# Disclosure R4 Texas

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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 anticompetitive shipping practices.**
* **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**

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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**.

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Public Enforcement Counterplan---

**Text: The United States federal government should allow relevant agencies to sue to enjoin anti-competitive business practices allowed by the Shipping Act antitrust exemption and recover single damages.**

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

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

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

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

Private antitrust damages actions in the US

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

The treble damages remedy

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

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

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

Discovery and evidence

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

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

Contingent fees

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

Class actions

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

State indirect purchaser actions

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

Huge jury verdicts and settlements

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

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

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

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

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

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

EU antitrust laws and enforcement

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

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

The green paper

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

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

Amount of damages

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

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

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

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

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

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

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

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

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Regulations Counterplan---

**The United States federal government should---**

**--- Substantially increase prohibitions on anti-competitive shipping practices by imposing ex-ante regulations prohibiting practices banned under the AFF.**

**--- Not remove or narrow the scope of the Shipping Act antitrust exemption and should publicly clarify that it will not do so.**

**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---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**

**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.

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**

**Wu 11** – Stern School of Business, New York University

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

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**The 1AC’s neoliberal application of antitrust naturalizes corporate domination and confines the government’s role to course correcting markets**

**Vaheesan 18** – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

ii. **antitrust law is not and cannot be “apolitical”**

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the **basic questions** of **whom the law benefits** and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The **conception of the market as a “spontaneous order”** is a useful construct for **defenders of the status quo** because it lends **legitimacy to the current order** and **suggests that intervention is futile**.24 This model, however, is a **myth** and **bears no correspondence to actual markets**. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the sub- stratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally con- ducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short- term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between **different con- figurations of state action** and **different sets of beneficiaries**.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is **qualitatively different** from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this **goal of decentralization**, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a **rightward shift** in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions **curtailed the reach of antitrust law**, scaling back its objectives39 and **rewriting legal doctrine** to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the **meaning of consumer welfare is still not settled**. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic sur- plus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42 C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an **“apolitical” antitrust jurisprudence** is **futile at best** and a **cynical effort to conceal political choices at worst.** The choice is not be- tween “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

Over the past forty years, **technocrats have dominated antitrust law**.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have **ignored or distorted the legislative histories** of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of **technocratic hyperactivism** and **legislative lethargy** has created, in the words of Harry First and Spencer Waller, “**an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”**49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives **dominate debate** within this cloistered enterprise.50

This congressional indifference to antitrust is not inevitable. Despite pro- longed quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

iii. the consumer welfare model is **not anchored in congressional intent** and **reflects a narrow conception of monopoly and oligopoly**

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is **not “above politics.”** It is a political construct that features at least two serious deficiencies. First, the consumer welfare model **contradicts the legislative histories of the principal antitrust statutes**; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an **impoverished understanding of corporate power**. It focuses principally on **one aspect of business power**—**power over consumers**—and **ignores other critical manifestations**.

Congress’s **original vision for the antitrust laws**, one that recognizes both the economic and the political impacts of monopoly, is a **superior alternative** to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over **not only consumers** but also competitors, workers, producers, and citizens is **essential for preserving at least a modicum of economic and political equality** in a democratic society.

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is **not true to the intent of Congress**. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that eco- nomics and politics are inseparable. Congress originally sought to structure markets to **advance the interests of ordinary Americans in multiple capacities, not just as consumers**. Consumer welfare antitrust reflects, at best, a **selective reading** of this legislative history and, at worst, an **intentional distortion of this historical record**. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58 Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the anti- trust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. **The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power**

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an **emaciated conception of corporate power**. With its foundation in neoclassical economics, the consumer welfare model **privileges short- term consumer interests**. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and **does not account for long-term dynamics**. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, **prizes short-term price harms** to consumers and sellers and **discounts longer-term injuries**.62

Furthermore, the consumer welfare model **legitimizes the existing distribution of resources** by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A we**althy consumer commands power in the market**; a **poor consumer**, in comparison, has **little or no clout** in the market.63

The consumer welfare model, moreover, affords li**ttle or no importance to corporations’ ability to dictate the development of entire markets**. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to **exclude rivals** and **strangle economic opportunity** so long as this exclusion is not likely to injure consumers. In practical terms, **consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning**. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory de- cisions.69 The ongoing—and frenzied—contest between states and cities to at- tract Amazon’s second headquarters is indicative of a giant business’s weight. In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and man- aged to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the me- dia,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a **product of big business’s reaction** against the relatively vigorous antitrust pro- gram of the postwar decades.77

With its **narrow analytical frame**, the consumer welfare model of antitrust **accepts and legitimizes many forms of state-supported corporate power.** Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that **hurt competitors and citizens**. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is **not an apolitical choice**, but a **charter of liberty** for dominant businesses.

**Neoliberalism causes cyclical economic collapses, widespread environmental destruction, and democracy collapse**

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Robert Kuttner, “Neoliberalism: Political Success, Economic Failure,” The American Prospect, 6/25/19, https://prospect.org/economy/neoliberalism-political-success-economic-failure/

Since the late 1970s, we've had a grand experiment to test the claim that free markets really do work best. This resurrection occurred despite the practical failure of laissez-faire in the 1930s, the resulting humiliation of free-market theory, and the contrasting success of managed capitalism during the three-decade postwar boom.

Yet when growth faltered in the 1970s, libertarian economic theory got another turn at bat. This revival proved extremely convenient for the conservatives who came to power in the 1980s. The **neoliberal counterrevolution**, in theory and policy, has reversed or **undermined** nearly every aspect of **managed capitalism**—from progressive taxation, welfare transfers, and **antitrust**, to the empowerment of workers and the **regulation** of banks and other major industries.

Neoliberalism's premise is that free markets can regulate themselves; that government is inherently incompetent, captive to special interests, and an intrusion on the efficiency of the market; that in distributive terms, market outcomes are basically deserved; and that redistribution creates perverse incentives by punishing the economy's winners and rewarding its losers. So government should get out of the market's way.

By the 1990s, even moderate liberals had been converted to the belief that social objectives can be achieved by harnessing the power of markets. Intermittent periods of governance by Democratic presidents slowed but did not reverse the slide to neoliberal policy and doctrine. The corporate wing of the Democratic Party approved.

Now, after nearly half a century, the verdict is in. Virtually **every one of these policies has failed**, even on their own terms. Enterprise has been richly rewarded, taxes have been cut, and **regulation reduced** or privatized. The **economy is vastly more unequal**, yet **economic growth is slower** and more chaotic than during the era of managed capitalism. Deregulation has produced not salutary competition, but **market concentration**. Economic power has resulted in feedback loops of political power, in which elites make rules that bolster further concentration.

The **culprit isn't just “markets”**—some impersonal force that somehow got loose again. This is a **story of power using theory**. The mixed economy was undone by economic elites, who revised rules for their own benefit. They invested heavily in friendly theorists to bless this shift as sound and necessary economics, and friendly politicians to put those theories into practice.

Recent years have seen two **spectacular cases of market mispricing** with **devastating consequences**: the near-**depression of 2008** and **irreversible climate change**. The economic collapse of 2008 was the result of the **deregulation of finance**. It cost the real U.S. economy upwards of **$15 trillion** (and vastly more globally), depending on how you count, far more than any conceivable efficiency gain that might be credited to financial innovation. Free-market theory presumes that innovation is necessarily benign. But much of the **financial engineering** of the deregulatory era was self-**serving, opaque, and corrupt**—the **opposite of an efficient and transparent market.**

The **existential threat of global climate change** reflects the **incompetence of markets** to accurately price carbon and the escalating costs of pollution. The British economist Nicholas Stern has aptly termed the **worsening climate catastrophe** **history's greatest case of market failure**. Here again, this is not just the result of failed theory. The entrenched political power of extractive industries and their political allies influences the rules and the market price of carbon. This is less an invisible hand than a **thumb on the scale**. The premise of efficient markets provides useful cover.

The grand neoliberal experiment of the past 40 years has demonstrated that **markets in fact do not regulate themselves. Managed markets turn out to be more equitable and more efficient.** Yet the theory and practical influence of neoliberalism marches splendidly on, because it is so useful to society’s most powerful people—as a scholarly veneer to what would otherwise be a raw power grab. The British political economist Colin Crouch captured this anomaly in a book nicely titled The Strange Non-Death of Neoliberalism. Why did neoliberalism not die? As Crouch observed, neoliberalism failed both as theory and as policy, but succeeded superbly as power politics for economic elites.

The neoliberal ascendance has had another **calamitous cost—to democratic legitimacy**. As government ceased to buffer market forces, daily life has become more of a **struggle for ordinary people**. The elements of a decent middle-class life are elusive—reliable jobs and careers, adequate pensions, secure medical care, affordable housing, and college that doesn't require a lifetime of debt. Meanwhile, life has become ever **sweeter for economic** elites, whose income and wealth have pulled away and whose loyalty to place, neighbor, and nation has become more contingent and less reliable.

Large numbers of people, in turn, have given up on the promise of affirmative government, and on democracy itself. After the Berlin Wall came down in 1989, ours was widely billed as an era when triumphant liberal capitalism would march hand in hand with liberal democracy. But in a few brief decades, the ostensibly secure regime of **liberal democracy has collapsed** in nation after nation, with echoes of the 1930s.

As the great political historian Karl Polanyi warned, when **markets overwhelm society**, ordinary people often turn to **tyrants**. In regimes that border on neofascist, klepto-capitalists get along just fine with dictators, undermining the neoliberal premise of capitalism and democracy as complements. Several authoritarian thugs, playing on tribal nationalism as the antidote to capitalist cosmopolitanism, are surprisingly popular.

It's also important to appreciate that neoliberalism is **not laissez-faire**. Classically, the premise of a “free market” is that government simply gets out of the way. This is **nonsensical**, since all **markets are creatures of rules**, most fundamentally rules defining property, but also rules defining credit, debt, and bankruptcy; rules defining patents, trademarks, and copyrights; rules defining terms of labor; and so on. Even deregulation requires rules. In Polanyi's words, “laissez-faire was planned.”

The political question is who gets to make the rules, and for whose benefit. The neoliberalism of Friedrich Hayek and Milton Friedman invoked free markets, but in practice the neoliberal regime has promoted rules created by and for private owners of capital, to keep democratic government from asserting rules of fair competition or countervailing social interests. The regime has rules protecting pharmaceutical giants from the right of consumers to import prescription drugs or to benefit from generics. The rules of **competition** and intellectual property generally have been **tilted to protect incumbents**. Rules of bankruptcy have been tilted in favor of creditors. Deceptive mortgages require elaborate rules, written by the financial sector and then enforced by government. Patent rules have allowed agribusiness and giant chemical companies like Monsanto to take over much of agriculture—the opposite of open markets. Industry has invented rules requiring employees and consumers to submit to binding arbitration and to relinquish a range of statutory and common-law rights.

**Anti-domination counters neoclassical assumptions and judicial supremacy---that restores agency flexibility to democratically check existential threats**

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Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than **four urgent crises**: an ongoing **pandemic1**; **racial injustice** and its consequent civil unrest2; an **economic depression** approaching the pain inflicted in 1929; and the accumulating, existential threat of **climate change**.4 **Citizens must rely on their state** to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of **agent to carry out collective solutions**, these perils may very well **proceed unabated.**

Pushing an anti-administravist agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this **multi-pronged anti-administravist attack** stands upon **shaky conceptual foundations**. Each builds atop a theory of constitutionalism that embraces a **too-literal conception of popular sovereignty.**33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

**Critics** commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they **incorrectly posit** two separate, **autonomous processes**: the collective **formation of ends** (lawmaking) and the **implementation** (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore **political, judgments.**39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that **administration does indeed carry constitutional liberal democratic credentials** – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a **system of representative democracy** that aims to **set the conditions by which citizens can relate to each other as political equals**, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal **participants in the collective decision-making process.**

This essay will proceed as follows. Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that (A) eschews outmoded notions of popular sovereignty and (B) natural law. It will then (C) explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as indefeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory’s representative turn. It will first (A) define this important intellectual development and then (B) explain how administrative agencies might fit comfortably within a representative system. The essay (C) concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of “we the people.”48 Democratic citizens, possessing inalienable rights, are to come together, deliberate,49 and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory lawmaking.50 At least as early as 1798, Congress has delegated coercive rule-making power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans’ pensions, mail delivery, intellectual property, and the payment of public debts.51 In McCullough v. Maryland,52 the U.S. Supreme Court interpreted the “necessary and proper” clause53 to anticipate Congress’ desire to create such agencies – in this case, a national bank. Bruce Ackerman,54 in his seminal work, argues that our contemporary agencies carry Constitutional credentials. Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts. Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.55 The Administrative Procedure Act56 (“APA”), for example, imposes upon agencies principles of due process and the rule of law.57

Regardless, **if democratic lawmaking is to shape the community of those that make it, there must be some kind of agent or instrumentality to carry it out**.58 A Congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.59 Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.60 Lawmaking is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential Lochner v. New York61 dissent, “decide concrete cases.” The required elaboration almost always imports values that are not clearly and unambiguously identified in any statutory text.62 The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many **objections to agency power** presume **antiquated conceptions** of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign63 against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress64 as the commissioned agent (or embodiment?) of the popular sovereign. To preserve citizens’ natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc. – each policed by independent courts capable of identifying and enforcing citizens’ inalienable liberties.65 If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress – and so their policymaking cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

A. The Mind and Body of the Democratic Sovereign

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a specific body: the one wearing the crown.66 To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”67 i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.68 During the democratic revolutions, radical69 theorists merged the monarch with her subjects.70 They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s volonté générale71 serves as a model for this kind of logic.72 Montesquieu, whose thinking influenced the American founders,73 likewise held that the “people as a body have sovereign power” in a republic.74 Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”75 It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”76 come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor - with homogenizing and fascist implications.77 For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.78 Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.79 Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.80 Just as the contractual “meeting of the minds” is a legal fiction of private law,81 a popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.82 In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,83 even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.84 Some (body) would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.85 Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.86

Lawmaking under constitutional liberal democracy is thus **not a question of ascertaining the existence of some non-existent popular “will”** to be left in the hands of loyal fiduciaries in government87 to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.88 Instead, it a **question of developing transparent and accessible collective decision**- making procedures that ensure that **all citizens can understand themselves as equal participants** in their collective ordering; that **ordinary people are involved in public life** and have a say in their collective destiny.89 They do not rule. Rather, they are **equal players in the game of representative democracy.**90

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one – at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative idea intended to depersonalize and distribute public power in a way that serves the entire community.91 It is a Kantian “as if” principle.92 Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, **we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity**, human equality and the public good.93 Because if the sovereign is a “we,” then **governing involves more than the interests and preferences of single individuals**. We will therefore demand that political institutions remain **accountable and accessible** to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.94

This figurative idea of popular sovereignty also **unlocks the closed doors of power** and **forces the inclusion of voices** previously ignored.95 Whosoever happens to be governing at any given time, that person is not “the people” precisely because “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort96 notes, that this **place of power remain an empty one** – or at least one with a revolving door – where no body at all is permitted to rule permanently. For to fill that void would allow for a part to speak on behalf of the whole. “We the People” might become, as political theorist Nadia Urbinati notes, “Me the People.”97 It would thus force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a fictional popular sovereign and, importantly, the rule of law and not of men.98 If the place of power remains empty because **all citizens contribute** in some way to lawmaking, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if we take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.99 Thus, insofar as theories of non-delegation and legislative primacy rely on an organ-body theory of popular sovereignty,100 they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared – and found wanting. Indeed, it is at least possible that **administrative agencies can be made consistent with the requirements of constitutional popular sovereignty**.101 Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as **co-equal participants** in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.102 It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

**Adv 1**

**No impact to slow growth.**

Dr. Christopher J. **Fettweis 17**, Associate Professor of Political Science at Tulane University, PhD in Government and Politics from the University of Maryland, “Unipolarity, Hegemony, and the New Peace”, Security Studies, Vol. 26, No. 3, p. 434-442 [language modified]

Others are more skeptical of institutions’ potential to shape behavior, and believe instead that stability is dependent upon the active application of the hegemon’s military power.51

The second version of the hegemonic-stability explanation is based upon a different view of human nature than is the liberal, one less sanguine about the potential for voluntary cooperation. Actors respond to concrete incentives, according to this outlook, and will ignore rules or law if transgressions are not punished. The would-be hegemon must enforce stability, therefore, not merely establish it. Policing metaphors are common in this literature, with the United States playing the role of sheriff or globocop charged with keeping the peace.52

[FOOTNOTE]

52 Richard N. **Haass**, The Reluctant Sheriff: The United States after the Cold War (New York: Council on Foreign Relations Press, 1997); Colin S. Gray, The Sheriff: America's Defense of the New World Order (Lexington: University Press of Kentucky, 2004).

View all notes

[END FOOTNOTE]

Take away the police, or damage their credibility, and instability would soon return. “The present world order,” according to Robert Kagan, “is as fragile as it is unique,” and would collapse without sustained US efforts.53 “In many instances,” add Lawrence Kaplan and William Kristol, “all that stands between civility and genocide, order and mayhem, is American power.”54 Though this argument is commonly associated with neoconservatism55—and will be referred to as the neoconservative explanation from here on in—it is also accepted by a number of scholars and observers generally considered outside of that ideological approach.56

The two versions are united on this point: it is not unipolarity in general that accounts for the New Peace, but American unipolarity in particular. US hegemony is essentially benevolent, according to both liberals and neoconservatives. The United States has constructed an order that takes the interests of other states into account, which decreases revisionist impulses. At the very least, it is nonthreatening, and does not generate the kind of balancing behavior that might be expected to bring it to an end.57 In the liberal version, the order constructed by the United States is beneficial to all its members, who have a stake in its maintenance. Adherents of the more muscular version, whether neoconservative or not, assume that the default position of smaller states in a unipolar system is to bandwagon with the center.58 No one seems to suggest that there is an irenic structural logic of unipolarity independent of US behavior. The question is therefore not so much about the connection between unipolarity and the New Peace as much as it is whether US behavior, in one form or another, has brought it about.

Hegemonic stability is in some ways more theoretically elegant than the other possible explanations for the New Peace. For one thing, it does not suffer from questions regarding its causal direction. While it may be reasonable to suggest that peace produced the expansion of democracy and/or economic development rather than the other way around, peace did not produce unipolarity. In fact, if the United States is indeed supplying the global public good of security, it might be able to take credit for a number of these positive trends. Not just peace but democracy, economic stability, and development all might be beneficial side effects of unipolarity. 59 “A world without U.S. primacy,” argued Samuel P. Huntington, “would be a world with more violence and disorder and less democracy and economic growth.”60

There is a great deal at stake here, for both scholarship and practice. If hegemony is responsible for the New Peace, then its peaceful trends are unlikely to last much beyond the unipolar moment. The other proposed explanations described above are essentially irreversible: nuclear weapons cannot be uninvented, and no defense against their use is ever going to be completely foolproof; the pace of globalization and economic interdependence shows no sign of slowing; democracy seems to be firmly embedded in the cultural fabric of many of the places it currently exists, and may well be in the process of spreading to the few places where it does not. The UN, while oft criticized, shows no signs of disappearing. And finally, history contains precious few examples of the return of institutions deemed by society to be outmoded, barbaric, and/or futile.61 In other words, liberal normative evolution is typically unidirectional. Few would argue, for instance, that either slavery or dueling is likely to reappear in this century; illiberal normative recidivism is exceptionally rare.62 If the neoconservatives are correct and US hard power is primarily responsible for the New Peace, however, then it cannot be expected to last long after US hegemonic decline, or adjustment in its grand strategy toward retrenchment. If liberal internationalists are right and the New Peace is largely a product of the world order that the United States has forged, then it may have a bit more staying power beyond unipolarity, but not necessarily much.

Determining the relationship between hegemony and the New Peace has importance that goes beyond the academy. Whether or not decline is on the immediate horizon, unipolarity is unlikely to last forever. If the New Peace is essentially an American creation, that post-unipolar future is likely to be quite a bit more violent than the present.

Evidence for and against Pax Americana

Since the world had never experienced system-wide unipolarity prior to the end of the Cold War, judgments about its relative stability and likely duration are necessarily speculative.63 Extrapolations can be made from regional unipolar systems, like the Roman Mediterranean, but definitive system-wide statements cannot be made from one case. Still, if US power were primarily responsible for the New Peace, one would expect that it would leave some clues about its effects. This section reviews three kinds of evidence regarding Pax Americana in order to determine whether an empirical relationship can be said to exist between various kinds of US activity and global stability.

Conflict and Hegemony by Region

Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The **U**nited **S**tates has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic- stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear.

Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist **across regions**.

If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is **imperfectly correlated** with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East **worse**. In recent years, substantial hard power investments (**Somalia**, **Afghanistan**, **Iraq**), moderate intervention (**Libya**), and reliance on diplomacy (**Syria**) have been equally **ineffective in stabilizing** states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has **failed** to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 19**90s**, the **U**nited **S**tates cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 **The world grew dramatically more peaceful**

**[CUT HERE.]**

**while the United States cut its forces, however**, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same **nonrelationship** exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between **warfare** and **fluctuations in US GDP**, **alliance commitments**, and **forward military presence**. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there **does not seem to be much correlation** between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.”71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat **extreme versions** of a

central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.”73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the **U**nited **S**tates can **retrench without fear of negative consequences**. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.”77 In **no case** did the various anticipated disorders materialize. As Table 2 demonstrates, **armed conflict levels fell** steadily, **irrespective** of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had **much effect** on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving **no trace** in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem.

As it stands, the **only evidence** we have regarding the relationship between US power and international stability suggests that the two are **unrelated**. The rest of the world appears **quite capable and willing** to operate **effectively** without the presence of a global police~~man~~. Those who think otherwise have **precious little empirical support** upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.

**Food price increases won’t cause war – empirics**

**Pinker**, Prof @ Harvard, **11**

(Steven, Steven Pinker: Resource Scarcity Doesn’t Cause Wars, <http://www.globalwarming.org/2011/11/28/steven-pinker-resource-scarcity-doesnt-cause-wars/>)

Once again it seems to me that the appropriate response is “maybe, but maybe not.” Though climate change can cause plenty of misery… it will not necessarily **lead to armed conflict**. The **political scientists** who track war and peace, such as Halvard **Buhaug**, Idean **Salehyan**, Ole **Theisen**, and Nils **Gleditsch**, are skeptical of the popular idea that people **fight wars** over **scarce resources**. **Hunger and resource shortages** are tragically common in sub-Saharan countries such as **Malawi**, **Zambia**, and **Tanzania**, **but wars involving them are not. Hurricanes, floods, droughts, and tsunamis** (such as the disastrous one in the Indian Ocean in 2004) do not generally lead to conflict. The American dust bowl in the 1930s, to take another example, caused plenty of deprivation **but no civil war**. And while temperatures have been rising steadily in Africa during **the past fifteen years**, **civil wars and war deaths have been falling.** Pressures on access to land and water can certainly cause local skirmishes, but a genuine war requires that hostile forces be **organized** and **armed**, and that depends more on the influence of **bad governments**, **closed economies**, and **militant ideologies** than on the sheer **availability** of land and water. Certainly any connection to terrorism is in the imagination of the terror warriors: terrorists tend to be underemployed lower-middle-class men, not subsistence farmers. As for genocide, the Sudanese government finds it convenient to blame violence in Darfur on desertification, distracting the world from its own role in tolerating or encouraging the ethnic cleansing. In a regression analysis on armed conflicts from 1980 to 1992, Theisen found that conflict was more likely if a country was **poor**, **populous**, politically unstable, **and abundant in oil**, but not if it had suffered **from droughts**, **water shortages**, or mild **land degradation**. (Severe land degradation did have a small effect.) Reviewing analyses that examined a large number (N) **of countries rather than cherry-picking** one or toe, he concluded, “Those who foresee doom, because of the relationship between resource scarcity and violent internal conflict, **have very little support from the large-N literature.”**

**BUT they will reduce poverty – best stats are NEG**

-linear relationship – 1% increase in price reduces poverty up to 64%

-happens fast – within one to two years – sequencing analysis supports

**Heady**, Research Fellow @ International Food Policy Research Institute, **14**

(Derek, Higher food prices are better for the poor in the long run, <http://europesworld.org/2014/05/28/higher-food-prices-are-better-for-the-poor-in-the-long-run/#.WIa_U_krJOp>)

The mid-2000s saw some fundamental shifts in the global economy, not least the many global imbalances and policy mistakes that contributed to the financial crisis. Less well known, however, is the dramatic reversal in international food price trends. After a long-term secular decline over the 1980s and 1990s, food prices surged upwards from 2006 to 2008. The international prices of wheat and maize approximately doubled over this period and the price of rice spectacularly tripled in the space of a few months between late 2007 and mid-2008. These rapid changes in the prices of mankind’s most essential commodity became known as the **“global food crisis”,** but many researchers are now questioning whether it should **ever have been labelled as such,** as it has since been shown that **higher food prices** can **greatly contribute** to **poverty reduction** in rural communities. Of course this surge in food prices was not labelled a crisis without some justification. Few experts predicted the surge in food prices, and few knew when it would end. Major players in the international grain trade panicked in response to this uncertainty and withheld supply through export restrictions, or imported far more than they normally would in order to sure up stocks. The UN’s World Food Program faced tremendous difficulties in obtaining the grains it needed to distribute to the world’s most vulnerable people. Preliminary evidence and logic also suggested that the bulk of the world’s poor buy more food than they produce, meaning higher food prices would reduce their disposable incomes (at least in the short term). The urban poor were particularly hard hit – since they earn little or no income from farming – and the peak of the 2008 crisis saw food riots across many developing countries, and even the overthrow of the government in Haiti. **But** although the surge in global food prices was a crisis in some ways, it is also possible that higher food prices have **helped reduce global poverty** in the long term. The reason is this: While the poor invariably spend much of their income on food, many of them also **derive that income** **from growing food** or other **agricultural commodities**. Indeed, the vast majority of the world’s poor (defined by the World Bank as those living on less than $1.25 per day) **live in rural areas**; perhaps **as much as 75%.** Most of these depend primarily on family farming for their livelihoods, or on hiring themselves out as agricultural workers. In the short term, it is true that many of the rural poor will not produce enough food to feed themselves, and could therefore be hurt by higher food prices. But higher food prices also lead farmers to invest more in agriculture in an effort to **increase their profits**. One of these investments is **hiring more labour**, and agriculture in developing countries is **highly labour-intensive**. This increased demand for labour will have a large impact on the **wages of the poor**, especially in economies with large agricultural sectors, especially since labour is effectively a non-tradable commodity with no international substitutes. For these reasons, several economists are beginning to find it quite conceivable that **higher food prices could ultimately benefit the poor**. Recent research at the **International Food Policy Research Institute** examined the impact of higher food prices on poverty rates, in a sample that covers some 68 developing countries and over three decades of data. Our results **overwhelmingly suggest** that increases in food prices predict **reductions in poverty,** rather than increases. Moreover, the predicted effects are relatively large: **A 1% increase** in real food prices is expected to reduce the $1.25 per day poverty rate anywhere **between 0.35 and 0.64 percentage points**. The evidence also points to these benefits emerging **relatively quickly** – in the space of **one to two years.** Two **other recent studies** have also suggested that wage responses to higher food prices are large enough to overturn the idea that higher food prices hurt the poor. World Bank research on **rural India**, the country with the single largest concentration of the world’s poor, found that wage responses are **large enough to overturn the initially adverse effect** of **higher food prices** on **disposable incomes**. Furthermore, IFPRI researchers have used an economy-wide simulation model to separate the short and long-term effects of higher food prices on Uganda’s poor. As in rural India, wage responses **in Uganda** overturn the **initial conclusion** that higher food prices increase poverty. In the long run, **higher prices are actually a boon for poverty reduction.**

**Causes war AND internal link turns their scenarios.**

**MacMillan**, former Director of the FAO’s Field Operations Division, **14**

(Andrew, Higher Food Prices Can Help to End Hunger, Malnutrition and Food Waste, <http://www.ipsnews.net/2014/06/higher-food-prices-can-help-to-end-hunger-malnutrition-and-food-waste/>)

Any customers who give thought to how and where all the different foods are produced and end up in their shopping trolleys will start to uncover a rather disturbing situation. They will find that in most countries, people working at all levels in the food system – in supermarkets, in meat processing and packing plants, as fruit harvesters or farm labourers, or as waitresses in fast-food restaurants – are among the worst paid of all workers. They will discover that many of the skilled families that run the small-scale farms that produce most of the world’s food live precariously They are exposed to multiple risks caused by fluctuating markets, pests and diseases and extreme weather problems, whether frosts, hailstorms, floods, typhoons or droughts. They will also learn that in most developing countries hunger is heavily concentrated in rural areas, where some 70 percent of the world’s 842 million chronically hungry people live, largely dependent on farming, fishing and forestry. Much urban poverty results from people fleeing rural deprivation. And **many of the conflicts that threaten global stability have their origins in areas of extreme poverty**. It seems dreadfully wrong that the very people who produce so much of our food should be those who suffer most from deep poverty and food shortages. One reason for this apparently unjust situation is what economists call asymmetrical relationships in the food chain. For instance, supermarkets engage in cut-throat competition for customers by **lowering their prices,** reducing what they pay to their suppliers who, in turn, **cut back on their workers’ pay**. Most governments like to keep food prices “affordable”, claiming that it makes food accessible to poor families, thereby preventing hunger and malnutrition. The main policy instruments used by rich and emerging nations include tax-funded subsidies that compensate their farmers for low-priced food sales. They also set low taxes on most foods. The idea that low food prices will reduce the scale of the hunger problem **is flawed** since the main reason for people being hungry is that **they cannot afford the food they need**, even when prices **are low**. Rather than, as now, shielding all consumers from paying **a full and fair price** for food, it seems to make more sense to **let prices rise** and **increase the food buying power of the poor**. As Fair Trade customers have discovered, higher retail prices can be passed back to all those involved in the food production chain, especially farm labourers. **They probably offer the best market-driven option for cutting rural poverty and hunger**. But to eliminate hunger quickly, income transfers, targeted on poor families and with their value indexed to food prices, are also needed, at least until countries begin to manage their economies more equitably.

**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

**Naxal insurgency causes extinction.**

**Ehtisham**, MSc in Defence and Strategic studies, **13**

(Hasan, Is India’s nuclear arsenal safe?, http://blogs.tribune.com.pk/story/18875/is-indian-nuclear-arsenal-safe/)

There are huge nuclear security issues in India because it is prone to **insurgent groups** and separatist rebels. According to the Daily Mail’s reports, most of India’s **top nuclear facilities** are located in exceedingly **Naxal terrorist struck districts** of India or in the “Red Corridor”. Some of the sensitive nuclear installations situated in this “Red Corridor” are, Uranium Corporation Of India Limited, Talcher Heavy Water Plant, Institute of Physics, Ceramatic Fuel Fabrication Facility, Nuclear Fuel Complex, Seha Institute of Nuclear Physics, Atomic Minerals Directorate and many more. Around 90% of the Red Corridor areas are a ‘No Go Zones’ for the Indian troops and Air Force. The Naxal rebels are in full control and there is no writ of the Indian government in these areas. The shocking aspect of Daily Mail’s report is that **some Indian nuclear scientists are reportedly assisting Naxal rebels to learn to utilise and transport uranium**. On the other hand, many of India’s missile facilities are located in either the Red Corridor or in the areas controlled by Hindu radicals and militant organisations. There are reported cases of the abduction of nuclear scientists from these areas, which is a very disturbing situation with respect to the safety and security of nuclear weapons. **Any nuclear accident** in India could have a serious impact on its neighbouring countries and hence, the insufficient safety and security measures are of **great concern to Pakistan.** Just **imagine** if a nuclear weapon fell in the hands of **Indian terrorists**; **this could lead to an accidental nuclear war** between Pakistan and India. Likewise, an accident at a nuclear power plant could release radiation that may not respect any borders.

**No nuclear terror.**

**Weiss 2015** Leonard, visiting scholar at the Center for International Security and Cooperation at Stanford University, USA, and a member of the National Advisory Board of the Center for Arms Control and Non-Proliferation, On fear and nuclear terrorism, Bulletin of the Atomic Scientists 2015, Vol. 71(2) 75–87

There is clearly some risk of nuclear terrorism via theft of weapons, but the risk is low, and a successful theft of a nuclear weapon would likely require a team of insiders working within an otherwise highly secure environment. There is also some risk that a nuclear-armed country might use a terrorist group to launch a nuclear attack on an adversary. This possibility is also of low probability, because the sponsor country would almost inevitably risk nuclear annihilation itself. Finally, a terrorist group might try to design and build its own weapon, possibly with the help of disaffected persons from a weapon state who might provide them with nuclear know-how and/or materials. Given all the steps needed to achieve a weapon that is workable with high probability without being discovered and without suffering an accident this scenario is also fraught with risk for the terrorists. As a result, terrorists are much more likely to try to achieve their aims using conventional weapons, which are cheaper, safer, and technically more reliable. Thus, while no one can discount completely the acquisition by a terrorist group of a nuclear explosive weapon, such an event appears to be of very low probability over the next decade at least, and can be made still lower using techniques or policies that do not require constitutionally problematic steps by the federal government or an optional war whose death rate could match or exceed what the terrorists are capable of. There is a tendency on the part of security policy advocates to hype security threats to obtain support for their desired policy outcomes. They are free to do so in a democratic society, and most come by their advocacy through genuine conviction that a real security threat is receiving insufficient attention. But there is now enough evidence of how such advocacy has been distorted for the purpose of overcoming political opposition to policies stemming from ideology that careful public exposure and examination of data on claimed threats should be part of any such debate. Until this happens, the most appropriate attitude toward claimed threats of nuclear terrorism, especially when accompanied by advocacy of policies intruding on individual freedom, should be one of skepticism. Interestingly, while all this attention to nuclear terrorism goes on, the United States and other nuclear nations have no problem promoting the use of nuclear power and national nuclear programs (only for friends, of course) that end up creating more nuclear materials that can be used for weapons. The use of civilian nuclear programs to disguise national weapon ambitions has been a hallmark of proliferation history ever since the Atoms for Peace program (Sokolski, 2001), suggesting that the real nuclear threat resides where it always has resided in national nuclear programs; but placing the threat where it properly belongs does not carry the public-relations frisson currently attached to the word Òterrorism.Ó

**Adv 2**

**Alt causes to readiness**

**Serbu 17** ― Jared Serbu, journalist at Federal News Radio, 2017. (“Military readiness problems can’t be fixed overnight, Defense chiefs warn”, Federal News Radio, February 8th, 2017, Available Online at: <https://federalnewsradio.com/defense/2017/02/military-readiness-problems-cant-fixed-overnight-defense-chiefs-warn/> Accessed 9-17-17)

But they emphasized that the problems they currently face are the result of several consecutive years of **budget chaos**, including a **sudden sequestration** in 2013, persistent underfunding of key functions like **base maintenance** **and pilot training** and **shoddy treatment** of the mostly civilian workforce that’s tasked with keeping ships, tanks and airplanes in good repair. In short, the military’s readiness problems are **serious**, were developed over the course of many years and **can’t be fixed overnight**, they said.

**No impact to 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.

**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]]

**That disrupts financial stability---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

**IPOs ensure continued growth and productivity gains through stable increases in innovation**

**Wies and Moorman 15** – Assistant Professor, Department of Marketing & House of Finance Research Center SAFE, Goethe University Frankfurt, Professor of Business Administration, Fuqua School of Business, Duke University

Simone Wies and Christine Moorman, "Going Public: How Stock Market Listing Changes Firm Innovation Behavior," Journal of Marketing Research, Vol. LII, pp. 694–709, 10-1-2015, https://journals.sagepub.com/doi/full/10.1509/jmr.13.0289

Does Going Public Change the Level of Innovation?

Does going public increase the overall number of innovations? The **overriding goal** **of going public** is to **ensure continued growth** (Brau and Fawcett 2006); innovation, especially in the CPG sector, is a **pivotal part** of achieving that goal. As we have discussed, innovation is likely to be **more sensitive to financing constraints** than other forms of investments (e.g., Hall and Lerner 2010). Thus, an **immediate inflow** of financial capital and **improved access** to future capital should be **positively related** to overall **number of innovations**. We predict the following:

H1: **After going public**, firms introduce a **larger number of innovations.**

Does going public increase innovation variety? In general, CPG firms do not introduce a single version of a new product. Instead, they **introduce innovation variety**, defined as the range of versions of the same product that differ by package size, color, formulation, or taste. Offering a **larger variety** of the same innovation is a **popular strategy** to generate sales for several reasons. First, a greater assortment satisfies customer variety seeking within a segment and appeals to **different customer segments**. Second, more variety increases the firm’s share of shelf space, which prevents competitive offerings from seizing the space. Third, the coordinated packaging and labeling across the different SKUs can achieve a sort of “billboard effect” on the store shelf (Quelch and Kenny 1994, p. 154), which increases brand awareness and brand reputation. The inflow of immediate cash and improved access to future capital should enable firms to scale up their innovation variety. We predict the following:

H2: After going public, firms introduce a **higher level of variety per innovation**.

**Regs CP**

**The plan allows FMC** (Federal Maritime Commission) **enforcement and litigation against alliances**

**NITL 21**, National Industrial Transportation League, a trade association whose mission is to advance the views of shippers on industrial freight transportation issues and advance their professional development (May 19, 2021, NITL Urges Congress to Adopt Shipping Act Reforms in Response to Unprecedented Disruption to the Ocean Shipping Network, https://www.nitl.org/wp-content/uploads/2020/03/NITL-release-Shipping-Act-Revisions-May-19-2021-final.pdf)

The National Industrial Transportation League (**NITL**), the nation’s oldest trade association representing industrial freight transportation shippers, is calling on Congress to modernize the **Shipping Act** of 1984 after months of congestion at U.S. seaports and unprecedented disruption to the ocean shipping network. The ongoing ocean shipping turmoil has wreaked havoc on US exporters and importers, costing them billions in higher shipping costs, demurrage and detention charges, and lost business, with still no clear end in sight. The inability of US companies to timely access marine containers and chassis and secure sufficient vessel bookings to meet their business requirements has upended the ocean cargo shipping and delivery network. These unprecedented challenges have **exposed gaps** in the law governing ocean carrier services that warrant immediate action. A proposal drafted by NITL recommends modifications to address these challenges. The proposal is designed to provide remedies for importers and exporters who are experiencing unprecedented shipping costs, are unable to obtain adequate ocean transportation service to meet their cargo delivery needs and are concerned about unfair business practices. The NITL proposal provides four main recommendations to **modify The Shipping Act**, including: • Establishing rules **prohibiting** common carriers and marine terminal operators from adopting and applying **unjust** and **unreasonable** demurrage and detention rules and practices by codifying the industry guidance issued by the **F**ederal **M**aritime **C**ommission in the Spring of 2020, and shifting the burden of proof for complaints onto the service providers to show that their practices are reasonable and comply with the rules. • Clarifying the obligations of common carriers with respect to equipment and vessel space allocations and **contract performance** by requiring them to adhere to minimum service standards that meet the public interest. Ocean carriers would also be required to develop contingency service plans during periods of port congestion to mitigate supply chain disruptions. • Modifying the prohibited acts to address **unfair business practices** related to the instrumentalities required to perform the transportation services, including access to, allocation of, and interchange of equipment, and any unreasonable allocations of vessel space by ocean common carriers considering foreseeable import and export demand. Expanding the FMC’s authority to act upon complaints filed against **anticompetitive agreements** between **ocean carriers** that operate with antitrust immunity, such as alliances, and allowing **third-party intervenors** to participate in court proceedings initiated by the **FMC** against such agreements. “While ocean transportation costs are rising to unprecedented levels, we have seen a substantial deterioration in service by the ocean carriers. The lack of timely access to marine equipment and vessel sailings has caused adverse ripple effects throughout US companies’ supply chains leading to material shortages, empty store shelves, and business interruption,” said NITL Director and Ocean Committee Chair Lori Fellmer. “NITL believes that the inability of exporters and importers to effectively address these challenges commercially means the time has come to update the Shipping Act to reflect current day circumstances. “The NITL proposal addresses many of the problems faced by the shipping community and seeks to address gaps in the current law. While the League strongly commends the regulatory efforts in recent years initiated by the FMC, we believe the agency and shipping industry would benefit greatly from these proposed reforms that are targeted to address present day challenges,” said Fellmer. The League was instrumental in the efforts leading up to the 1998 amendments to the Shipping Act and looks forward to working with the Congress, the FMC, and all industry stakeholders to address the critical challenges faced by importers and exporters and others by updating this important federal law.

* **Require that shipping rates not exceed a certain threshold determined fair by the Federal Maritime Commission**
* **Require that ports run at least at 90% capacity**
* **Require that shipping carriers fill at least 80% of capacity when shipping food**
* **Set a limit on the amount of emissions that shipping carriers can emit**
* **Invest money in port development efforts, and in particular efforts to develop green technology for shipping carriers**
* **Substantially increase environmental regulations on ports**
* **Require that ports accept U.S. military forces**

**Antitrust’s unusually broad scope is the core of our link---that doesn’t apply to the counterplan’s rule-based and industry-specific approach.**

**Lambert 17** – Wall Chair in Corporate Law and Governance and Professor of Law, University of Missouri

Thomas A. Lambert, “How to Regulate: A Guide for Policymakers,” Cambridge University Press, August 2017

Taken together, then, the **difficulty of evaluating** the **competitive effects** of business practices (decision costs) and the **inevitability of mistakes** (error costs) **limit what antitrust can accomplish**. **Perfection is impossible**, and **efforts to achieve it** are likely to be **wasteful**. Of course, as Chapter 2 explains, the same can be said for all efforts to regulate mixed-bag behavior. The point is most salient with antitrust, though, because **antitrust’s scope is unusually broad** (i.e., it is the residual regulator of **all business behavior**), and **the behaviors it regularly restricts** – trade-restraining agreements and business methods that may injure rivals – are particularly likely to **involve ambiguous welfare effects**. It is especially important, then, that courts, in **crafting antitrust rules** and **standards**, eschew perfection and settle for optimization – that is, they should develop liability tests calculated not to catch every anticompetitive act but instead to minimize the sum of error and decision costs. Fortunately, the US Supreme Court has in recent years become far more cognizant of antitrust’s inherent limits and has generally endeavored to structure antitrust’s standards in a manner that will optimize the law’s effectiveness.18

In addition to being an inherently limited body of law, a second difficulty with antitrust as a remedy for market power is that it is poorly poised to prevent harms in markets involving “natural monopolies.” The discussion that follows examines natural monopoly conditions and the chief policy responses thereto.

Direct Regulation

As explained earlier, **antitrust** is **standard-based** and **applies** (unless displaced) **to all industries**. **Alternative market power remedies**, which we may lump together under the description “**direct regulation**,” are **generally rule-based** and **industry-specific**. They also differ from antitrust in that they tend to be **administered by expert agencies** rather than by **generalist courts**.

**A purely regulatory system is best---it’s much more efficient---the perm wrecks that by including the aff’s ex-post litigation approach**

**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

Pure: pros. A **pure system** is **cheaper**, **simpler**, **operates much more quickly**, and **provides better guidance**. The **need for speed**, well illustrated by the response of the Federal Reserve and the Treasury Department to the **sudden financial collapse** in September 2008, can be a **compelling reason** for a **regulatory system in which courts play little or no role**. Thus, while failing firms normally are subject to liquidation or reorganization in a bankruptcy court (part of the federal court system), commercial banks that fail are “resolved” in administrative proceedings by the Federal Deposit Insurance Corporation.

**Outright condemnation is incompatible with antitrust.**

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

Bruce H. Kobayashi, Joshua D. Wright, “Antitrust and Ex-Ante Sector Regulation,” Report on the Digital Economy, Section III, Global Antitrust Institute, 2020, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/#\_ftn29

**In contrast**, the **outright condemnation or blacklisting** of practices or behaviors without such evidence **would not rest easily** with the **current evidence-based system** of antitrust laws.[27] Rather, the latter approach would be consistent with the **abandoned approach** taken during the **early history of the U.S. antitrust laws**, where the per se categorization was used extensively to condemn many procompetitive practices. In contrast, much of the recent evolution of the U.S. antitrust laws involved replacing existing and unsupported presumptions and per se rules with a rule of reason analysis that evaluates the impact of a challenged behavior on competition.[28]

**The counterplan’s rule is meaningfully distinct from the aff’s standard.**

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

Bruce H. Kobayashi, Joshua D. Wright, “Antitrust and Ex-Ante Sector Regulation,” Report on the Digital Economy, Section III, Global Antitrust Institute, 2020, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/#\_ftn29

The second factor listed in Table 1 used to **distinguish ex-ante** and **ex-post approaches** is a “**rules versus standards**” distinction.[21] The **standard analysis of ex-ante rules versus ex-post standards incorporates** the **timing tradeoffs** discussed above—**optimal ex-ante rules** often require a **more complete ex-ante determination** of the **specific contours of the rule** and the **consequences of violating** the rule, while **ex-post standards** and the remedy to be applied are given specific content **only after** an individual or firm acts and relevant information is revealed.[22] As noted above, which of these approaches generates higher social welfare in a particular setting will depend upon **information costs**—including the government’s cost of **acquiring** and **disseminating information** about the applicable rule or standard to the public, and the costs of **discerning whether** not an individual or firm has **violated** the rule or standard. Moreover, these **costs can change over time**. For example, in dynamic industries, rapid innovation can make carefully crafted rules obsolete. In contrast, ex-post adjudications under a standard can evolve to changes and are less prone to obsolescence.[23]

There is a second important dimension to the **rules versus standards distinction** relating to the **optimal level of complexity** and **detail** contained in the two approaches. In many analyses, this dimension is suppressed by the assumption that the relevant analysis is between simple bright line rules and more complex standards. Indeed, many of the proposals to **replace** “**ex-post**” **litigation based antitrust** are calls to **establish lists of prohibited practices** (**blacklists**) for certain firms (e.g., firms that meet a structural presumption or are identified as a gatekeeper).[24] Such **bright line rules** establishing conduct as illegal per se would **replace complex** and **costly determinations of liability** based upon evidence of a business practice’s anticompetitive effects.

**Antitrust and regulation are different things.**

**Lambert 17** – Wall Chair in Corporate Law and Governance and Professor of Law, University of Missouri

Thomas A. Lambert, “How to Regulate: A Guide for Policymakers,” Cambridge University Press, August 2017

Available Remedies and Their Implementation Difficulties and Side Effects

Treatments for the market power disease fall into **two general categories**. One consists of the body of law called **antitrust**, a set of somewhat **amorphous standards** that are aimed at preventing competition-reducing business practices and whose precise prohibitions are **determined on a case-by-case basis**. Sometimes dubbed the “residual regulator” of market power, antitrust governs potentially anticompetitive business practices unless it is **displaced** by some **more tailored form of regulation**. The second category of market power remedies, then, **consists of direct regulation** – i.e., **industry-specific**, **ex ante rules** (as opposed to **antitrust’s general**, **ex post standards3**) designed to assure that producers do not **reduce** their **output below**, or **raise prices above**, the levels that would prevail in a competitive market.

**Only judgements really matter for actually stopping bad action—the plan just results in huge costs**

**Crane**, Frederick Paul Furth Sr. Professor of Law, Michigan Law, **‘10**

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

There are two other ways that private antitrust lawsuits might mete out negative sanctions on corporate managers prior to judgment day. First, **antitrust litigation is extremely expensive** and the costs are often borne **disproportionately by defendants**. 100 CEOs, CFOs, and particularly general counsels care a great deal about legal fees, but the divisional managers who often make the decisions that ensnare a firm in an antitrust suit **may not care**. A divisional manager typically seeks to maximize the reported profitability of her own business unit, not necessarily the value of her firm as a whole.' 0' For accounting purposes, legal fees are often treated as operating expenses of the firm as a whole. Therefore, legal fees may not come directly out of a divisional manager's budget or count against her revenues for the purposes of divisional financial reporting and incentive compensation. The threat of having to pay legal fees during a protracted and expensive lawsuit **may have relatively little deterrent effect on the key decisionmakers** who consider **whether to engage in anticompetitive tactics.**

A second way that private antitrust lawsuits could provide an early deterrent shock is through large settlement payouts, which are a sort of privately negotiated and accelerated judgment day. **But with the exception of government case** tag-along suits, which are discussed below, large settlement payouts in private cases usually do not occur until the **eve of trial**. Corporate managers and boards are usually unwilling to open up their coffers for more than nuisance value settlements **until the threat of an adverse judgment is imminent**. Thus, private settlements may accelerate judgment day by shortcircuiting appeals, but the average time from the **planning of anticompetitive conduct** to the payment of any substantial settlement amount still probably **exceeds five years**.

**Takes too long to create a clear signal**

**Crane**, Frederick Paul Furth Sr. Professor of Law, Michigan Law, **‘10**

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

Given all of the above factors, it is implausible that the threat of future private litigation does much to deter anticompetitive behavior. The author's own experience in a private antitrust case is illustrative. By the time the case settled during an appeal, **it had been nine years** since the lawsuit was filed **and fifteen years since the alleged misconduct began**. Only a handful of personnel who were with the company during the relevant events were still employed by the firm at the time of settlement. Since the underlying conduct occurred, the company had witnessed multiple generations of senior management come and go. The company's capital structure had changed multiple times, too. First, it was part of a corporate conglomerate, **then it was spun off** as an independent, publicly traded company, then it was acquired by another conglomerate, and shortly afterwards it was taken private. The managers and shareholders who had reaped the gains from any unlawful conduct-assuming that there was any-**had long since moved on**.

**Supply Chain Adv**

**High food prices reduce poverty – best, newest stats are NEG**

-linear relationship – 1% increase in price reduces poverty up to 64%

-happens fast – within one to two years – sequencing analysis supports

**Heady**, Research Fellow @ International Food Policy Research Institute, **14**

(Derek, Higher food prices are better for the poor in the long run, <http://europesworld.org/2014/05/28/higher-food-prices-are-better-for-the-poor-in-the-long-run/#.WIa_U_krJOp>)

The mid-2000s saw some fundamental shifts in the global economy, not least the many global imbalances and policy mistakes that contributed to the financial crisis. Less well known, however, is the dramatic reversal in international food price trends. After a long-term secular decline over the 1980s and 1990s, food prices surged upwards from 2006 to 2008. The international prices of wheat and maize approximately doubled over this period and the price of rice spectacularly tripled in the space of a few months between late 2007 and mid-2008. These rapid changes in the prices of mankind’s most essential commodity became known as the **“global food crisis”,** but many researchers are now questioning whether it should **ever have been labelled as such,** as it has since been shown that **higher food prices** can **greatly contribute** to **poverty reduction** in rural communities. Of course this surge in food prices was not labelled a crisis without some justification. Few experts predicted the surge in food prices, and few knew when it would end. Major players in the international grain trade panicked in response to this uncertainty and withheld supply through export restrictions, or imported far more than they normally would in order to sure up stocks. The UN’s World Food Program faced tremendous difficulties in obtaining the grains it needed to distribute to the world’s most vulnerable people. Preliminary evidence and logic also suggested that the bulk of the world’s poor buy more food than they produce, meaning higher food prices would reduce their disposable incomes (at least in the short term). The urban poor were particularly hard hit – since they earn little or no income from farming – and the peak of the 2008 crisis saw food riots across many developing countries, and even the overthrow of the government in Haiti. **But** although the surge in global food prices was a crisis in some ways, it is also possible that higher food prices have **helped reduce global poverty** in the long term. The reason is this: While the poor invariably spend much of their income on food, many of them also **derive that income** **from growing food** or other **agricultural commodities**. Indeed, the vast majority of the world’s poor (defined by the World Bank as those living on less than $1.25 per day) **live in rural areas**; perhaps **as much as 75%.** Most of these depend primarily on family farming for their livelihoods, or on hiring themselves out as agricultural workers. In the short term, it is true that many of the rural poor will not produce enough food to feed themselves, and could therefore be hurt by higher food prices. But higher food prices also lead farmers to invest more in agriculture in an effort to **increase their profits**. One of these investments is **hiring more labour**, and agriculture in developing countries is **highly labour-intensive**. This increased demand for labour will have a large impact on the **wages of the poor**, especially in economies with large agricultural sectors, especially since labour is effectively a non-tradable commodity with no international substitutes. For these reasons, several economists are beginning to find it quite conceivable that **higher food prices could ultimately benefit the poor**. Recent research at the **International Food Policy Research Institute** examined the impact of higher food prices on poverty rates, in a sample that covers some 68 developing countries and over three decades of data. Our results **overwhelmingly suggest** that increases in food prices predict **reductions in poverty,** rather than increases. Moreover, the predicted effects are relatively large: **A 1% increase** in real food prices is expected to reduce the $1.25 per day poverty rate anywhere **between 0.35 and 0.64 percentage points**. The evidence also points to these benefits emerging **relatively quickly** – in the space of **one to two years.** Two **other recent studies** have also suggested that wage responses to higher food prices are large enough to overturn the idea that higher food prices hurt the poor. World Bank research on **rural India**, the country with the single largest concentration of the world’s poor, found that wage responses are **large enough to overturn the initially adverse effect** of **higher food prices** on **disposable incomes**. Furthermore, IFPRI researchers have used an economy-wide simulation model to separate the short and long-term effects of higher food prices on Uganda’s poor. As in rural India, wage responses **in Uganda** overturn the **initial conclusion** that higher food prices increase poverty. In the long run, **higher prices are actually a boon for poverty reduction.**

# 1NR

## Innovation DA

**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]."

#### 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**.”

**New laws will specifically be manipulated and abused by agencies to justify widespread crackdown**

**Delrahim**, Assistant Attorney General, Antitrust Division, United States Department of Justice, **‘20**

(Makan, “The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals,” 69 Cath. U. L. Rev. 657)

What does the future hold for consumer welfare standard? That’s up to us. No policy, no matter how sound, is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to **manipulate them in ways never previously seen**. I won’t mention specific examples, but we have seen this playbook when federal courts **interpret** or, more accurately, **rewrite** the law in **head scratching ways** and when agencies issue new regulations that **strain the statutory text.** Some reformers now seek to **bring this playbook** to the domain of antitrust law, which, **if read broadly**, could wield **tremendous power over the economy**. Unbridled, this power could do significant damage to the economic impulses that drive **innovation**, gains, and efficiency, and other pro-competitive outcomes for consumers.

Antitrust law may be **particularly vulnerable to hasty change** given its **common law status** and evolution in light of advancements and economic thinking. We will see in our lifetimes **whether the pendulum will swing back** and unravel the progress the field has made. What can practitioners, academics, judges, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as “hipster” antitrust because advocates for abandoning the consumer welfare standard invoked a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one’s opponents only go so far.

Winning the economic debate goes further, but not far enough. The modern antitrust reform movement is less concerned about economic soundness **than it is about results**. That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don’t act swiftly and certainly, then we risk looking impotent **next to those who would punish monopolists just for being big**. That approach, of course, **is an axe where a scalpel is needed**. If we don’t use our scalpel, we shouldn’t be surprised to **see the reformers sharpening their axes**.

**Antitrust changes are uniquely harmful----automatic treble damage provisions mean legislative expansion overdeters and prevents beneficial conduct**

**Muris**, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, **‘21**

(Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” <https://instituteforlegalreform.com/research/private-antitrust-remedies-an-argument-against-further-stacking-the-deck/>)

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

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent. **Proposals to slap another layer of deterrence** on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. **If anything**, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, **limiting treble damages** and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make **a bad situation worse** by ratcheting up **the level of overdeterrence**.

**Creates robust incentives to challenge mergers in every sector, irrespective of their procompetitive benefits**

**Arthur et al.**, L. Q. C. Lamar Professor of Law, Emory Law, **‘21**

(Thomas C., Amitai Aviram, University of Illinois Jodi S. Balsam, Brooklyn Law School Jorge L. Contreras, University of Utah Anthony Dukes, University of Southern California Vivek Ghosal, Rensselaer Polytechnic Institute Michael S. Jacobs, DePaul University Jordan Kobritz, SUNY Cortland Alexander Volokh, Emory University, Brief of Amici Curiae Antitrust Law and Business School Professors in Support of Petitioners, NCAA v. Alston, available at: <https://www.supremecourt.gov/DocketPDF/20/20-512/168408/20210208135430804_20-512%2020-520%20tsacAntitrustLawAndBusinessSchoolProfessors.pdf>)

Second, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to succeed. This rule not only would impose on antitrust defendants the titanic burden of proving a universal negative,3 it also would empower antitrust plaintiffs to invalidate virtually all collaborations, no matter how procompetitive, merely by dreaming up marginal ways to make them slightly more competitive. See Smith v. Pro Football, 593 F.2d 1173, 1215 (D.D.C. 1978) (MacKinnon, J., concurring in part, dissenting in part) (“In evaluating less restrictive alternatives as a matter of law, it is difficult to imagine what kind of draft would be valid if the existence of a less restrictive alternative would automatically render the present draft unreasonable. Some less restrictive alternative can always be imagined.”) Indeed, “[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018). And **a skilled plaintiffs’ lawyer** would have **little difficulty finding attorneys’ fees and treble damages** to be sufficient **incentive** to challenge **virtually all** such **collaborations**, thus ensuring that the most direct consequence of the Ninth Circuit’s application of the Rule of Reason would be a flood of antitrust litigation, followed by a reduction in collaborative enterprises and the negative effects of that reduction.

This consequence follows from the fact that the Ninth Circuit’s ruling is not limited to the NCAA’s “amateurism” rules. Instead, the Ninth Circuit’s opinion as written applies to all forms of joint ventures and procompetitive collaborations and thus is likely to disincentivize those arrangements. See, e.g., U.S. Dep’t of Justice & FTC, supra, at 1 (2000) (warning that making it too easy to condemn “agreements among actual or potential competitors may deter the development of procompetitive collaborations”).

The Ninth Circuit’s decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures **across a host of areas** including **healthcare**, **pharmaceutical development**, **information technology**, **consumer electronics**, and **manufacturing**. According to the Ninth Circuit’s approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture’s product is priced too high. But see Texaco Inc. v. Dagher, 547 U.S. 1, 6–7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”). The **potential exposure to treble damages** for such conduct is likely to **chill otherwise procompetitive arrangements**, thus **contradicting the ultimate goal of the antitrust laws: promoting competition**.

**Specifically harms tech mergers---it’s priority number 1 for regulators, and ensures deals never leave the boardroom**

Dushnitsky 21 – Gary Dushnitsky is an associate professor of Strategy and Entrepreneurship at London Business School. He also serves as a senior fellow at the Mack Institute for Innovation Management at the Wharton School of the University of Pennsylvania. Daniel Sokol is a professor of Law and affiliate professor of Business at the University of Florida

(Gary Dushnitsky and Daniel Sokol, “Competition laws could be a death knell for startup mergers and acquisitions,” 7/22/2021, The Hill, https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and?rl=1)

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of misguided antitrust legislation. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have unintended consequences that would hamper innovation and entrepreneurship. The result is that certain potential deals will never leave the boardroom and others will be abandoned because the risks of antitrust intervention are too high.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in collateral damage across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

**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. 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.

#### 3. 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] Growth is the strongest in months.

Smart ’10-22 [Tim; October 22; Reporter; U.S. News and World Report, “Survey: U.S. Economic Growth Accelerated in October, Led by Services,” <https://www.usnews.com/news/economy/articles/2021-10-22/survey-us-economic-growth-accelerated-in-october-led-by-services>]

Growth in U.S. economic activity accelerated in October, overcoming supply chain snafus and shortages of labor and materials, according to the flash composite Purchasing Managers Index released Friday by IHS Markit.

The overall index now stands at 57.3, up from 55 last month, with the services sector index at 58.2, a three-month high and up from 54.9 in September. Manufacturing slipped to 59.2 from 60.7 in September, registering a seven-month low.

Economists projected the services index at 55.2, with the manufacturing index estimated at 60.7.

"U.S. Private sector businesses recorded a sharp and accelerated upturn in output led by the service sector during October," the report said, "with growth the strongest for three months, albeit still much weaker than earlier in the year."

The report noted companies struggled with a backlog of orders, constrained by a lack of workers and key parts. Prices rose at a record pace, reflecting rising inflation across many categories of goods.

The report mirrors many other recent readings on the economy, which show strong demand from customers running head-on into shortages and higher prices.

#### Who cares? Price gouging isn’t our internal link. It’s innovation. Acquisitions are critical to AI 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.)

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## Innovation DA

#### AI tech development, NOT econ, is the key determinant of war with China.

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Graham Allison, August 2020, "Is China Beating the U.S. to AI Supremacy?," Belfer Center for Science and International Affairs, <https://www.belfercenter.org/publication/china-beating-us-ai-supremacy>

An AI Arms Race?

During the Cold War, the stakes in the nuclear arms race with the Soviet Union were obvious. In today’s **Thucydidean rivalry** between a **meteorically** rising **China** and a colossal ruling **United States**, what are the risks of an escalating AI arms race?

Like it or not, **future war will be AI-driven**. As Secretary of Defense Mark Esper recently noted at the conference of the National Security Commission on AI, “Advances in AI have the potential to change the character of warfare for generations to come. **Whichever nation harnesses AI first will have a decisive advantage on the battlefield for many, many years.”** AI’s ability to accelerate decision cycles in conflict will compel militaries to adopt it. In air-to-air combat, pilots begin with an ooda loop: observe, orient, decide, act. If A can “get inside B’s OODA loop,” A wins—since he can maneuver to escape A’s fire and attack where he calculates B’s path will leave him when A’s missile arrives. Because AI can observe, orient, decide and act at multiples of a human pilot, it will become irresponsible to send a human pilot into battle with an AI piloted aircraft.51 As former Chairman of the Joint Chiefs of Staff Joeseph Dunford put it: “**Whoever has the competitive advantage in artificial intelligence and can field systems informed by artificial intelligence, could very well have an overall competitive advantage**.”52

The demonstrated success of AlphaGo, and more recently, AlphaStar, in defeating all competitors in one of the world’s most complex real-time strategy video games suggests that in any structured contest between offense and defense, **AI will dominate humans.** The company, country or team with the best AI will win. As an example, consider American football. In what commentators often discuss as a “chess match,” the offense and defense coordinators know that if the defense guesses correctly whether the next play will be a pass or a run, most nfl teams’ defenses can successfully stop most opponents’ offense. Reading all the variables in a situation, AI should be able to tilt the scales on the field—or in analogous military competitions on land, sea, and in the air and space.

The domain’s leader will also be the first to know which of today’s military mainstays AI will upend. Germany discovered the power of submarines before World War I because it led in their development. British admirals did not wake up to their deadly efficiency until a lone German U-boat in 1914 sank three armored cruisers on a single morning. **By then, it was too late**—the British had already invested their treasure in building battle fleet that had become largely obsolete. The coordination of drones and cruise missiles that successfully attacked Saudi Arabia’s most valuable target and cut its oil exports by half is suggestive. Will AI-empowered drone swarms make aircraft carriers equally obsolete, all for one one-thousandth of the cost? Will AI analysis of data from all sources pierce the invisibility of stealthy systems like the F-35 in which the United States has invested so substantially? **The first country to know will be the one driving the research and development frontier.**