]

Yet, decades of **neoliberal integration** have **not** brought **Fukuyama’s prophecy** closer to its realization. Across the world, liberal market integration has facilitated convivial relations among key countries and paid important dividends to elites, yet it has also resulted in the concentration of **wealth** in ever **fewer hands**, **rising inequalities** within countries (although not between them) and higher concentration of wealth at the top, and increased **risks** and **vulnerability** as the logic of market **competitiveness** takes hold of many aspects of our lives (Anand & Segal, 2015; Lynch, 2006). The relation between the **U**nited **S**tates and **China** or the processes of economic integration in the **E**uropean **U**nion are **clear examples** of these trends. In these places as well as others, **inequalities**, **precarization** and **economic insecurity** have given way to a **populist** and nationalist momentum that can be interpreted both as a popular response to the extreme and diverse forms of violence engendered by processes of market integration, or as a manoeuvre to channel **discontent** towards the ‘**other’** in order to protect **elite interests** (Gonzalez-Vicente & Carroll, 2017). By prescribing ever more market **globalization** to counter **populist politics** and **avoid conflict**, **liberal elites** add **fuel to the fire** as they sever the very conditions that led to the disfranchisement of significant segments of the population in the first place. Thereby, it is crucial to understand how the argument for **capitalist peace** fails to factor in the **crisis-prone** and **socially destructive** tendencies of **capitalism**, particularly in a context of unfenced global competitiveness along market lines.2

Two of the **underlying problems** in the liberal peace argument stand out. The first has to do with the **statistical selection** of **fixed points** in time that suggest correlations between **growth in trade** and **diminished conflict** – while **failing** to discern mechanisms of **causation** (Hayes, 2012). A **wider temporal lens** is needed to situate the contemporary rise of **mercantilist** and **illiberal politics** in the context of neoliberal globalization, representing the same sort of ‘**counter movement’** that Polanyi had warned of in his reading of the 19th-century downward spiral towards war – aided in our contemporary case by the **demise** of the traditional left (Blyth & Matthijs, 2017; Carroll & Gonzalez-Vicente, 2017). The second problem relates to liberal international **political economy** and IRT’s scalar fixation on **inter-state matters** and hence their inability to factor in **violence** in the **absence of war**. I turn now to these two points.

**Resources Adv**

**Warming doesn’t cause extinction.**

**Farquhar et al. 17** Sebastian Farquhar, DPhil student at Oxford specializing in Cyber Security and AI. John Halstead, doctorate in political philosophy. Owen Cotton-Barratt, DPhil in pure mathematics. Stefan Schubert, Oxford's department of experimental psychology. Haydn Belfield, degree in Philosophy, Politics and Economics from Oriel College. Andrew Snyder-Beattie, Director of Research at the Future of Humanity Institute, University of Oxford, MS in biomathematics. [Existential Risk: Diplomacy and Governance, Global Priorities Project 2017]//BPS

**The most likely levels** of global warming **are very unlikely** to cause human extinction.15 The existential risks of climate change instead stem from tail risk climate change – **the low probability** of **extreme levels of warming** – and interaction with other sources of risk. It is **impossible** to say with confidence at what point global warming would become severe enough to pose an existential threat. Research has suggested that warming of 11-12°C would render most of the planet uninhabitable,16 and would completely devastate agriculture.17 This would pose an extreme threat to human civilisation as we know it.18 Warming of around 7°C or more could potentially produce conflict and instability on such a scale that the indirect effects could be an existential risk, although it is extremely uncertain how likely such scenarios are.19 Moreover, the timescales over which such changes might happen could mean that humanity is able to **adapt enough** to avoid extinction in **even very extreme scenarios**.

**Outreach Adv**

**Empirics**

**Auslin 3/3**

Michael Auslin, resident scholar and director of Japanese studies at the American Enterprise Institute, formerly an associate professor at Yale University, Wall Street Journal, March 3, 2017, “Asia’s Promise Gives Way to Its Growing List of Troubles”, https://www.wsj.com/articles/asias-precarious-rise-1488559173?mod=e2tw

And those governments aren’t so sturdy in the first place, which bring us to another regional problem: feeble institutions. **Asia has** no NATO, no European Union. It has **no effective regional mechanism to tackle shared problems with joint resolve.**

In large part, that is because Asia was dominated for centuries by its most powerful nations—China, Japan and India—and by imperialists from abroad. Today, the region is riven by the type of distrust and dislike among neighbors that used to bedevil Europe. Its great powers have no formal allies among their neighbors and few close partners—a legacy of their long histories as regional bullies.

This leadership gap helps to explain why Asia has never developed an effective regional community. **Issues of mutual concern are** either **addressed in an ad hoc way or left to languish. Consider the failure of** the Association of Southeast Asian Nations, or **Asean**—supposedly the region’s premier organization—to intervene meaningfully on behalf of the Rohingya, a Muslim minority group living in Myanmar’s Rakhine state. Myanmar’s military has been accused of violently persecuting the group, causing tens of thousands of Rohingya refugees to flee into Bangladesh or board boats for other Southeast Asian countries. **The bloc’s tepid response, based in large measure on a longstanding reluctance to interfere in each other’s internal affairs, has highlighted the region’s institutional difficulties with solving shared problems.**

# 1NR

## Innovation DA

**For now, companies perceive threatening litigation as far-off and have priced-in current risks**

Lauren **Feiner**, CNBC, Google’s antitrust mess: Here are all the major cases it’s facing in the U.S. and Europe, December 18, 20**20**, https://www.cnbc.com/2020/12/18/google-antitrust-cases-in-us-and-europe-overview.html

While Google faces the threat of potential break-ups in the future, **it will likely be years** before any significant resolution is reached. Once the new cases make their way through the courts, there’s still **far from a guarantee** that a judge would grant **anything that drastic** **even if they do side with the government**. It’s likely at least some of the cases against Google will be **consolidated**, with the bipartisan coalition already indicating it would file a motion to do so with the DOJ case.

**While new laws** that could make the courts more favorable to the government in such cases **loom on the horizon**, **they are far from an immediate threat**.

That’s likely why these new lawsuits **have had little impact** on Google’s stock price. Shares of its parent company Alphabet have **rocketed nearly 30%** in 2020 and nearly 20% over the past three months alone. **Investors have grown used to the scrutiny** on the trillion dollar company **and the threat is already priced in.**

#### 2AC cherry-picking misses the forest through the trees---there certainly is action now, but it’s not transformative---enforcement only affects a small slice of deals, and companies do not expect the immediate statutory or legal changes necessary for successful antitrust action

**Zero 21** – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be **more cloud cover than storms** on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they **lack the lightning** needed to **actually block deals.**

Let’s look at these twin threats and the risks they pose to dealmaking. President **Biden’s** executive **order** has **spurred** the Department of Justice and Federal Trade Commission to increase **scrutiny** of deals in a move that, **“if implemented** by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. **But that’s a big ‘if.’** The attorneys write that **actually intensifying competition review standards** would require **acts of Congress and/or litigation.** Both **regulatory agencies** have **mixed records in courts**. And it’s **unclear** if Democrats will **defy the political gravity** that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? **A frenetic M&A pace** has **overwhelmed** oversight body **the Federal Trade Commission** to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but **context is king**: the **handful** of challenged deals **represent a small slice of the year’s record value** of announced transactions.

For starters, **some of the highest profile deals** challenged by the new administration’s antitrust regime represent merger dynamics that **have always drawn intense scrutiny**. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have **long steered clear** of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well **be more thunder than lightning.**

**The data flows neg**

**Wait and Roter 2/1** – partner at Norton Rose Fulbright and a former FTC attorney; associate at Norton Rose

Amanda Wait and Leslie Roter, "Data On Biden's Tough Antitrust Stance Paints Subtler Picture," Law360, 2-1-2022, https://www.law360.com/corporate/articles/1460601/data-on-biden-s-tough-antitrust-stance-paints-subtler-picture

The Data

Yet with **all this attention** to antitrust merger enforcement, we are **not seeing a commensurate increase** in enforcement. **At least not yet.**

Mergers and acquisition activity that is reportable to the FTC and DOJ pursuant to the HSR Act has increased dramatically over the past decade. According to the FTC and DOJ's HSR annual reports, the number of adjusted transactions reported under the HSR Act increased from 1,414 in fiscal year 2011 to 2,030 in fiscal year 2019, seeing a decline during the fiscal year 2020 pandemic, and then rebounding to 3,644 in fiscal year 2021.[11]

Yet, the number of mergers challenged as a percentage of these reported transactions has **remained fairly consistent** at about 2% to 3% of all adjusted reported transactions over the past 10 years. **In fact**, the number of challenged transactions appears to have **actually decreased** in fiscal year 2021 — both in terms of the number of transactions challenged and as a percentage of the adjusted reported transactions.

By our count, the FTC **challenged only 15 transactions** in fiscal year 2021 — about **half** of the number of challenges the year before — whereas the DOJ challenged about the same number of transactions — 14 or 15 — as the prior year.

**Executive orders are irrelevant.**

**Posner 21** – Professor, UChicago Law.

Eric Posner, 7-21-2021, "The Antitrust War’s Opening Salvo," Project Syndicate, https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07

CHICAGO – US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. **In fact, the order doesn’t actually order anything.** Rather, it **“encourages”** federal agencies with authority over market competition to use their existing legal powers **to do something** about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the **content** of those regulations **remains** largely **up to them.**

Nonetheless, it would be a mistake to dismiss the order’s tentative language as mere rhetoric. Antitrust is the main body of law governing market competition in the US, and it has been the object of sustained attack by business interests and conservative intellectuals for more than 50 years. Biden is the first president since Harry Truman to take a strong public anti-monopoly stand, and he has backed it up by appointing ardent anti-monopoly advocates to his government.

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

Still, **the Biden administration’s antitrust agenda will face significant judicial obstacles.** Over the past 40 years, an increasingly business-friendly Supreme Court has gutted antitrust law. In ruling after ruling, it has weakened the standards used to evaluate anti-competitive behavior; raised the burden of bringing an antitrust case; limited the types of antitrust victims who are allowed to bring cases; allowed businesses to use arbitration clauses to protect themselves from class action lawsuits; and much else.

On top of that, **the Supreme Court has disseminated throughout the judiciary a generalized suspicion of antitrust claims.** Judges at all levels have absorbed an **academic skepticism** about antitrust law that is now 30 years out of date. Accordingly, business plaintiffs are usually seen as sore losers who have resorted to the law because they were beaten in the marketplace. Consumer cases are attributed to the machinations of trial lawyers. The pretexts businesses offer for their anti-competitive practices are swallowed whole.

So, while Biden is right that “federal government inaction” is partly to blame for the decline in antitrust enforcement, **there is little that his (or any) administration can do unless it has the courts on its side**. This probably accounts for the order’s careful language. Agencies like the DOJ and the FTC would surely like to enforce antitrust laws more vigorously than in the past, but they are not going to commit resources to bringing cases that will fail in court.

**Current action is constrained absent changes like the aff**

**Broadman 21** – Partner and Chair of the Emerging Markets and CFIUS Practices at Berkeley Research Group LLC, a faculty member at Johns Hopkins University, and an Independent Corporate Director

Harry G. Broadman, "Biden’s Antitrust Policy Mustn’t Throw Out The Baby With The Bathwater," Forbes, 7-31-2021, <https://www.forbes.com/sites/harrybroadman/2021/07/31/bidens-antitrust-policy-mustnt-throw-out-the-baby-with-the-bathwater/?sh=31813c5811db>

While some of the policy actions that may stem from Biden’s Executive Order could be implemented—particularly certain initiatives undertaken by the Federal Trade Commission (FTC), an independent agency, and to a lesser extent the Department of Justice’s Antitrust Division (DOJAD)—the reality is that both executive orders and the appointment of certain personnel **ultimately can do only so much**. And for so long – for example, a duration equal to the **tenure of an administration**, assuming a subsequent administration issues executive orders rescinding previous ones.

This is because most will likely be administrative actions **bound by existing law** and thus open to **challenge in court**. Yet what is often under-appreciated under such scenarios, is that the policy uncertainty engendered during such a period may well affect decisions by investors, businesses, workers, and consumers that could run counter to those otherwise preferred.

There are **two instances** where antitrust policy actions during Biden’s administration could have a **lasting effect**.

The first is if the FTC or the DOJAD file lawsuits against certain firms charging them with anticompetitive practices. A recent example initiated toward the end of the Trump Administration was when the FTC and 46 states sued Facebook, accusing the firm of acquiring competitors WhatsApp and Instagram in order diminish competition in the social media industry. The objective was to force Facebook to divest the two entities. (While at present, the lawsuit has been **rejected by the court**, it is an open question as to whether Biden’s new FTC Chairwoman will refile the case.)

The second is if Congress passes **new antitrust legislation** that Biden signs. At present, there are three antitrust bills pending in the Senate, the two dominant ones being Senator Amy Klobuchar’s and Senator Josh Hawley’s bills. While not identical in several important dimensions, they are both focused on “big tech”. In parallel, the House is considering five antitrust bills, largely running in parallel with those being considered in the Senate.

**Proven by the continuing M&A fervor among businesses**

**Seeber 21** – CEO of Level Legal

Joey Seeber, "Linking Data Privacy to Antitrust Regulations Will Drive Increased Workloads for Legal Practitioners in 2022," CPO Magazine, 10-27-2021, https://www.cpomagazine.com/data-privacy/linking-data-privacy-to-antitrust-regulations-will-drive-increased-workloads-for-legal-practitioners-in-2022/

The administration’s decision to take the regulatory route in lieu of legislation to address data privacy is a creative and strategic approach that has not been widely appreciated. Federal agencies, operating independently and executing administrative regulations promulgated by the administration, are much more likely to have success enforcing protection of consumer data, and will do so faster and with virtually no judicial oversight—and all without the messy process of federal legislation.

So far, the changes introduced in the **executive order** have **not deterred businesses** from forging ahead with **M&A activity**, albeit with greater scrutiny and increased workload for **corporate legal teams** and their advisors in pre-merger due diligence. It’s also likely that responding to second requests will become commensurately more **demanding and complex**.

#### 2 – Trends aren’t absolute – anti-trust can reverse them.

**Fontanella-Khan 1/28** – US corporate finance and deals editor at the Financial Times

James Fontanella-Khan, "Has the M&A party passed its peak?," Financial Times, 1-28-2022, https://www.ft.com/content/70e88089-93a2-4fbe-a33f-ccf6bc502ad8

It has been bonus season on Wall Street this month and for the ranks of bankers who work on mergers and acquisitions, it is about as good as it gets.

A record boom in deal activity last year has translated to big gains for bankers. Investment banks have announced bonus increases ranging from 20 to 49 per cent on the back of record fees. That should make sellers of Hamptons property, fine wine and non-fungible token art happy.

But the mood among M&A bankers has become little more circumspect since the turn of the year. Some are asking privately: have we passed the peak of the deal boom that started more than a decade ago?

“Topping 2021 was always going to be difficult,” one prominent rainmaker told me. On the back of a record nearly $6tn worth of deals agreed last year, investment banks generated $157bn in fees, including $47bn just for mergers and acquisition advice. Both fee levels were the most since Refinitiv began collecting data on them more than two decades ago.

The year capped a long streak where ultra low-interest rates, a booming stock market and unprecedented government support across the economy made it cheap to buy rivals, diversify businesses or play catch-up with an ever more digital economy. The share price of boutique advisers such as PJT Partners, Moelis and Evercore more than doubled over the past decade.

Now, though, stock market volatility tied to rising inflation and tightening monetary policy is creating uncertainty. Surely the partial reversal of many of the boomtime conditions for M&A should prompt a slowing of dealmaking?

Well it might not be as straightforward as that. Bankers, being bankers, are bullish on the record, especially the chiefs of publicly traded boutique firms that specialise in M&A and restructuring advisory work.

Ralph Schlosstein, the chief executive of Evercore, said recently that what sustained good M&A environments were strong equity markets, availability of debt and some visibility on the direction of the economy. Those all come together to support chief executive confidence. “We have all of those things right now,” he said at a recent investor presentation hosted by Goldman Sachs.

Paul Taubman, CEO of PJT Partners, also recently told investors that even if interest rates went up significantly, it would not have a dramatic impact on dealmaking as the true drivers of M&A were other factors.

“What’s been driving M&A activity has been this incredible transformation we’re seeing around the globe,” Taubman said. “You have this digitisation trend, which is not slowing down. It’s only speeding up . . . You have the decarbonisation trend. You have the electrification trend. You have so many macro trends where companies need to reposition their business.”

Several other bankers, who asked to speak on background, said the current volatility in the market is likely to put the breaks on dealmaking for some time. But they also added that once valuations come down, cash-rich companies as well as private equity groups sitting on trillions of dollars in “dry powder” of uninvested funds are likely to return to the dealmaking table.

“At the moment most deals I’m working on have been put on pause as sellers and buyers struggle to find agreement on pricing as the share price of their companies keep jumping. But I’m hopeful,” said the prominent rainmaker. “We managed the Covid crisis and we’ll overcome this one too.”

What is unlikely to power the M&A market are acquisitions by special purpose acquisition companies, as the Wall Street phenomenon on the past 18 months has somewhat retreated after a series of scandals and dismal performances. “The number of Spacs coming to market is going to drop to pre-pandemic levels, when nobody cared about them,” said a banker who worked on several transactions in 2020 and 2021 involving companies that list as shells and subsequently find a target to merge with.

Big deals are also not a given, partly because investors are wary of bold M&A at a time of uncertainty. Unilever’s stock dropped significantly after news it had made a £50bn offer to buy GSK’s consumer healthcare business.

“When it comes to big M&A, companies need to be better at communicating with their investor base to ensure they are on board with bold actions,” said Anu Aiyengar, global co-head of M&A at JPMorgan.

The real damper for dealmaking, however, is likely to be coming from Washington, where a new generation of antitrust officials appointed by the Biden administration are determined to revolutionise the rule book.

**Companies are fighting in court to give themselves time, but know that their window is quickly closing to complete transactions**

**The Economist 22**

The Economist, "The growing demand for more vigorous antitrust action," The Economist, 1-10-2022, https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action

If in doubt, litigate

Unlike their Chinese counterparts, Western businesses will not take this lying down, let alone vow “comprehensive self-examination and rectification”, as Meituan, a food-delivery giant, did after being fined $530m by SAMR in October. America’s tech giants are deploying high-powered lobbyists to scupper or water down rules before they see the light of day. In November the us Chamber of Commerce sent three strongly worded letters to the FTC accusing Ms Khan of overstepping her brief and dismantling procedural safeguards at the agency. It will be “active in litigating”, vows Mr Bradley, its policy chief.

Meta, Illumina and Penguin Random House are fighting regulators in court. Judges used to the consumer-welfare standard may resist attempts to redefine it. Corporate lawyers will remind them that, by prioritising outcomes other than price, the neo-Brandeisians “want people to pay for [their] policy preferences”, as the chief counsel at a big tech firm puts it.

Big firms argue that, as they expand into adjacent markets, they increasingly compete with one another. This is especially true of big tech, whose rise has fuelled the Brandeisian revival. Amazon is the third-biggest online advertiser behind Alphabet and Meta. Apple is building a search engine to challenge Google. Google’s cloud-computing division is taking on Amazon Web Services and Microsoft’s Azure. Meta is getting into e-commerce. The research papers cited in Mr Biden’s executive order date back half a decade. Concentration in America may since have plateaued.

This resistance ensures that the competition authorities’ multipronged assault on big business will take time to play out. The new trustbusting zeal also rubs up against a rekindled affection for national champions, which are by definition big and powerful. European bosses urge Ms Vestager to take into account how competitive global markets are, not just the EU’s, when deciding on mergers. The single-market commissioner, Mr Breton, is receptive to such ideas. Even Ms Vestager, who ignored Franco-German calls to permit the creation of the Alstom-Siemens rail champion, now speaks warmly of the battery consortium.

That may be why, for all the antitrust commotion, M&A activity remains strong in Europe and America, as companies take advantage of cheap capital and a surfeit of pandemic-distressed targets. Chinese tech titans have shed a collective $1.4trn in stockmarket value since China started turning the screws on them in earnest last February. America’s five biggest tech firms have added $2.1trn in the same period. The neo-Brandeisians may have “achieved political success prematurely”, suggests Mr Furman from Harvard.

Yet bosses, lobbyists and corporate lawyers acknowledge that a chill has descended as regulators test their powers. The dealmaking frenzy may partly reflect a desire to get in under the wire. Without clear rules, companies no longer know when to notify regulators about a deal and must think about competition from the outset. One lobbyist claims that clients with deals pending at the FTC are not getting answers. They may face an investigation halfway through a deal or even after it closes—and in a growing number of jurisdictions. Just one hold-out can put paid to a merger. In March 2021 Applied Materials, an American semiconductor company, scrapped its acquisition of a Japanese rival, which had been approved in America, Europe and Japan, but not in China. Boeing got clearance to merge parts of its business with Embraer, a Brazilian planemaker, everywhere except Europe.

**FTC and DOJ action haven’t chilled mergers, but have put dealmakers on high alert---a *key question* is court receptiveness to antitrust changes**

**Wise 1/24** – Senior Reporter at Law 360

Justin Wise, "Deals Boom Meets Expansive Biden Antitrust Agenda," Law360, 1-24-2022, https://www.law360.com/technology/articles/1457929/deals-boom-meets-expansive-biden-antitrust-agenda

Law360 (January 24, 2022, 4:51 PM EST) -- The pace and value of corporate transactions **soared to new heights** in 2021 and signals point to an **equally active environment** in early **2022**, creating a dynamic in which merger activity is surging as the Biden administration settles into a more ambitious and aggressive antitrust enforcement approach.

How that approach will impact the deals landscape remains uncertain, a group of corporate and antitrust lawyers told Law360 Pulse, but there's **no sign** yet that **rhetoric** from agencies like the Federal Trade Commission is **making deal makers pause.**

Still, some attorneys say important aspects of their work are changing, with more expansive regulatory scrutiny, longer investigations and general uncertainty about what other policies could emerge.

The FTC and U.S. Department of Justice announced on Jan. 18 the launch of a public inquiry likely aimed at toughening merger guidelines, encapsulating the changing dynamics.

"Right now, 2022 feels **very similar** to 2021 in terms of the pace of deals. We have a **full pipeline** of buyers and sellers looking to do M&A," Cooley LLP corporate partner Ian Nussbaum said. "But it's a bit of a **crystal ball**. We all have to acknowledge that **there's risks** that we can't see around corners."

Those risks can stem from a number of factors, including the way **antitrust** enforcement could influence businesses' mergers and acquisitions strategy.

"It's always possible that the regulators can affect the deals environment," Nussbaum added. "If there are more actions taken throughout the year, that is one of the things that could affect activity."

Businesses were bullish on mergers and acquisitions last year, with the value of corporate transactions worldwide surpassing $5 trillion, according to financial market data provider Refinitiv. Tech deals totaled more than $1 trillion, which some corporate attorneys say is partly linked to the push from many firms during the pandemic to digitize their business and move into cloud software.

Overall, experts noted that low interest rates and private equity investors having access to a lot of capital were key drivers in the market.

Such feverish activity corresponded with more than 4,000 federal merger filings, according to preliminary FTC data, more than double the total from fiscal year 2020. And it didn't take long for major deals to get rolling in 2022. Microsoft, advised by Simpson Thacher & Bartlett LLP, last week announced a planned $68.7 billion purchase of video game company Activision Blizzard.

Moving Up The Priority List

The FTC and DOJ's joint announcement that they are considering overhauling federal merger guidelines is in line with a **series of policy shifts** under the Biden administration. Under Chair Lina Khan, the FTC has expanded its questioning in FTC merger investigations and reinstituted a "prior approval" requirement on transactions forced to cut clearance settlements with the agency.

The agency has also repealed its guidelines for vertical mergers, or transactions between two entities at different points in the supply chain.

The moves are a progressive posture from the administration, and many lawmakers see historic approaches to consolidation as too permissive. And the potential for new merger guidance could offer a clearer illustration of what direction enforcement is heading in, said Leslie Overton, an Axinn Veltrop & Harkrider LLP partner and former DOJ deputy assistant attorney general for civil enforcement.

"As the agencies craft revisions to their guidelines, we will have even more understanding in terms of how they are [approaching] antitrust analysis," she said. "Even if people disagree with it, that transparency will be valuable."

**All of this** **has the business community's attention**, attorneys noted, **with antitrust risk analysis shooting up the priority list** on merger agreements. Certain considerations in the deals process, such as the possibility of litigation, are receiving more attention, **but companies aren't suddenly halting their M&A plans** because of this approach, they said.

"**Nothing has occurred** to suggest that somebody who was **going to do a deal is now not going to** because of the changes at the FTC and the DOJ," said Tom Ensign, an antitrust partner at Fenwick & West LLP. He acknowledged it's still early, as Khan has been in her role for about seven months, and DOJ antitrust head Jonathan Kanter was only confirmed in November.

Proposed mergers are generally facing longer investigations from the FTC, Ensign said, and are going through a more expensive process as a consequence. Companies are also facing questions targeting nontraditional areas, such as a merger's impact on the labor market and privacy, as the FTC pushes beyond a focus on consumer welfare and prices of goods.

"At least in terms of the statements made by Khan, it seems as if [the agency's] perception is that a longer investigation may have a chilling effect on M&A activity generally," Ensign said, adding that any such impact has yet to be seen.

Khan has said her goal at the agency is to address "rampant consolidation," and she recently stated that a lack of competition has resulted in "diminished opportunity, higher prices, lower wages and lagging innovation."

Big Tech has received a great deal of attention in Washington, but enforcers' work over the past year has shown its focus won't be limited to Silicon Valley or big billion-dollar transactions, said Orrick Herrington & Sutcliffe LLP Partner Craig Falls. He noted the FTC has been actively scrutinizing "old-word" industries like gas and supermarkets, suggesting the agency won't ignore any sector.

"How we conceive of antitrust harm is changing, so companies have to really change how they approach their deals, their agreements and their business conduct," Falls said, noting that the shift is "changing how we advise companies so that they understand that issues to be investigated are broader than they used to be and that there's more to consider up front."

**'Deal Makers Are Watching'**

While the outbreak of COVID-19 jolted the greater U.S. economy in 2020, Cooley partners Nussbaum and Kevin Cooper noted that the stock market largely remained resilient despite the continued impacts of the virus in 2021, helping engender a sustained current of deal making.

Factors such as a more volatile stock market and interest rate hikes from the Federal Reserve could dampen some businesses' outlook, they noted, but it's **not expected to completely pump** **the** M&A **brakes**.

The unrelenting pace of deals has placed a "significant strain" on the FTC, according to Khan, and has left the roughly 1,100-person agency to make difficult decisions around which transactions to more closely scrutinize.

"When you have, like we did over the last year, a doubling, in terms of deal volume, our resources stayed the same," Khan said in a recent interview with The New York Times and CNBC. "And we have to make very difficult choices about which billion-dollar deals we're going to ensure we're closely investigating, but they're very real trade-offs, in terms of what that work is going to come at the expense of."

Khan said more money and resources for the agency is critical for the FTC to fulfill its agenda.

**Uncertainty persists** about what policies could be **on the horizon**, such as whether the FTC and DOJ will significantly rewrite horizontal and vertical merger guidelines. **A key question is** also **how receptive courts may be to the administration's actions.**

Under Khan, the FTC recently got the green light to move forward with its amended monopoly lawsuit against Facebook. Other recent actions include the FTC's complaint against computing company Nvidia Corp.'s planned $40 billion purchase of Arm Ltd., and the DOJ's action against book publisher Penguin Random House's proposed $2.2 billion purchase of Simon & Schuster.

"Both agencies seem interested in pursuing a more progressive, expansive view of antitrust, but **ultimately they will need to persuade courts** of that approach," Overton of Axinn Veltrop said. "That said, that doesn't mean a progressive take by the agencies won't have influence [without the courts]."

**The threshold for the link is a substantive change in antitrust law that subsumes new business practices---even if that substantive change is small, it signals that courts everywhere should treat mergers with skepticism**

**Tracy 21** – Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

What would the changes mean?

Even if Congress acts on only a couple of **middle-of-the-road** proposals, it could **mark the biggest substantive changes in decades**, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, **“that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,”** said Wayne State University law professor Stephen Calkins.

#### Action now throws the system into chaos---it’s a bolt out of the blue that firms weren’t expecting in the short-term, and signals a novel, economy-wide shift in governmental approach that fundamentally changes the game

**Tyler 21** – Senior Legal Analyst at Bloomberg Law

Eleanor Tyler, "ANALYSIS: The Very Purpose of Antitrust Law Is At Issue in 2022," Bloomberg Law, 11-1-2021, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-very-purpose-of-antitrust-law-is-at-issue-in-2022>

**New Laws, Old Power Struggles**

While antitrust has become a hot topic in the past few years, this year saw big legislative pushes in a number of key jurisdictions to revise or reform antitrust/competition law itself. Behind those proposed changes is a **fundamental debate** about what the laws **should do** and **where the balance of power lies** between lawmakers, enforcers, and courts.

Laws applicable to tech platforms have occupied most of the antitrust news headlines this year, but the new measures that enforcers are considering—or, in some cases, implementing—will often apply **much more broadly** (including the proposed U.S. legislation). And more importantly, the changed approach to market regulation reflected in these laws has policy **implications for everyone**. **Antitrust is one of the few areas** in U.S. law that **talk openly about market power**; attitudes about the balance of power between consumers and enterprises, big and small businesses, and government and private businesses are **all involved** in the debate.

Some laws will make it through the legislative gauntlet, and they will **fundamentally shift investment patterns**, and may even shift entrenched power in a few big markets. The **long game of interpreting any new laws in the courts will begin shortly thereafter**. All of that means **uncertainty** for market participants and enforcers alike.

**It causes a wave of overturned precedents that constrain mergers by large firms**

**Pearlstein 20** – former business and economics columnist for The Washington Post and the Robinson professor of public affairs at George Mason University

Steven Pearlstein, "Facebook and Google cases are our last chance to save the economy from monopolization," The Washington Post, 12-18-2020, <https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/>

**Keeping a close eye** on both the antitrust cases and the legislative debate will be the members of the Supreme Court, including six conservative justices who have a well-documented hostility to government regulation of business. The century-old Sherman and Clayton acts are remarkably spare and concise statutes, which has meant that most antitrust law has been judge-made, based on the precedents laid down in individual cases**. Any antitrust reform that might come out of Congress**, however, is certain to be much more detailed and prescriptive than those earlier laws. Not only would such legislation **erode** the **power** and **discretion** of the court, but it **would also likely overturn a number of recent precedents** that have made it much **more difficul**t for regulators to **limit** the **size** and **business practices** of dominant firms.

All that could well be playing out in Congress just as the court considers the inevitable appeals in the cases of U.S. v. Google and FTC v. Facebook. And it would hardly be unprecedented if some members of the Supreme Court were to consider the **political and legislative consequences** as they decide the fate of two companies with whom most Americans interact on a daily basis.

**That spills over to affect mergers in every sector**

**Crowell & Moring 20** – Contributions from: Shawn R. Johnson, partner and co-chair of Crowell & Moring's Antitrust & Competition Group; Wm. Randolph Smith, partner in (and former chair of) the firm's Antitrust & Competition Group; Jeane A. Thomas, partner in Crowell & Moring's Antitrust & Competition and Privacy & Cybersecurity Groups, and co-chair of the firm's E-Discovery & Information Management Practice; Andrew I. Gavil, senior of counsel in Crowell & Moring’s Washington, D.C., office and is a member of the firm’s Antitrust & Competition Group; Gail D. Zirkelbach, partner in Crowell & Moring's Government Contracts and Investigations groups; Alexis J. Gilman, partner in Crowell & Moring’s Antitrust & Competition Group; Jason C. Murray, co-chair of the firm's Antitrust & Competition Group; Lisa Kimmel, senior counsel in Crowell & Moring's Antitrust & Competition Group; Thomas De Meese, co-managing partner of the firm's Brussels office.

Crowell & Moring, "Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry," Regulatory Forecast 2020, 2-26-2020, <https://www.crowell.com/files/Regulatory-Forecast-2020-Antitrust-Cover-Story-Crowell-Moring.pdf>

“The antitrust world hasn’t seen an issue this large in **decades**. **Unlike** every major antitrust development of the past, a look into Big Tech involves companies that may not charge customers anything and whose assets involve private consumer data that may not be able to be transferred as part of a remedy,” says Shawn Johnson, a partner at Crowell & Moring and co-chair of its Antitrust Group in Washington, D.C. “And this is not just about Big Tech. In the end, **all companies** are becoming digital. From how we view the role of data privacy to so-called killer acquisitions, these investigations are going to impact a **wide range of businesses** for **years to come**.”

While an imminent breakup of any Big Tech firm is unlikely, the **increased attention** to antitrust issues has **implications far beyond** the handful of companies that dominate the news. These new developments could affect **mergers**, **acquisitions**, and business **practices** in **virtually every sector**. That’s because competitive advantage today is often reliant upon access to key data, to online platforms, and to **cutting-edge technologies**—and antitrust legal and regulatory action sets the rules for such access.

“**This is a megatrend**,” says Wm. Randolph Smith, a partner at Crowell & Moring in Washington, D.C., former chair of the firm’s Antitrust Group, and a former executive assistant to the chairman of the FTC. “A confluence of events, including political philosophy, economic impact, and missteps on issues like privacy, is creating a shift in antitrust focus and thinking that could **reverberate into other sectors**.”

#### 2 - Big, U.S. firms are what matter---and they’re innovating now.

Jan Rybnicek 20—Antitrust Attorney, former Advisor at FTC, Editor for the Antitrust Law Journal. ("Innovation in the United States and Europe," November 11, 2020, from The Global Antitrust Institute Report on the Digital Economy 13, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733698>) edited for ableist language

A key indicator of a vibrant economy that is characterized by vigorous competition and intense innovation is high levels of spending on research and development. Research and development fuels economic growth, job creation, and competition by allowing researchers and entrepreneurs to discover new technologies, design new products, tap new markets, and improve efficiency and enhance performance. Critics of U.S. competition policy have argued that today’s largest firms have become so large that they are untouchable by competition from current or future rivals and, as a result, have lost the incentive to innovate that once may have been part of their core identity as scrappy upstarts but that has since faded as they rest on their laurels, happy in their dominant positions.37 They further argue that dominant firms snuff out would-be entrants that otherwise would be devoting capital to research and development initiatives to build competing offerings for consumers.38 These critics allege that this purported dampening in the incentive to innovate has deprived consumers of better products and services that would otherwise arise through the push and pull of competition.

But the actual data tell a different story about the state of research and development in the United States and how it compares to its counterparts in Europe. In fact, companies in the United States lead the world in research and development. As shown in Figure 6, out of the top companies globally investing in research and development spending, 11 out of the top 20 (55 percent) and seven out of the top 10 (70 percent) are based in the United States as of 2018.39 By comparison, only six of the top 20 are located in Europe (30 percent), and only two find themselves in the top 10 (20 percent). The remaining firms on the list based on research and development spend are based in Asia.

Contrary to critics’ claims, there is no lack of research and development in the United States, and U.S. firms continue to outpace global counterparts in investing in new technologies and products. The reality is that companies in the United States invest in a broad range of research and development initiatives despite the presence of large, successful tech companies. Unsurprisingly, just as no one today would invest in developing a new combustion engine-powered car that would have to compete against established and mature competitors that have considerable expertise in the market, it would be unwise to try to compete against any of the large tech companies with a “me too” product. Instead, innovators (and, as discussed below, the venture capital and other sources of capital that fund them) devote resources to discovering new and different solutions that may indirectly replace incumbents by disrupting old markets and creating new ones. Indeed, this how many of today’s most successful tech firm achieved success— by building new products and creating new markets, not by mimicking yesteryear’s giants, such as IBM, Microsoft, and Intel.

A closer look at research and development investment in the United States further shows that tech firms are leading the way. In fact, many of the tech firms that have allegedly contributed to the decline of competition and innovation in the United States are the biggest spenders. As shown in Figure 7, Amazon, Alphabet, Intel, Microsoft, and Apple comprise the nation’s topic five spenders, with investments totaling more than $75 billion in 2018.40 These companies are pouring money into innovation not because they have nothing else to do with it but because they are attempting to stay ahead of the competition in their core markets by introducing even better products and services, and to break into adjacent markets where they see opportunities to use their expertise to be disruptive forces.

#### Competition is high.

Thibault Schrepel 20, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris 1 Pantheon-Sorbonne and Invited Professor at Sciences Po Paris, 2020, “ARTICLE: Antitrust Without Romance,” 13 NYU J.L. & Liberty 326

The first risk created by the moralization of antitrust law is economic disorganization. At this point, it appears worth returning to the reasons moral concepts are thriving in antitrust law. We have seen that the moralization of antitrust, made possible by a populist discourse arguing that the system is broken by elites, serves personal interests. Moralists play on fears and predict a dark future in the absence of governmental action. 228

[\*388] By doing so, they ignore positive tendencies which undermine the role they would like to play in order to save "the people." Several studies suggest that the U.S. economy is, overall, more concentrated today at the national level than it was in the early 2000s. 229 This concentration does not, however, imply a corresponding decrease in competition. Concentrated markets may show great dynamism because of strong competitive pressure between the players. 230 For that reason, in 2018, the United States regained a first place ranking as the world's most competitive economy. 231 The country is also [\*389] ranked first in the annual ranking of the Global Competitiveness Report, 232 standing out in particular for its "business dynamism" as well as its "innovation capability." 233

In the Eurozone, although it would be useful to distinguish between countries, the overall level of concentration has been stable over the last ten years. 234 On average, the Herfindahl-Hirschman Index has remained relatively constant at a level of 330 since the Great Recession. 235 Entry and exit of firms in the evaluated industries stayed close together and at similar levels in recent years. 236 Moreover, markups, an indication of market power, have not increased significantly and have yet to reach pre-crisis levels. 237 Competitiveness remains high, with Germany ranking as the world's third most competitive economy, Switzerland the fourth, the Netherlands the sixth, the United Kingdom the eighth, Sweden the ninth, Denmark the tenth, and Finland the eleventh. 238 There has [\*390] been no noticeable change in the trend of economic dynamism in the Eurozone over the last twenty years or so. 239

In short, as the Global Competitiveness Report indicates, "Europe and North America are, combined, home to seven of the ten most competitive economies." 240 The 2018 IMD World Ranking shows similar results. 241 Most importantly, examining the U.S. economy since the creation of the Sherman Act in 1890, and the European economy since the Rome Treaty in 1958, growth and wealth have increased more than in the history of humankind, benefiting society as a whole. 242 Some economists go even further, arguing that our prosperity is understated because our metrics to measure growth lead us to miss around half a percentage point per year. 243 While it is easy to identify individual adverse events (generally, anticompetitive practices or mergers), it is much harder to take notice of positive trends, as they are usually not embodied in a single, easily noticeable event.

These tendencies do not indicate antitrust law should not be improved, or suggest the absence of market failures, but they do indicate that antitrust law, as currently applied, produces good results, or at least does not hinder good results. 244 In short: antitrust law is not broken; it works rather effectively. This conclusion calls into question the merits of drastic changes to antitrust policy on the grounds that economies must be restored or revamped when, in fact, [\*391] they are already competitive. 245 The same goes for integrating new concepts and objectives into antitrust law to address problems raised by tech giants; micro-legal analyses of anticompetitive practices must not oust macroeconomic trends. 246 As pointed out by the OECD, the "simplicity" of the rationale for more oppressive antitrust law, based on the analysis of a handful of practices, raises questions. 247

#### 3 - Antitrust SHOULD favor the defendant---that’s what drives innovation.

Atkinson ’21 [Robert D; March 10; Ph.D. at UNC-Chapel Hill, the founder and president of ITIF; Information Technology & Innovation Foundation, “How Progressives Have Spun Dubious Theories and Faulty Research into a Harmful New Antitrust Doctrine,” https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new]

Myth 8: Big Technology Companies Create Innovation Kill Zones28

Large U.S. technology platforms invest almost as much in R&D as the entire U.K. economy does (business and government).29 But knowing that innovation is important, neo-Brandeisians have argued that big technology companies actually limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in them (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firms to benefit from economies of scale or network effects, and enable the smaller firms to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell therefore might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler that guides entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring, as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities.

Moreover, if they are creating kill zones, why did the number of angel and seed deals rise almost sixfold between 2006 and 2019, peaking in 2015? The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down. (See figure 5.)

#### 2 - Supply will last a thousand years --- and allies solve

Bell 12

(Larry, contributor to Forbes, “China's Rare Earth Metals Monopoly Needn't Put An Electronics Stranglehold On America” 4/15/12, Forbes)

Some other countries are also working to ensure access to rare earths. After China enacted a 2010 embargo on rare earth shipments to Japan for leverage in a territorial dispute, Japan now maintains a stockpile of seven rares and is talking about offering government loans that encourage companies to fund foreign investments private reserves. The Toyota and Sojitz Corporations have already entered into tie-ins with Vietnamese rare earth claim-holders. Toyota is also operating a small rare earths mine in India.

Elsewhere in the Far East, South Korea announced plans last year to stockpile 76,000 tons of rares over the next five years, about 10% of all global production. The country has allocated a huge $8 billion war chest for this purpose, an amazing sum considering that its economy is one-fifteenth the size of ours.

In Europe, Sweden has declared a Norra Harr heavy rare earth project owned by Tasman Metals, Ltd. to be in its “national interest” under the Swedish Environment Act; and German Chancellor Angela Merkel recently inked an agreement to obtain rare earths from Mongolia.

American companies are on their own in the rare earth race, and some of them, along with taxpayers, may reasonably prefer to keep it that way… so long as government will get out of their way. A 2010 U.S. Geological Survey Report estimates that known reserves of rare oxides are about 1.5 million tons, and total domestic resources might be 13 million tons. At peak 10,200 2007 U.S. consumption levels, supplies from known reserves would last nearly 150 years, and possibly more than one thousand years if other resources are explored and exploited. In addition, other friendly, stable countries like Australia and Canada have substantial rare earth deposits as well. The Australian mining company Lynas Corporation aims to annually produce 11,000 tons of rare earth oxides from its new Mount Weld mine