**Disclosure NDT R1**

**1NC**

**OFF**

**1NC---T**

T Core Antitrust---

**The core antitrust laws are only Sherman and Clayton**

**ATR 07** – Law enforcement agency that enforces the U.S. antitrust laws

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

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

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

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

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

**Violation: the** **aff amends the FTC Act---that’s not an antitrust law**

**Raphael 16** – Litigation partner in the San Francisco office of Munger, Tolles & Olson

Justin P. Raphael, Motion to Dismiss and Memorandum in Support filed by Defendant, Thompson, et al. v. 1-800 Contracts, Inc., et al., US District Court for the District of Utah, November 2016, LexisNexis

The FTC administrative action **was not brought** “to prevent, restrain, or punish violations of **any of the antitrust laws**.” Rather, it was brought under **Section 5 of the FTC Act**, 15 U.S.C. § 45. The term “**antitrust laws**” is **defined in the Clayton Act** to **encompass a specific list of federal antitrust statutes**, 15 U.S.C. § 12(a), **which the Supreme Court has held is exclusive**. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958) (“[T]he definition contained in § 1 of the Clayton Act is **exclusive**. Therefore **it is of no moment** that [a statute not listed therein] may be **colloquially described** as an ‘antitrust’ statute.”). That definition **does not include Section 5 of the FTC Act**, and **multiple courts** have **acknowledged that the FTC Act is not an** “**antitrust law**.” See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing “prima facie” weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that “**prima facie weight** is given only to violations of the ‘**antitrust laws**’ as defined by the Clayton Act,” which “**does not include violations of the FTC Act**”); Yamaha Motor Co. v. FTC, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is **not** “one of the ‘**antitrust laws**’ within the meaning of Sections [16(a) and 16(i)] of the Clayton Act”).

**Vote neg---**

**[1]---Limits---the FTC Act includes an entirely separate mechanism for enforcing antitrust---functionally doubles the topic**

**[2]---Ground---core neg strategies like the Section 5 counterplan and disads to treble damages are predicated on an aff change to Sherman or Clayton**

**1NC---T**

T Expand---

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

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

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

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

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

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

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

Introduction

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

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

**Vote neg---**

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

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

**1NC---CP**

Adv CP---

**The United States federal government should:**

* **establish mechanisms that allow government agencies and laboratories to collaborate directly with private technology start-ups through at least co-development and technology-licensing agreements.**
* **should implement an asymmetric defense strategy to respond to limited military aggression against allies, including, economic warfare, sanctions, limited, proportionate, asymmetric military force, and all relevant preparatory measures with allies to make operations effective**
* **increase funding and planning for smart cities.**

**1st plank solves innovative health and innovation**

**Surana et al 20** – Assistant research professor at the Center for Global Sustainability, School of Public Policy at the University of Maryland College Park. She previously worked at the Harvard Kennedy School and the World Bank.

Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 1, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

Despite their potential to bridge the gap between RD&D and deployment, climate-tech **start-ups face fierce headwinds**. To be sure, all start-ups, regardless of sector, face barriers, and only around half of them survive beyond five years. 2 In climate tech, the challenges facing start-ups are amplified. In some cases, climate-tech innovation may require decades of investment in human, technological, and financial resources before bearing fruit. In others, technology **deployment might interface or compete with incumbent utilities and businesses that can be resistant to change**, having already built carbon-intensive infrastructures and business models over decades.

Consequently, despite their promise from a societal and environmental perspective, climate-tech start-ups are often perceived to be unattractive from a financial perspective. In the early 2010s, VCs invested in climate-tech firms without adequately accounting for these challenges. Thus, instead of making quick returns and a big upside, many lost much of their investment.

The perceived risks of climate-tech start-ups still linger. The infamous commercialization “valley of death” claims a higher proportion of climate-tech start-ups than information or medical technology start-ups, which receive the lion’s share of VC funding. 3 Yet some climate-tech startups make it through. **Identifying approaches that help ease barriers faced by** climate-**tech startups can** ultimately **catalyze their role in accelerating** clean energy **innovation**.

**One solution to improve the chances of** climate-**tech start-up survival is** particularly surprising: **collaboration with federal agencies and laboratories.** By collaboration, we mean mechanisms that allow agencies and government laboratories to work directly with start-ups, such as co-development and technology-licensing agreements. We do not include grants and loans. Entrepreneurs and agencies may seem like an unlikely match, but **our rigorous, peer-reviewed research found them to be compatible**. Indeed, **collaborations between** climate-**tech start-ups and federal agencies yield better results than their collaborations with universities or other firms, as measured by patents received and follow-on financing.**

**Second plank solves rest of advantage 1**

**O’Hanlon ’19** – senior fellow, and director of research, in Foreign Policy at the Brookings Institution, co-directs the Security and Strategy team, the Defense Industrial Base working group, and the Africa Security Initiative within the Foreign Policy program, adjunct professor at Columbia and Georgetown universities, a professional lecturer at George Washington University, and a member of the International Institute for Strategic Studies

Michael O’Hanlon, “Can America Still Protect Its Allies?,” September 4, 2019, <https://www.foreignaffairs.com/articles/world/2019-08-12/can-america-still-protect-its-allies>.

This type of limited enemy assault would raise difficult questions for U.S. policymakers—what I call “the Senkaku paradox.” Should Washington risk a great-power—and potentially **nuclear**—**conflict** in order to preserve its credibility, even over something relatively unimportant? Or should it conclude that the stakes are too small to justify such a risk? In the event of limited enemy aggression against an inherently worthless target, a large-scale U.S. response—as the traditional approach to extended deterrence would dictate—would seem massively disproportionate. On the other hand**, a nonresponse would be unacceptable**, and inconsistent with American treaty obligations, too.

**The way out of this paradox is** through a strategy of **asymmetric defense**. **The United States should not formally renounce the possibility of a full military response to very limited** (and quite possibly nonlethal) **aggression against its allies.** Indeed, Lieutenant General John Wissler, then commander of the U.S. III Marine Expeditionary Force in Japan, was **right to insist** in 2014 that **the United States** and Japan **could expel the Chinese from the** Diaoyu/**Senkaku Islands** if required. As a practical matter, however, the United States needs other options—for both before and after a crisis begins.

Most of all, **Washington’s deterrence strategy should seek to avoid drawing first blood** against another great power if at all possible. The United States should prepare responses to small-scale aggression that emphasize economic warfare, and sanctions in particular. At first, the main role of U.S. military force should be to create a defensive perimeter so that China’s or Russia’s appetite for expansion is not further whetted. In the event that a crisis worsens, Washington and its allies could attempt indirect military measures—for instance, targeting ships in the Persian Gulf carrying oil to China. This sort of response would, at least initially, keep the conflict far from the shores of any great power, providing more time for the belligerents to avoid further escalation. But **economic warfare should be the core of the strategy, with military force in support**.

Such an approach would help **convince** a would-be adversary that **it would have more to lose than to gain** from the use of force—especially if the United States and its allies had taken proper preparatory measures to ensure that they could tolerate any reprisals. The trick would be to make sure the punishments for noncompliance were commensurate with the initial aggression, while maintaining the potential to escalate if necessary.

For sanctions to be economically sustainable, the United States and its allies need to understand vulnerabilities in their supply chains, financial dealings, and other economic relationships. They should develop strategies to mitigate these vulnerabilities—for example, by bolstering their national defense stockpiles of key minerals and metals, many of which today come primarily from China. They should take steps to avoid becoming overly dependent on China for key manufactured components and goods—Washington could prevent Chinese imports from exceeding a specified percentage of certain critical sectors. European states should also continue improving the infrastructure needed to import liquefied natural gas from the United States and other countries as a backup in case energy imports from Russia are interrupted in a future crisis.

**A sanctions-based strategy would be judicious and proportionate, but it would not be weak**. Indeed, if Beijing or Moscow refused to either back down or otherwise resolve the dispute once the United States and its allies had deployed sanctions, Washington could raise the stakes. Recognizing that the aggressor state’s strategic aims had become fundamentally untrustworthy or hostile, Washington could seek to not only punish the perpetrator for its specific action but also limit its future economic growth. Over time, export controls and permanent sanctions could replace temporary punitive measures. **This strategy would require support from key U.S. allies to be effective**—one more reason why Washington needs to respond to these kinds of crises in a way that seems judicious, patient, and nonescalatory, so as to strengthen its coalition and not scare away key partners.

**1NC---CP**

**Text: The fifty states and all relevant United States territories should:**

* **Prohibit unfair methods of competition by digital platforms that restrict interoperability.**
* **Coordinate unified, multistate efforts to prosecute violations of said prohibitions through the National Association of Attorneys General.**

**States solve---they can enact and interpret their own laws, and cannot be inherently preempted**

**HLR 20** – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

**Antitrust federalism**, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the **states' ability** to **bring suit under federal antitrust law** and the second their ability to **enact** and **enforce** their **own state antitrust laws** -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to **attack antitrust offenders**, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in **congressional action** or the **courts' interpretation of congressional inaction**. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in **Hart-Scott-Rodino**. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- **was not preempted** in **California v. ARC America Corp.**, it considered the same Sherman Act silence.

**State coordination through the NAAG solves certainty and resource disparities**

**ABA 10** – American Bar Association

“ABA Antitrust Health Care I-G,” Antitrust Health Care Handbook, American Bar Association, 2010, LexisNexis

Federal and state enforcement authorities frequently cooperate in health care antitrust investigations and enforcement actions, and the agencies have issued a protocol describing basic procedures for their coordinated enforcement. **States** also **coordinate** their **antitrust enforcement** through the **Multistate Antitrust Task Force** of the **National Association of Attorneys General**. These efforts serve **important enforcement goals** by **permitting participants to share expertise and resources** and **affording greater certainty** to health care providers and payors **seeking to resolve antitrust concerns** in a **consistent** and **expeditious manner**. Federal and state enforcement authorities have overlapping jurisdiction with respect to most conduct, and some states have aggressively enforced the antitrust laws in the health care sector.

**1NC---DA**

Innovation DA---

**Immediately expanding scope of antitrust liability brings innovative conduct 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---K**

Neolib K---

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

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

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

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

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

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

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

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

**But there is a catch.**

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

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

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

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

**1NC---DA**

**The Federal Trade Commission should not pursue competition rulemaking related to surveillance, real-estate brokerage, occupational licensing, unfair competition in online marketplaces, and industry specific practices that substantially inhibit competition.**

**The FTC will succeed if it can focus on noncompetes now – but expanding the scope of antitrust trades off**

**Pierce 21** – Richard J. Pierce, Jr. is the Lyle T. Alverson Professor of Law at George Washington University

Richard J. Pierce, July 15 2021, “Unsolicited Advice for FTC Chair Khan,” Yale Journal on Regulation and ABA Section of Administrative Law & Regulatory Practice,

<https://www.yalejreg.com/nc/unsolicited-advice-for-ftc-chair-khan-by-richard-j-pierce-jr/>

New FTC Chair Lina Khan has not sought my advice, but here it is. In his July 9 Executive Order, President Biden described an antitrust agenda that he wants the FTC and the other agencies with antitrust responsibilities to implement. His agenda consists of 72 major changes in competition law. **Any agency that attempts to implement** an **agenda** **that includes** that many **major changes in law at the same time is doomed** to failure. **No agency has the resources** required to implement an agenda that ambitious. Chair **Khan** and her colleagues **need to choose no more than half a dozen** parts of the president’s agenda to pursue immediately.

The FTC **can begin** the **prioritization** process by **deferring** pursuit of the **long list of changes in law** that Chair Khan proposed in her famous student Note and her first meeting as Chair. I described some of those changes in my July 1 essay[1] and my July 3 essay.[2] The Supreme Court would reject those changes because they are inconsistent with the approach to antitrust law that the Court has pursued for fifty years. Absent enactment of a statute that clearly compels the Court to reject everything that it has said and done for half a century and to head in a direction that it has long rejected, pursuit of **any of those proposed changes would produce nothing but** headlines followed by judicial **rejections**.

There are five changes in law in President Biden’s list that the FTC has been attempting to make for many years, with limited success in court. I described those proposed changes in my July 12 essay.[3] The FTC should continue to pursue those socially-beneficial changes, but with the understanding that they are long-term goals. The FTC is unlikely to succeed in persuading the courts to acquiesce in most of those changes during President Biden’s first term in office.

**The FTC’s number one short-term goal should be** to **eliminate** most of the **non-compete clauses** in employment contracts. President Biden emphasized the severity of the problems caused by non-compete clauses in the speech that he made when he announced his antitrust agenda. As he noted, **they now exist in** about **30%** of employment contracts, including contracts for employment as a hamburger flipper in a fast food restaurant. They inflict significant harm on employees by prohibiting them from taking jobs that would improve their pay or working conditions.

**Non-compete clauses** significantly **impair** **the** performance of the **labor market** by limiting the role of competition. They are responsible for a significant part of the large gap between our constantly increasing labor productivity **and** our **stagnant wage levels**. That **gap has grown** over the past thirty years. They also have contributed to the vast gaps in our income and wealth that have increased dramatically in recent years.

The Supreme Court’s June 21 opinion in NCAA v. Alston provides powerful evidence that **the Court would be receptive to an FTC campaign to outlaw most non-compete clauses**. The Justices made it clear that they unanimously support efforts to improve the performance of labor markets. They are prepared to hold unlawful any anticompetitive practice that employers adopt as a means of artificially depressing wages. Noncompete clauses fit that characterization perfectly.

There is a large body of scholarship, including excellent empirical studies, that documents the severe adverse effects of noncompete clauses on the performance of labor markets. There is no evidence that they have offsetting social benefits in most contexts. The FTC staff has **already gathered and analyzed most of the evidence it needs** to launch a successful campaign against non-compete clauses. It hosted an excellent workshop on the subject in 2019.[4]

Elimination of most noncompete clauses would also benefit consumers by improving the performance of markets for goods and services. Small firms and startups cannot compete effectively with the large firms that now dominate many markets unless they can hire some of the experienced workers that work for the large established firms. Noncompete clauses preclude them from being able to lure those workers away from the market incumbents, thereby crippling their efforts to succeed in entering a market and thriving in that market. Because of non-compete clauses, a new market entrant cannot succeed even if it would be able to offer a superior product or service if it could hire experienced workers.

The FTC should exercise caution in two ways **if it decides to prioritize elimination** of most non-compete clauses. First, **the FTC should not** overreach substantively. Most employers have no chance of proving that their noncompete clauses further any socially beneficial purpose. In a few narrow contexts, however, there is some theoretical and empirical support for the argument that noncompete clauses yield net social benefits. Thus, for instance, noncompete clauses may produce net benefits in the context of high-paid scientists and senior executives who have unique access to a firm’s trade secrets. The FTC should focus initially on the goal of eliminating noncompete clauses in the contracts of low-paid employees.

Second, the FTC should not overreach procedurally. The FTC will be tempted to rely on the D.C. Circuit’s opinion in National Petroleum Refiners v. FTC,[5] to support issuance of rule that bans noncompete clauses in most employment contracts. In that opinion, the court held that the FTC can use notice and comment rulemaking to issue a rule that implements section five of the FTC Act. The FTC should resist that temptation. The D.C. Circuit’s 1973 opinion was based on a type of reasoning that no court has used in decades, and courts have always been reluctant to uphold FTC actions that are based solely on section five. The Supreme Court is virtually certain to overrule the D.C. Circuit precedent if the FTC tries to rely on it.[6] I can even predict the language the Court would use to overrule that opinion. In 2019, the Supreme Court overruled a 1974 D.C. Circuit precedent with this explanation: “National Parks’ contrary holding is a relic from a bygone era of statutory interpretation.”[7]

It would be a shame if the FTC went through the lengthy and resource-intensive notice and comment process only to have the Supreme Court reject its work product on procedural grounds. The FTC **can easily accomplish the goal of eliminating most noncompete clauses** by using a combination of procedural tools and substantive authority that it has long used and that courts have long accepted. It can issue a statement of enforcement policy in which it announces, explains, and supports with solid evidence, its policy of banning most noncompete clauses. It can then initiate **one or more high visibility, well-chosen enforcement actions** in which it finds that the noncompete clauses in the employment contracts of the low-paid employees of a particular firm violate the Sherman Antitrust Act. By using that approach, **the FTC can implement** one of President Biden’s most important goals **in** a relatively **short** period of **time**.

**The counterplan’s sufficient and eliminates thumpers**

**Thornhill and Faulders 22** – Siran S. Faulders Partner at Troutman Pepper. Abbey Thornhill Associate at Troutman Pepper.

Abbey Thornhill and Siran S. Faulders, January 18 2022, “FTC Releases 2022 Statement of Regulatory Priorities,” Troutman Pepper, https://www.regulatoryoversight.com/2022/01/ftc-releases-2022-statement-of-regulatory-priorities/

These new rules will further President Joe Biden’s announced goal of promoting competition in the American economy. On July 9, 2021, the president affirmed in Executive Order No. 14036 that it is his administration’s policy to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.”[[11]](https://www.regulatoryoversight.com/2022/01/ftc-releases-2022-statement-of-regulatory-priorities/" \l "_ftn11) In that executive order, the president explicitly encouraged the FTC to consider competition rulemaking relating to **noncompete clauses**, surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.[[12]](https://www.regulatoryoversight.com/2022/01/ftc-releases-2022-statement-of-regulatory-priorities/" \l "_ftn12) **The FTC agenda for 2022 confirms that the Commission is on board with the president’s agenda.**

**Non-competes collapse wage growth and ruin business dynamism**

**Walter 19** – Karla Walter is the senior director of Employment Policy at the Center for American Progress. Walter focuses primarily on improving the economic security of American workers by increasing workers’ wages and benefits, promoting workplace protections, and advancing workers’ rights at work.

Karla Walter, January 9 2019, “The Freedom to Leave,” American Progress, https://www.americanprogress.org/article/the-freedom-to-leave/

Noncompete and no-poaching agreements not only prevent individual workers from moving to better jobs that will allow them to earn more and advance in their careers; they also **contribute to larger negative trends in the American economy** that are reducing economic dynamism, impeding labor market competition, and, consequently, **driving wage stagnation** across the economy.

This report demonstrates how abusive noncompete and no-poach agreements harm workers across income levels and the larger **U.S. economy**; and it asserts that states have the power to protect workers from these agreements. Reversing this practice should be a priority for policymakers who want to support working families.

Strong wage growth is central to the health of the American middle and working class.6 **All but the wealthiest of American families rely on wages**—rather than wealth—to support themselves and save for the future. Throughout the middle of the 20th century, working Americans enjoyed rapid improvements in their standard of living as wage growth increased in tandem with rapidly expanding American productivity.7

Over the past four decades, however, **American wages have stagnated**, even as productivity has continued to grow. Since the Great Recession, growth in wages has just barely outpaced inflation.8 Moreover, despite low unemployment rates and strong gross domestic product (GDP) growth, **real wage growth has been flat** since President Donald Trump took office in January 2017.9

Noncompete and no-poaching agreements have found that this wage gap increased as workers aged.10

Similarly, in a 2016 report, the U.S. Council of Economic **contributed to this trend**. A small but growing body of research indicates that when workers are forced to sign these sorts of agreements, their ability to bargain for better wages **is reduced since they cannot leave a job**—or even threaten to leave a job—for a competitor. One academic study found that **workers’ wages were significantly lower in states with strict enforcement of noncompetes** than they were in states with the most lenient enforcement of noncompete agreements; the study also Advisers concluded that “it is likely that **the primary effect of these [noncompete**] agreements **is to impede worker mobility and limit wage competition**.”11

In addition, noncompete agreements can prevent low- and middle-income families from building wealth through entrepreneurship and small business ownership. Business owners in the United States enjoy significantly higher levels of wealth than those who do not own a business—with even larger wealth gains for African American and Latino business owners compared with African American and Latino non-business owners.12 However, as previous CAP research has shown, entrepreneurship has been on a long-term decline since the early 2000s.13

Noncompete agreements may exacerbate this problem by preventing workers from striking out on their own to create rival firms. Some academic studies find that **entrepreneurs launch startups at lower rates** and have a harder time attracting employees for businesses in jurisdictions that strictly enforce these sorts of agreements.14

Moreover, this is not just a hinderance for entrepreneurs **but may also inhibit regional economic growth**, as companies may receive less benefits from co-locating near skilled labor pools when noncompete and no-poaching agreements are used at high rates.

**Causes war**

**Sundaram and Popov 19** – Jomo Kwame Sundaram is a former economics professor and former UN Assistant Secretary-General for Economic Development. Vladimir Popov is a former economics researcher for the UN Secretariat.

Jomo Kwame Sundaram and Vladimir Popov, “Economic Crisis Can Trigger World War,” *Inter Press Service*, 12 February 2019, http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. **As fears rise of** yet **another international financial crisis, there are growing concerns about** the increased possibility of **large-scale military conflict.**

More worryingly, in the current political landscape, **prolonged economic crisis**, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, **could easily spin out of control and ‘morph’ into** military conflict, and worse, **world war.**

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to **unconventional monetary measures**, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they **did little to address underlying economic weaknesses**, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the **unprecedented liquidity** central banks injected into economies **has not been well allocated to stimulate** resurgence of **the real economy**.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. **Prolonged economic distress has worsened public antipathy towards the culturally alien** — not only abroad, but also within. Thus, **another round of economic stress is deemed likely to foment unrest**, conflict, **even war** as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. **Opportunistic leaders** have been blaming such misfortunes on outsiders and **may seek to reverse policies associated with** the perceived causes, such as ‘**globalist’ economic liberalization**.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, **protracted economic distress**, economic conflicts or another financial crisis **could lead to military confrontation** by the protagonists, even if unintended. Less than a decade **after the Great Depression** started, **the Second World War had begu**n as the Axis powers challenged the earlier entrenched colonial powers.

**Case**

**Adv 1**

**Congress backlashes to activist FTC - kills solvency because they hollow out enforcement**

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

(Sandeep, “Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission,” University of Pennsylvania Journal of Business Law, Vol. 19)

Among those sympathetic to an expansive Section 5, some are likely to express reservations about its political feasibility. History certainly lends support to this concern. Congress has been **hostile to an activist FTC** in the past and could be expected to move to rein in any activism. In the 1970s, the FTC zealously pursued its antitrust and consumer protection missions.251 This period of aggressive enforcement and rulemaking **triggered a powerful backlash** from corporate America.252 The Washington Post condemned the Commission as the “National Nanny” in a stinging editorial.253 This period of zeal ended poorly for the FTC. Congress **asserted new power** over the agency and imposed additional **procedural conditions** on the use of its **consumer protection authority**.254

This fear of a political backlash from business and Congress **may be the strongest line of criticism** of an **expansive Section 5**. Corporations pour money into Congressional campaigns to ensure that their interests are represented and advanced. Although the FTC has been averse to policy activism or innovation for decades, the House has tried to limit the FTC’s authority to challenge mergers under Section 5, in the name of creating harmony between the FTC and the DOJ.255

The **recent experience** of another federal agency **is instructive**. Congressional Republicans, with the support of some Democrats, have been trying to hobble the Consumer Financial Protection Bureau (“**CFPB**”).256 The CFPB is seen as aggressively pursuing its statutory mission, bringing a wide range of enforcement actions and writing a number of rules to regulate consumer finance markets.257 In light of its vigor, the opposition from Congress does not come as a surprise. Even under more **favorable** political **circumstances**, an FTC that **seeks to breathe life** into Section 5 **is certain to invite comparable Congressional opposition.**

The probable reaction from many ideologically or financially captured members of Congress **should not be underestimated**, let alone ignored. Corporate interests and their Congressional allies would seek to **curtail any Section 5 expansions**. The FTC is a creation of Congress and so **must answer to Congress**. Congress can undertake a range of actions to limit the FTC’s day-to-day ability to function and its statutory power. At an extreme, Congress could repeal the FTC Act and **shut down the FTC** entirely. The risks to the FTC’s future would include **various existential threats** and should not be brushed aside. Undertaking a reinterpretation of Section 5 without an awareness of political dynamics on Capitol Hill would be a grave mistake.

**Internet not key to responding to grey zone conflict – Ukraine proves they can’t stop overt escalation AND governments get data elsewhere.**

**No impact to hybrid war---it’s overhyped.**

**Sari 19** – Senior Lecturer in Law, University of Exeter. Director, Exeter Centre for International Law.

Aurel, 6/6/19, "The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats", Harvard National Security Journal, https://harvardnsj.org/wp-content/uploads/sites/13/2019/06/Mutual-Assistance-Clauses-of-the-North-Atlantic-and-EU-Treaties.pdf

Nevertheless, the **threat** of subversion **should not be overrated**, either. In particular, the widespread unease over the blurring of the line between war and peace must be put into perspective. Hybrid warfare in its original, narrow sense describes a style of operational art: the integrated use of conventional and unconventional methods of warfighting in the same battlespace. Armed conflict, whether actual or impending, is integral to the concept. By contrast, hybrid warfare in its broader sense describes the use of the full range of instruments by hostile actors in pursuit of their strategic goals. Here, hybrid warfare no longer refers to a method of waging war, but to the combination of diverse levers of influence for the purposes of geopolitical competition. **Hard power** and the threat of military confrontation **remain essential** components of the concept, but actual or **imminent hostilities do not**. Describing non-forcible measures carried out by hostile powers as hybrid warfare may be justified in circumstances where these activities constitute shaping operations in anticipation of armed conflict or where they form part of ongoing hostilities.283 However, in the absence of any realistic connection with actual or **impeding war, labeling such measures as acts of warfare**, whether hybrid or not, **is a misnomer**.284 It may convey the hostile nature of geopolitical confrontation,285 but it is still hyperbole. **The dividing line** between war and peace **may look blurred** when it is viewed from the perspective of a wide understanding of hybrid warfare, **but this is so largely because** the very use of the concept in **such a loose manner creates a link** between non-forcible acts falling below the threshold of war and the mere prospect of war.286 Russian theorists of contemporary conflict have avoided such conceptual freefall by insisting that violence is an integral element of warfare.

**Slew of alt causes to smart cities – regulatory hurdles, climate change, corruption, and lack of resources.**

**No smart cities AND they fail.**

**Smith ‘17** [Kendra; November 17; writer @ wired; Scientific American, “The Inconvenient Truth about Smart Cities,” [https://blogs.scientificamerican.com/observations/the-inconvenient-truth-about-smart-cities]](https://blogs.scientificamerican.com/observations/the-inconvenient-truth-about-smart-cities%5d)

A big reason for the disconnect between smart city potential and reality is the fact that smart cities are where the digital world blends, but can also **collide**, with the non-digital world. Non-digital issues such as **legacy governance**, **social justice**, **politics**, **ideology**, **privacy** and **financial elements** that are not so smart, efficient or resilient when smart-city planning starts can become **large factors**. Any one of these elements can pose a challenge in and of itself and grow to **monstrous proportions** when combined with other **longstanding problems** in a city. Imagine the entanglements that existing public and private industries must go through to implement a single smart city project, let alone numerous projects such as smart lighting, smart transportation, smart buildings and the like to actually make a more complete smart city. Bill Gates’ effort is notable because Belmont is a blank slate to be built from the ground up.

**TURN - Big tech is key to prevent digital authoritarianism---the aff locks in China’s rise by making it impossible to compete.**

**de La Bruyère & Picarsic 20** – Senior Fellow, Foundation for Defense of Democracies; Senior Fellow, Foundation for Defense of Democracies

Emily de La Bruyère, Nathan Picarsic, “How Big Tech factors into the US-China geopolitical competition,” The Hill, October 2020, https://thehill.com/opinion/technology/521762-how-big-tech-factors-into-the-us-china-geopolitical-competition?rl=1

Congress is making the wrong call — not because of what was in the House report, but because of what was not: These 450 pages, the antitrust probe, and the national conversation about Big Tech writ large ignore the strategic context. They assume that the U.S. system **sits in a vacuum**; that the **alternative** to Big Tech is **small**, **or smaller**, **tech**.

**It is not**. The **alternative** to U.S. Big Tech is **China’s Big Tech**.

In fact, Big Tech is the **closest thing** that the United States has to a **strategic response** to China’s **asymmetric**, **global** offensive; to the Chinese Communist Party’s (CCP) **quest for international information dominance**, its **digital authoritarianism** and its **tech-fueled**, **military-civil fusion strategy**.

Beijing has diagnosed that advances in information technology are bringing about a new global order: A new set of networks, standards and platforms that will define global exchange of goods, ideas and people. The CCP wants to set those standards, build those platforms and oversee those networks. China seeks commercial, informational and military ends, all of them fused into a comprehensive vision of national power — and international control. “Whoever controls the flow of resources, markets and money,” wrote retired People’s Liberation Army commander Wang Xiangsui in 2017, “is **hegemon of the world**.”

This is **not an abstract threat**. Beijing’s **global architecture** is **well established**. In 2019, Beijing successfully promulgated 83 standards through the International Standards Organization (ISO), addressing everything from aviation and shipping to petrochemicals. The Beijing-backed Global Energy Interconnection Development and Cooperation Organization (GEIDCO) has signed agreements with over 30 national governments. Alibaba’s AliPay has 1.3 billion users. WeChat reportedly has been installed on over 100 million devices outside China from the Google Play store alone. TikTok has a similar profile in the U.S., with projections of over 100 million users; the ByteDance-owned video sharing app exceeds 2 billion downloads globally.

These are not compartmentalized commercial players. They contribute to a **platform geopolitics** that **propels** a **new form of coercive power**. The potential of this information strategy is evident in China’s National Transportation Logistics Platform, known as LOGINK internationally — though LOGINK itself is only one example of Beijing’s larger platform geopolitics.

**Internet is resilient.**

Jonathan **Strickland 10**, "HowStuffWorks "What would happen if the Internet collapsed?"," 2-10-12, HowStuffWorks, http://computer.howstuffworks.com/internet/basics/internet-collapse4.htm, DOA: 10-1-2014, y2k

Here's the good news -- **a total collapse of the Internet would be** almost **impossible**. The Internet isn't a magic box with an on/off switch. It's not even a physical thing. It's a collection of physical things and it's constantly changing. The Internet isn't the same entity from one moment to the next -- machines are always joining or leaving the Internet. It's possible for parts of the Internet to go offline. In fact, this happens all the time. Whether it's a particular server that crashes and needs to be rebooted or replaced or a cable under the ocean gets snagged by an anchor, there are events that can disrupt Internet service. But the effects tend to be **isolated** and **temporary**. While there is such a thing as the Internet backbone -- a collection of cables and servers that carry the bulk of data across various networks -- it's not **centralized**. There's no plug you could pull out from a socket or a cable you could cut that would cripple [destroy] the Internet. For the Internet to experience a global collapse, either the protocols that allow machines to communicate would have to stop working for some reason or the infrastructure itself would have to suffer massive damage. Since **the protocols aren't likely to stop working spontaneously**, we can rule out that eventuality. As for the massive damage scenario -- that could happen. An asteroid or comet could collide with the Earth with enough force to destroy a significant portion of the Internet's infrastructure. Overwhelming gamma radiation or electromagnetic fluctuations coming from the sun might also do the trick. But in those scenarios, the Earth itself would become a lifeless hulk. At that stage it hardly matters whether or not you can log in to MySpace. The positive way to look at this is to realize that the men and women who helped design **the Internet** created an amazing tool that's **remarkably stable.** Even when sections of the Internet have a technical hiccup, the rest carries on with **business as usual**. While the collapse of the Internet would be a catastrophic event, it's not one you need to worry about.

**Adv 2**

**The aff’s regulatory mechanism is vulnerable to pressure and capture---decks aff solvency**

**Lambert**, Wall Family Chair in Corporate Law and Governance Professor of Law, University of Missouri Law School, November, **‘11/1/21**

(Thomas, “Tech Platforms and Market Power: What’s the Optimal Policy Response?” Mercatus Working Paper)

A second important difference between antitrust courts and agencies relates to the decision makers’ incentives. The **federal judges** determining liability and imposing remedies in antitrust cases have **little reason to please** the parties before them. Possessing life tenure and fearing no retribution save possible reversal, they are **insulated from outside pressure** and motivated to make decisions calculated to enhance market output and thereby benefit consumers. The bureaucrats staffing agencies, by contrast, **do not enjoy this level of political insulation**. Many will have been appointed by or **have ties to a political leader**, whom they will wish to please. They may also contemplate **future employment** at one of their regulatees or at a regulatee’s rival. **Even absent** contemplation of a job change, they may have a **stake** in one regulatory outcome over another, as the budget or prestige of their agency **may be affected** by the regulatory choices they make. **Their personal interests** are therefore less aligned with the public’s interest **in maximizing overall market output.**

A third difference between antitrust and agency oversight is that antitrust courts’ involvement with parties is **limited in duration**, while overseeing agencies **remain perpetually involved** with the firms they regulate. Ongoing oversight requires **continuous contact** with the regulatee, whose perspective the regulator needs in order to make sound decisions. Eventually, however, the regulator may begin seeing things from the perspective of the regulatee.176 This is **especially likely** if the individuals with interests adverse to the regulatee’s position are widely dispersed and difficult to organize.177 The benefits to a regulatee from a decision may be outweighed by the **aggregate costs it would impose**, but if the costs are so widely spread that no individual or group has an incentive to incur the cost of arguing against the decision, the only argument the regulator will hear is that of the **regulatee-beneficiary**.178 In light of the relationships that develop from perpetual supervision and the common “concentrated benefits-diffused costs” dynamic, agencies possessing continuing oversight over their regulatees are **frequently captured by those firms,** **to the detriment of the public at large**.179

**Antitrust fails at regulating big tech**

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally**, this year has seen the hottest IPO market in years**, and investors continue to pile into start-ups at a record pace -- **Q1 saw more than $64 billion in venture funding**, a record.

**This does not look like a deserted wasteland of stifled innovation and broken dreams**.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

**None of these companies have monopolies over meaningfully defined relevant markets** -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, **a constantly shifting landscape of rivalries and backbiting** -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and **they compete bitterly for every available online ad dollar**, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. **Antitrust is a blunt instrument** meant to address major market distortions created by true monopolists. Being big, in itself, **is not illegal**. **Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways**.

**No internal link to democracy.**

**Karabell 20** – PhD from Harvard, Head of Global Strategies at Envestnet financial services firm.

Zachary Karabell, 1-23-20,"Don't Break Up Big Tech," Wired, https://www.wired.com/story/dont-break-up-big-tech/

The idea that breaking up Big Tech would strengthen democracy simply by decreasing the immense power of a few companies may be just as appealing, **but it’s false too.** **There is no past evidence that large, dominant companies imperil democracy;** AT&T and IBM had de facto monopolies in the 1960s and 1970s over telephony and computers when democracy in the United States was becoming ever more inclusive. Perhaps it’s not size per se but, rather, the nature of today’s companies—**not the “big,” just the “tech”**—that is at the heart of such problems.

Whether or not Big Tech represents an unhealthy concentration of power, we need to consider that the antitrust framework of the 20th century, which was meant to address industrial companies, may not fit the **technological oligopolies of the 21st century**. Antitrust was invented during the Progressive Era as a means to address issues of price, access, and competition.

What we need now is a new regulatory framework based on today’s issues: privacy, who owns and profits from data, competition, and innovation. Those should be the starting points for developing policy, in place of a focus on the size or number of tech companies. We need to ask what rules would protect consumers, ensure continued innovation, and allow for competition, without creating additional, unintended problems. **The answer isn’t likely to look like the ones that were developed more than 100 years ago;** **and shoehorning today’s challenges into that 20th-century mold may only make things worse.** “Break them up” has the virtue of sounding simple, and all the vices of being simplistic. We have real issues that need creative thinking; the regulations of the past, which didn’t work so well even then, are not an answer.

**Disinformation has existed forever – no evidence it’s gotten worse**

**Sacher and Yun 17** – Seth B. Sacher is an economist and John M. Yun is the director of economic education at the Global Antitrust Institute, Antonin Scalia Law School, George Mason University.

Seth B. Sacher and John M. Yun, “Fake News is Not An Antitrust Problem,” *Competition Policy International Antitrust Chronicle*, 2017, pp. 3-4, https://poseidon01.ssrn.com/delivery.php?ID=790086090127101092028065127099113117016083053010057028103075006126104106078100004074010017029060104024054109104067100082004104005023049082020121111079087110115127065007060101082025070104091106114091007106004122008120087126107116091075098099088026121&EXT=pdf&INDEX=TRUE.

While use of the term “**fake news**” has spiked, it **is not a new phenomenon**. Figure 2 indicates that the frequency of the term “fake news” in books written in English and scanned by Google spiked in 1940 and also more markedly in 2008 (which is the end of the sample).10

Corroborating Figure 2, according to a Merriam-Webster article, **the term fake news began to enjoy “general use at the end of the 19th century**.”11 The generation and distribution of intentionally false stories is not a new phenomenon even if it went under different names such as “false news” or even outright “lies.” For instance, in Figure 3, we compare the frequency of the phrase “fake news” and “false news” in English books.

Thus, Figure 3 suggests the problem of “fake news” and “false news” is not a new one. **Before the rise of the Internet, tabloids publishing outlandish claims have fueled conspiracy theories for decades** (e.g., assertions the Apollo moon landings were fake; Elvis sightings). Importantly, **it is not clear that fake news is having any greater or more harmful impact today than in previous times.**

**No democracy impact**

**Larison 12** – Daniel Larison, senior editor at The American Conservative and PhD in history from the University of Chicago, April 17th ("Democratic Peace Theory Is False," The American Conservative, available online at https://www.theamericanconservative.com/larison/democratic-peace-theory-is-false/, accessed 7-5-2020) LR

Rojas’ claim depends entirely on the meaning of “genuine democracy.” Even though there are **numerous examples** of wars between states with universal male suffrage and elected governments (including that little dust-up known as WWI), the states in question probably don’t qualify as “genuine” democracies and so can’t be used as counter-examples. Regardless, democratic peace theory draws **broad conclusions** from a short period in modern history with **very few cases** before the 20th century. The core of democratic peace theory as I understand it is that democratic governments are more accountable to their populations, and because the people will bear the costs of the war they are going to be less willing to support a war policy. This supposedly keeps democratic states from waging wars against one another because of the built-in electoral and institutional checks on government power. One small problem with this is that it is **rubbish**. Democracies in antiquity fought against one another. Political equality and voting do not abolish **conflicts of interest** between competing states. Democratic peace theory doesn’t account for the effects of **nationalist and imperialist ideologies** on the way democratic nations think about war. Democratic nations that have professional armies to do the fighting for them are often enthusiastic about overseas wars. The Conservative-Unionist government that waged the South African War (against two states with elected governments, I might add) enjoyed great popular support and won a huge majority in the “Khaki” election that followed. As long as it goes well and doesn’t have too many costs, **war can be quite popular**, and even if the war is costly it may still be popular if it is fought for nationalist reasons that appeal to a majority of the public. If the public is whipped into thinking that there is an intolerable foreign threat or if they believe that their country can gain something at relatively low cost by going to war, the **type of government** they have really **is irrelevant**. Unless a democratic public believes that a military conflict will go badly for their military, they may be ready to welcome the outbreak of a war that they expect to win. Setting aside the flaws and failures of U.S.-led democracy promotion for a moment, the idea that reducing the number of non-democracies makes war less likely is **just fantasy**. Clashing interests between states aren’t going away, and the more democratic states there are in the world the more likely it is that two or more of them will **eventually fight one another**.

**2NC**

**T Expand the Scope**

**The threshold is simple---if plaintiffs can currently bring legitimate suits that are not dismissed before the trial, the conduct is within the scope of antitrust**

**Newman 19**—(Assistant Professor, University of Memphis Cecil C. Humphreys School of Law). John M. Newman. 2019. “Procompetitive Justifications in Antitrust Law”. Indiana Law Journal, Volume 94, Issue 2, Article 4. <https://www.law.nyu.edu/sites/default/files/upload_documents/John%20Newman.pdf>. Accessed 11/21/21.

The antitrust enterprise does immunize truly non-welfare-motivated conduct from liability. But this immunity is bestowed by labeling such conduct “noncommercial” at the very outset of a given case. Conduct that is deemed noncommercial falls outside the ambit of the Sherman Act, which by its terms applies only to “trade” or “commerce”.200 Thus, for example, the Eighth Circuit in Missouri v. NOW201 declined to apply antitrust law to a boycott organized by the National Organization for Women (“NOW”). NOW refused to hold conventions in states that had not ratified the proposed Equal Rights Amendment to the U.S. Constitution.202 Recognizing the boycott’s “social” and “political” purpose, the court deemed the **challenged restraint** entirely **beyond the scope** of the **Sherman Act**.203 This decision was reached **before the zero-stage** of analysis (deciding between the **rule of reason** and the **per se** rule), before **initiating a rule-of-reason analysis**, and **certainly before** proceeding to the **procompetitive-justification stage** of **rule-of-reason analysis**. On somewhat analogous facts (a politically motivated boycott), the U.S. **Supreme Court** has expressed similar sentiments.204

**That’s because “scope” refers to the range of activities to which the laws apply, not which ones they prohibit**

**HLR 8** – Harvard Law Review

Harvard Law Review, "A Most Private Remedy: Foreign Party Suits and The U.S. Antitrust Laws," 114 Harv. L. Rev. 2122, 2-26-2008, accessed via Nexis Uni

B. The International Scope of the Antitrust Laws

The sweeping rhetoric that has captured the goals of U.S. antitrust law can be viewed as filling the vacuum left by the spare language of the laws themselves. 28 The first and most basic antitrust statute, the Sherman Act, is remarkably general in its proscriptions, 29 leading some to characterize the Act as "little more than a legislative command that the judiciary develop a common law of antitrust." 30 Although later statutes have addressed particular business activities, 31 these enactments have not so much lent precision to the restrictions as they have highlighted the **far-reaching** and **intrusive scope of** American **antitrust law.**

The reach of the antitrust laws is reflected by the **broad range of possible activities to which the laws apply.** The **Sherman Act**, by its own terms, **covers** "**trade or commerce** among the several States, or with foreign nations." 32 The Act is perhaps one of the most striking economic measures promulgated under Congress's Commerce Clause power "to regulate Commerce with foreign Nations, and among the several States." 33 Although deliberately tracking this constitutional language, the Sherman Act notably shifts the positional primacy from foreign to domestic commerce. 34 One might argue that this transposition reflects the paramount importance Congress assigned to domestic commerce, as contrasted with the Framers' ostensible concern with foreign dealings. Whether intended or not, the reversal may highlight a fundamental tension or uncertainty in determining the scope of the antitrust laws' intended jurisdiction.

**Patents are within the scope of the antitrust laws**

**Cary et al. 11** – Messrs. Cary and Sistla are members of the California and District of Columbia Bars. Mr. Nelson is a member of the New York and District of Columbia Bars. Mr. Kaiser is a member of the New Jersey and District of Columbia Bars

George S. Cary, Mark W. Nelson, Steven J. Kaiser, and Alex R. Sistla, "The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting," 77 ANTITRUST L.J. 913, American Bar Association, 2011, https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf

In any event, the **notion** that the patent law **somehow preempts or impliedly repeals** the antitrust laws **cannot be squared** with Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 93 where the Supreme Court held that **enforcement of a patent** procured by fraud on the PTO **may violate** Section 2 of the **Sherman** Act. In doing so, the Court overturned the decisions of the lower courts—and anticipatorily **rejected the implied preemption argument**—that the **application of antitrust law was inappropriate** in the patent context, holding that the “**far-reaching** social and economic **consequences** of a patent, therefore, give the public a **paramount interest** in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are **kept within their legitimate scope**.”94 As Justice Harlan stated in his concurring opinion, the Walker Process decision sought to achieve a “suitable accommodation . . . between the differing policies of patent and antitrust laws.”95 Accordingly, he emphasized the distinction between cases involving the enforcement of fraudulently obtained patents, in which “antitrust remedies should be **allowed room for full play**,” and cases involving patents that were invalid for “technical,” non-fraudulent reasons.96

**Actavis decision proved patents are within the scope of the antitrust laws**

* Dissenting justices say patents are “beyond antitrust’s reach”---majority ruled the opposite

**Jacobson 18** – Chair, ABA Section of Antitrust Law

Jonathan M. Jacobson, "Department, From The Section Chair The "Patent Monopoly"," 32 Antitrust ABA 3, Summer 2018, accessed via Nexis Uni

In Actavis, the Court **addressed a pay-for-delay reverse settlement**, **explicitly discussing** the **scope** of the patent test. First, the majority acknowledged that while the effects of the reverse settlement agreement would likely have fallen within the scope of the patent assuming it was valid and not infringed, that fact **does not immunize** the settlement agreement [\*4] **from antitrust** attack. 20 Next, addressing the assumptions of validity and non-infringement, the majority stated "it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by **measuring them against procompetitive antitrust policies** as well." 21 **For the dissenting Justices**, issues of patent validity and infringement were within the exclusive purview of patent policy, and anticompetitive effects falling within the scope of a patent are **beyond antitrust's reach**. 22

The Actavis majority held that whether a practice lies beyond the scope of the patent point is **a question for a rule of reason analysis**. In subjecting the scope of the patent to rule of reason analysis, the court also made clear that reverse payment settlements are not presumptively unlawful. As a result of Actavis, **both patent and antitrust factors**, including issues of patent validity and infringement where appropriate, **will be considered** in antitrust's rule of reason analysis to determine the scope of a patent.

Antitrust courts are now more experienced and willing to critically analyze conduct through the rule of reason lens, allowing for more sophisticated **enforce**ment of both **antitrust** and IP **laws**. There will be many future developments. The articles in this issue provide a great start.

**Exemptions don’t analyze effects**

**Gifford 88** – Professor of Law, University of Minnesota

Daniel J. Gifford, "Redefining the Antitrust Labor Exemption," 72 Minn. L. Rev. 1379, June 1988, accessed via Nexis Uni

The statutory and nonstatutory labor **exemptions** **constitute restrictions** on the **scope of the antitrust laws** particularly relevant to this Article. **Through these exemptions**, Congress and the courts have largely **eliminated competition** in the labor market (or the lack thereof) **from the scope** and hence the concern of **the antitrust laws**. Congress intended the antitrust laws to foster competition in product markets but to **ignore competition** in labor markets, **regardless of the effect** that a lack of competition in labor markets had upon manufacturing costs.

**And, they also violate ‘on anticompetitive business practices’---prohibitions must be placed on currently anticompetitive practices**

**Hogan 10** – Judge, Ohio Common Pleas Court, Franklin County

Daniel T. Hogan, Telsat Inc. v. Micro Ctr., 2010 Ohio Misc., Ohio Common Pleas Court, February 2010, LexisNexis

The statute says that price does not include "Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale." RC 5739.01 (H)(1)(c)(i). The word "**on**" is not used in the spatial sense of one thing being on top of another, but in a metaphorical sense. The metaphorical sense is metaphorical because it **retains some of the logical relations**. **One cannot place X on Y unless Y is present**. **X cannot be placed on Y if Y was present in the past but is no longer present**. Thus, even when "on" is used in the metaphorical sense, a discount cannot be taken "on" a sale after that sale has already been completed. Thus, the statute could reasonably be construed as not including post-sale rebates within the provision for discounts taken "on" a sale.

**“Anticompetitive business practices” are already antitrust violations**

**Scott 91** – Associate Professor of Law, Georgia State University College of Law

Charity Scott, “Medical Peer Review, Antitrust, and the Effect of Statutory Reform,” Maryland Law Review, Vol. 50, Winter 1991, LexisNexis

Congressman Waxman made it clear during the congressional hearings that "[t]here is one thing [HCQIA] will not do. It will not shield doctors from liability for what are truly **anticompetitive business practices**." 206 "Truly **anticompetitive business practices**" would seem **by definition** to be **antitrust violations**. The sponsors thus seem to be saying that the Act provides no immunity for peer-review participants who violate the antitrust laws. If so, then the implication is inevitable that "immunity" is granted only to peer-review conduct that would not constitute a violation of the antitrust laws in the first place. Thus, in the context of antitrust litigation, HCQIA's immunity is so "limited" as to be virtually nonexistent.

**Exemptions, however, shield anticompetitive context---means they’re the only topical affs**

**Elhauge 91** – Acting Professor of Law, Boalt Hall School of Law, University of California

Einer Richard Elhauge, "The Scope of Antitrust Process," Harvard Law Review, Vol. 104, No. 3, pp. 667-747, January 1991, https://www.jstor.org/stable/pdf/1341573.pdf?refreqid=excelsior%3Ac7b3817844888740616351077bd8b875

This paradigm of conflict and accommodation is both odd and unfortunate. It is odd because the notion that state regulatory interests can trump conflicting interests embodied in constitutionally valid federal statutes defies our ordinary understanding of preemption law. The very meaning of the supremacy clause4 is that conflicts between federal and state law must be resolved in favor of federal law. This principle is fully applicable to conflicts involving federal antitrust law.5 If, then, there is a genuine conflict between state regulation and federal antitrust law, state regulation cannot preempt federal law, even if this "inverse preemption" is confined to only some types of conflict.6 Yet preemption of federal law is exactly what **in effect** follows from a finding of **state action immunity** under the current paradigm, for the state regulation **nullifies the application** of federal law to an anticompetitive restraint that (by hypothesis) would otherwise be **within its scope**.

**[2]---Legal interpretation---****they render the resolution superfluous because they define scope as unlawful behavior---turns arbitrariness because it makes “expand the scope” the same as “increase prohibitions”**

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

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

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

**Independently, we are descriptively correct---the scope of antitrust includes all forms of commerce absent immunities, but what conduct is prohibited is applied on a case-by-case basis**

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

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

A. General Overview

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

**Question of scope entirely disregards the question of a violation of law**

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

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

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

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

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

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

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

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

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

**Lots of different exemptions with different mechanisms for each one proves aff ground**

**McGinnis 14** – J.D., May 2014, University of Michigan Law School

Anne McGinnis, "Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform ," 47 U. Mich. J. L. Reform 529, 2014, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1036&context=mjlr

B. Catalog of Exemptions

Together, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act bar anticompetitive behavior involving trade or commerce. Because modern courts construe trade or commerce **broadly**, almost any conduct that involves an exchange of money or bartering for a good or service is subject to antitrust law.37

[[Begin FN 37]]

37. See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 7–8. Note the limited exception for professional **baseball**. Id. at 3.

[[End FN 37]]

To prevent antitrust law’s broad application in areas where they have felt it unwarranted, the courts and Congress have read and written numerous exemptions into antitrust law over the past eighty years.38 For example, the Supreme Court created Noerr-Pennington immunity to protect political lobbying efforts from antitrust challenge,39 **Parker** immunity to immunize state regulatory action from scrutiny,40 and **Koegh** immunity to prohibit private treble damages suits where the plaintiff claims that a rate submitted to and approved by a regulator violated antitrust law.41

The majority of antitrust exemptions, however, were written into law by Congress. A leading Monograph by the American Bar Association Section of Antitrust Law organizes these statutory exemptions into three general categories.42 For the sake of simplicity, this Note will use that organizational system.

The first category consists of exemptions for an entire industry or type of activity in favor of state or national regulation. For example, the Shipping Act of 1916 exempted the ocean shipping industry from antitrust scrutiny,43 and the Transportation Act of 1920 immunized **railroad** mergers and other agreements.44 In 1945, Congress passed the McCarran-Ferguson Act, immunizing the “business of insurance” from federal antitrust scrutiny and leaving regulation to the states.45 Congress enacted the last broad statutory exemptions in the mid-1940s.46 As the era of deregulation took hold in the 1950s and 1960s, most of the exemptions in this category were repealed or substantially modified. Today, only five such exemptions remain.47

[[Begin FN 47]]

47. The five schemes currently in effect are: the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2006), which exempts the “business of **insurance**” if “regulated by state law”; the **Shipping** Act, 46 U.S.C. §§ 40101–42307 (2006), which exempts agreements between members of ocean shipping conferences to set and publish fixed rates for specific routes; the Capper-Volstead Act, 7 U.S.C. § 291 (2006), which works in conjunction with the Agricultural Marketing Agreement Act, 7 U.S.C. § 608b (2006) to exempt **agricultural cooperatives** and some agreements between farmers and agricultural processors about how to market, price, or restrict output for a particular crop; the Fishermen’s Collective Marketing Act, 15 U.S.C. §§ 521–522 (2006), which functions much like the Capper-Volstead Act to allow **fishing cooperatives** to collectively market fish; and the Norris-LaGuardia Act, which operates alongside sections 6 and 20 of the Clayton Act. Together, the Norris-LaGuardia Act and the Clayton Act provide an exemption for **labor union** activities. Clayton Act, 15 U.S.C. §§ 17–31 (repealed); Norris-LaGuardia Act, 29 U.S.C. §§ 101–113 (2006). The Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–113), replaced the Clayton Act § 20, expanding the once-modest limitation on injunctions in labor disputes. See United States v. Hutcheson, 312 U.S. 219 (1941); see also AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 38.

[[End FN 47]]

Each remaining exemption provides for oversight of an industry through regulation in theory, although in practice oversight is often limited.48

The second category consists of exemptions for specific transactions, practices, or events that are thought to be socially desirable or economically beneficial. As of 2006, nineteen exemptions fell into this category.49 Some authorize naked price fixing or market allocation,50 while others allow joint ventures or sales agreements that would otherwise be illegal.51

[[Begin FN 50]]

50. There are eight exemptions that fit into this subcategory. They include the **Natural Gas** Policy Act of 1978, 15 U.S.C. § 3364(e) (2006), as modified by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (authorizing natural gas pipeline companies to enter into market allocation agreements in the event of a gas shortage and exempting such agreements from antitrust scrutiny if approved by the Federal Energy Regulatory Commission); the Anti-**Hog** Cholera Serum Act, 7 U.S.C. § 852 (2006) (exempting a marketing agreement governing price and other sales conditions between Anti-Hog Cholera Serum Producers if approved by the Secretary of Agriculture); the **Defense Production** Act, 50 U.S.C. App. §§ 2061–2171 (2006) (exempting market allocation of military materials from antitrust scrutiny during a national emergency, if approved by the Secretary of Defense); 49 U.S.C. § 40129 (2006) (exempting certain agreements between competing **air carriers** to allocate landing rights at airports); Television Program Improvements Act of 1990, 47 U.S.C. § 303c(c) (2006) (authorizing persons in the **television** industry to agree on guidelines “to alleviate the negative impact of violence in telecast material” without antitrust scrutiny); 16 U.S.C. § 824k(e)(1) (2006) (exempting price fixing and other traditionally anticompetitive conduct in the electric power market from antitrust scrutiny by granting exclusive jurisdiction to the FERC); **Charitable Gift Annuity** Antitrust Relief Act, 15 U.S.C. §§ 37–37a (2006); ICC Termination Act of 1995, 49 U.S.C. § 13703 (2006) (exempting collective agreements between **motor carriers** that set rates for moves of household goods). See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 38–42.

[[End FN 50]]

[[Begin FN 51]]

51. Exemptions pertaining to joint ventures or sales agreements include: **Webb-Pomerene Act**, 15 U.S.C. §§ 61–66 (2006) (authorizing the creation and operation of joint ventures to sell products of American companies overseas, subject to supervision by the Federal Trade Commission); **Export Trading** Company Act, 15 U.S.C. §§ 4001–4003 (2006) (authorizing the creation and operation of joint ventures to sell products of American companies overseas, subject to supervision by Secretary of Commerce); **Sports Broadcasting** Act of 1961, 15 U.S.C. §§ 1291–1295 (2006) (authorizing collective sale of broadcasting rights to professional basketball, football, baseball, and hockey games); **Newspaper Preservation** Act, 15 U.S.C. §§ 1801–1804 (2006) (immunizing joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing); Agreement Relating to the International Telecommunications Satellite Organization “Intelsat,” Art. XV(c), Aug. 20, 1971, 23 U.S.T. 3814 and Headquarters Agreement Between the Government of the United States of America and the International Telecommunications Satellite Organization, ¶ 16, Nov. 22–24, 1976, 28 U.S.T. 2249 (exempting together, by treaty obligation, COMSAT, a common carrier of **satellite communications** for its conduct in serving INTELSAT, which is an international regulatory body); **Small Business Act**, 15 U.S.C. § 638(d) (immunizing research and development joint ventures between small businesses if approved by the administrator of the Small Business Association and the Attorney General); 49 U.S.C. § 41308 (2006) (exempting cooperative agreements about **international air travel** if approved by the Secretary of Transportation); 49 U.S.C. § 42111 (2006) (allowing mutual aid agreements between air carriers if there is a strike that affects international air travel); 15 U.S.C. § 37b (2006) (immunizing the **matching program** used to place medical school graduates with resident programs). See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 43–47.

[[End FN 51]]

Two immunize a specific merger or types of mergers.52 Some of the exemptions in this category replace antitrust liability with regulatory oversight,53 while others do not.54 Some of these exemptions, like the Anti-Hog Cholera Serum Act,55 appear to have little relevance today; however, this category of exemptions is the only one that continues to expand.56

One frequently cited example of an exemption that falls into this category is the Newspaper Preservation Act.57 The Act immunizes joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing. The Act was passed because legislators believed that it was important for society to have a large number of local newspapers with different editorial viewpoints, and many had begun to fail.58

The third category of statutory exemptions includes limited modifications of antitrust law for the benefit of some class of activity.59

[[Begin FN 59]]

59. The exemptions in the third category are: **Soft Drink** Interbrand Competition Act, 15 U.S.C. §§ 3501–3503 (2006) (requiring courts to consider whether trademarked soft drinks are “in substantial and effective competition with other products of the same general class” when evaluating horizontal market division agreements between soft drink bottlers and producers); **Bank Merger** Act, 12 U.S.C. § 1828(c) (2006) and Bank Holding Company Act, 12 U.S.C. § 1849(b) (2006) (requiring courts to consider the convenience and needs of the community when deciding whether to allow a particular bank merger that might otherwise be unlawful, exempting consummated mergers, staying mergers until any litigation is complete, and shortening the statute of limitations on challenges to proposed bank mergers); National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–4106 (2006) (eliminating treble damages for **qualified joint ventures** and modifying the rule of reason standard); Standards Development Organization Advancement Act of 2004, Pub. L. No. 108- 237, 118 Stat. 661 (amending 15 U.S.C. §§ 4301–4304) (eliminating treble damages and modifying the rule of reason standard for **Standards Development Organizations**); Health Care Quality Improvement Act, 42 U.S.C. §§ 11111–11152 (2006) (raising the burden of proof for antitrust challenges to peer review procedures for **medical practitioners**, and eliminating private rights of action for damages); Local Government Antitrust Act, 15 U.S.C. §§ 34–36 (2006) (eliminating treble damages liability for **local governments** who violate antitrust laws and limiting relief for private plaintiffs to an injunction). See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 49–52.

[[End FN 59]]

The exemptions in this category often modify the remedy that a plaintiff may seek or the substantive standard the plaintiff must meet in order to prove a breach of antitrust law.60 Sometimes, the substantive standard ordered by Congress effectively operates as complete immunity. For example, the Soft Drink Interbrand Competition Act required courts to examine horizontal market division agreements between soft drink bottlers and producers using a rule of reason-like analysis.61 But, because the Act also requires plaintiffs to show a lack of “substantial and effective competition” among bottlers, courts have determined that this additional requirement creates effective immunity for soft drink trademark holders and their bottlers.62

**Each could be amended in numerous ways**

**Gifford 88** – Professor of Law, University of Minnesota

Daniel J. Gifford, "Redefining the Antitrust Labor Exemption," 72 Minn. L. Rev. 1379, June 1988, accessed via Nexis Uni

Redefining The Antitrust Labor Exemption

A shift in bargaining toward profit-sharing objectives in those industries in which employers possessed substantial market power could be achieved through reformulation of the antitrust labor exemption. This Article proposes a redefinition of the antitrust labor exemption that will exclude, prima facie, the combination of union control of the industry-specific labor supply with employer power 153 in the product market. Under this **redefinition of** the labor **exemption**, courts would presume that agreements between oligopolistic or monopolistic employers and labor unions possessing power over the industry labor supply fell **within the scope of the antitrust laws**. As previously argued collective-bargaining agreements negotiated in hourly wage terms would produce unduly restrictive effects in these industries. Because collective bargaining agreements employing a profit-sharing method 154 would not produce the doubly restrictive effect on the product market of an hourly wage agreement, proof that the agreement employed the former measure, or otherwise avoided excessive restrictive effects on the product market, would rebut the presumption. Once the [\*1437] presumption was rebutted, the labor exemption would then apply. The antitrust laws, in short, should intervene in the bargaining context just enough to preclude agreements that restrict the product market more than is necessary to maximize the aggregate return to labor.

**The test is clear-cut---if the practices in question have to be evaluated on pro-competitive merits, then they are not immunities or exemptions**

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

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

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

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

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

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

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

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

**You should throw out email correspondences because they lead the witness, warp the lit base, and create perverse research disincentives, but Sagers flows very neg**

**Sagers 21** – James A. Thomas Distinguished Professor of Law at Cleveland State University

Christopher L. Sagers, "Antitrust Question," ADT NU Debate, 12-6-2021, https://nudebateadt.blogspot.com/2021/12/antitrust-question.html

I would **definitely agree** with your two **categories of topics**. You identify several specific policy proposals that would **limit particular statutory or caselaw exemption**s, and say that those arguments would serve the goal of **expanding antitrust "scope**." That's **definitely what I had in mind** when I used that term in the book, and it is how I think **most antitrust lawyers** would **understand these terms**. Judges and lawyers would **instinctively think** of a question of "**scope**" or "applicability" as going to whether a **general category of conduct** by some category of defendants is subject to **statutory antitrust rules**, in an abstract sense. But even if antitrust would apply to some defendant's conduct in a particular case, we might also have to ask whether some other rule of antitrust, which we usually call (more or less interchangeably) and **exemption or an immunity**, exempts that conduct. So, the specific topics in your first category--state action, extraterritorial application, Noerr, and statutory exemption issues--seem to me **reasonably captured** by the word "**scope**."

Each of the four examples in your **separate category** seem to me like **cases in which antitrust plainly applies**, and the **only question** is whether the specific conduct at issue **is illegal.**

**Adv 1**

**No escalation**

Colin S. **Gray 13**, Prof. of International Politics and Strategic Studies @ the University of Reading and External Researcher @ the Strategic Studies Institute @ the U.S. Army War College, April, “Making Strategic Sense of Cyber Power: Why the Sky Is Not Falling,” U.S. Army War College Press, <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB1147.pdf>

CONCLUSIONS AND RECOMMENDATIONS: **THE SKY IS NOT FALLING**¶ This analysis has sought to explore, identify, and explain the strategic meaning of cyber power. The organizing and thematic question that has shaped and driven the inquiry has been “So what?” Today we all do cyber, but this behavior usually has not been much informed by an understanding that reaches beyond the tactical and technical. I have endeavored to analyze in strategic terms what is on offer from the largely technical and tactical literature on cyber. What can or might be done and how to go about doing it are vitally important bodies of knowledge. But at least as important is understanding what cyber, as a fifth domain of warfare, brings to national security when it is considered strategically. Military history is stocked abundantly with examples of tactical behavior un - guided by any credible semblance of strategy. This inquiry has not been a campaign to reveal what cy ber can and might do; a large literature already exists that claims fairly convincingly to explain “how to . . .” But what does cyber power mean, and how does it fit strategically, if it does? These Conclusions and Rec ommendations offer some understanding of this fifth geography of war in terms that make sense to this strategist, at least. ¶ 1. Cyber can only be an enabler of physical effort. Stand-alone (popularly misnamed as “strategic”) cyber action is inherently **grossly limited by its immateriality.** The physicality of conflict with cyber’s human participants and mechanical artifacts has not been a passing phase in our species’ strategic history. Cyber action, quite independent of action on land, at sea, in the air, and in orbital space, certainly is possible. But the strategic logic of such behavior, keyed to anticipated success in tactical achievement, is not promising. To date, “What if . . .” **speculation** about strategic cyber attack usually is either contextually too light, or, more often, contextually **unpersuasive**. 49 However, this is not a great strategic truth, though it is a judgment advanced with considerable confidence. Although societies could, of course, be hurt by cyber action, it is important not to lose touch with the fact, in Libicki’s apposite words, that “[i]n the absence of physical combat, cyber war cannot lead to the occupation of territory. It is almost **inconceivable** that a sufficiently vigorous cyber war can overthrow the adversary’s government and replace it with a more pliable one.” 50 In the same way that the concepts of sea war, air war, and space war are fundamentally unsound, so also the idea of cyber war is unpersuasive. ¶ It is not impossible, but then, neither is war conducted only at sea, or in the air, or in space. On the one hand, cyber war may seem more probable than like environmentally independent action at sea or in the air. After all, cyber warfare would be **very unlikely to harm human beings directly**, let alone damage physically the machines on which they depend. These near-facts (cyber attack might cause socially critical machines to behave in a rogue manner with damaging physical consequences) might seem to ren - der cyber a safer zone of belligerent engagement than would physically violent action in other domains. But most likely there would be serious uncertainties pertaining to the consequences of cyber action, which must include the possibility of escalation into other domains of conflict. Despite popular assertions to the contrary, cyber is not likely to prove a precision weapon anytime soon. 51 In addition, assuming that the political and strategic contexts for cyber war were as serious as surely they would need to be to trigger events warranting plausible labeling as cyber war, the distinctly limited harm likely to follow from cyber assault would hardly appeal as prospectively effective coercive moves. On balance, it is most probable that cyber’s strategic future in war will be as a contribut - ing enabler of effectiveness of physical efforts in the other four geographies of conflict. Speculation about cyber war, defined strictly as hostile action by net - worked computers against networked computers, is hugely unconvincing.¶ 2. Cyber defense is difficult, but should be **sufficiently effective.** The structural advantages of the offense in cyber conflict are as obvious as they are **easy to overstate.** Penetration and exploitation, or even attack, would need to be by surprise. It can be swift almost beyond the imagination of those encultured by the traditional demands of physical combat. Cyber attack may be so stealthy that it escapes notice for a long while, or it might wreak digital havoc by com - plete surprise. And need one emphasize, that at least for a while, hostile cyber action is likely to be hard (though not quite impossible) to attribute with a cy - berized equivalent to a “smoking gun.” Once one is in the realm of the catastrophic “What if . . . ,” the world is indeed a frightening place. On a personal note, this defense analyst was for some years exposed to highly speculative briefings that hypothesized how unques - tionably cunning plans for nuclear attack could so promptly disable the United States as a functioning state that our nuclear retaliation would likely be still - born. I should hardly need to add that the briefers of these Scary Scenarios were obliged to make a series of Heroic Assumptions. ¶ The literature of cyber scare is more than mildly reminiscent of the nuclear attack stories with which I was assailed in the 1970s and 1980s. As one may observe regarding what Winston Churchill wrote of the disaster that was the Gallipoli campaign of 1915, “[t]he terrible ‘Ifs’ accumulate.” 52 Of course, there are dangers in the cyber domain. Not only are there cyber-competent competitors and enemies abroad; there are also Americans who make mistakes in cyber operation. Furthermore, there are the manufacturers and constructors of the physical artifacts behind (or in, depending upon the preferred definition) cyber - space who assuredly err in this and that detail. The more sophisticated—usually meaning complex—the code for cyber, the more **certain** must it be that mistakes both lurk in the program and will be made in digital communication.¶ What I have just outlined minimally is not a reluc - tant admission of the fallibility of cyber, but rather a statement of what is obvious and should be anticipat - ed about people and material in a domain of war. All human activities are more or less harassed by friction and carry with them some risk of failure, great or small. A strategist who has read Clausewitz, especially Book One of On War , 53 will know this. Alternatively, anyone who skims my summary version of the general theory of strategy will note that Dictum 14 states explicitly that “Strategy is more difficult to devise and execute than are policy, operations, and tactics: friction of all kinds comprise phenomena inseparable from the mak - ing and execution of strategies.” 54 Because of its often widely distributed character, the physical infrastruc - ture of an enemy’s cyber power is typically, though not invariably, an impracticable target set for physical assault. Happily, this probable fact should have only annoying consequences. The discretionary nature and therefore the variable possible characters feasible for friendly cyberspace(s), mean that the more danger - ous potential vulnerabilities that in theory could be the condition of our cyber-dependency ought to be avoidable at best, or bearable and survivable at worst. Libicki offers forthright advice on this aspect of the subject that deserves to be taken at face value: ¶ [T]here is no inherent reason that improving informa - tion technologies should lead to a rise in the amount of critical information in existence (for example, the names of every secret agent). Really critical information should never see a computer; if it sees a computer, it should not be one that is networked; and if the computer is networked, it should be air-gapped.¶ Cyber defense admittedly is difficult to do, but so is cyber offense. To quote Libicki yet again, “[i]n this medium [cyberspace] the best defense is not necessarily a good offense; it is usually a good defense.” 56 Unlike the geostrategic context for nuclear-framed competition in U.S.–Soviet/Russian rivalry, the geographical domain of cyberspace definitely is defensible. Even when the enemy is both clever and lucky, it will be our own design and operating fault if he is able to do more than disrupt and irritate us temporarily.¶ When cyber is contextually regarded properly— which means first, in particular, when it is viewed as but the latest military domain for defense planning—it should be plain to see that cyber performance needs to be good enough rather than perfect. 57 Our Landpower, sea power, air power, and prospectively our space systems also will have to be capable of accepting combat damage and loss, then recovering and carrying on. There is no fundamental reason that less should be demanded of our cyber power. Second, given that cyber is not of a nature or potential character at all likely to parallel nuclear dangers in the menace it could con - tain, we should anticipate international cyber rivalry to follow the competitive dynamic path already fol - lowed in the other domains in the past. Because the digital age is so young, the pace of technical change and tactical invention can be startling. However, the mechanization RMA of the 1920s and 1930s recorded reaction to the new science and technology of the time that is reminiscent of the cyber alarmism that has flour - ished of recent years. 58 We can be confident that cyber defense should be able to **function well enough**, given the strength of political, military, and commercial motivation for it to do so. The technical context here is a medium that is a constructed one, which provides air-gapping options for choice regarding the extent of networking. Naturally, a price is paid in convenience for some closing off of possible cyberspace(s), but all important defense decisions involve choice, so what is novel about that? There is nothing new about accepting some limitations on utility as a price worth paying for security.¶ 3. Intelligence is critically important, but informa - tion should not be overvalued. The strategic history of cyber over the past decade confirms what we could know already from the science and technology of this new domain for conflict. Specifically, cyber power is not technically forgiving of user error. Cyber warriors seeking criminal or military benefit require precise information if their intended exploits are to succeed. Lucky guesses should not stumble upon passwords, while efforts to disrupt electronic Supervisory Con - trol and Data Acquisition (SCADA) systems ought to be unable to achieve widespread harmful effects. But obviously there are practical limits to the air-gap op - tion, given that control (and command) systems need to be networks for communication. However, Internet connection needs to be treated as a potential source of serious danger.¶ It is one thing to be able to be an electronic nuisance, to annoy, disrupt, and perhaps delay. But it is quite another to be capable of inflicting real persisting harm on the fighting power of an enemy. Critically important military computer networks are, of course, accessible neither to the inspired amateur outsider, nor to the malignant political enemy. Easy passing reference to a hypothetical “cyber Pearl Harbor” reflects both poor history and **ignorance of contemporary military common sense.** Critical potential military (and other) targets for cyber attack are **extremely hard** to access and influence (I believe and certainly hope), and the technical knowledge, skills, and effort required to do serious harm to national security is **forbiddingly high.** Th

is is not to claim, foolishly, that cyber means absolutely could not secure near-catastrophic results. However, it is to say that such a scenario is **extremely improbable**. Cyber defense is advancing all the time, as is cyber offense, of course. But so discretionary in vital detail can one be in the making of cyberspace, that confidence—real confidence—in cyber attack could not plausibly be high. It should be noted that I am confining this particular discussion to what rather idly tends to be called cyber war. In political and strategic practice, it is unlikely that war would or, more importantly, ever could be restricted to the EMS. Somewhat rhetorically, one should pose the question: Is it likely (almost anything, strictly, is possible) that cyber war with the potential to inflict catastrophic damage would be allowed to stand unsupported in and by action in the other four geographical domains of war? I believe not.¶ Because we have told ourselves that ours uniquely is the Information Age, we have become unduly respectful of the potency of this rather slippery catch-all term. As usual, it is helpful to contextualize the al - legedly magical ingredient, information, by locating it properly in strategic history as just one important element contributing to net strategic effectiveness. This mild caveat is supported usefully by recognizing the general contemporary rule that information per se harms nothing and nobody. The electrons in cyber - ized conflict have to be interpreted and acted upon by physical forces (including agency by physical human beings). As one might say, intelligence (alone) sinks no ship; only men and machines can sink ships! That said, there is no doubt that if friendly cyber action can infiltrate and misinform the electronic informa - tion on which advisory weaponry and other machines depend, considerable warfighting advantage could be gained. I do not intend to join Clausewitz in his dis - dain for intelligence, but I will argue that in strategic affairs, intelligence usually is somewhat uncertain. 59 Detailed up-to-date intelligence literally is essential for successful cyber offense, but it can be healthily sobering to appreciate that the strategic rewards of intelligence often are considerably exaggerated. The basic reason is not hard to recognize. Strategic success is a complex endeavor that requires adequate perfor - mances by many necessary contributors at every level of conflict (from the political to the tactical). ¶ When thoroughly reliable intelligence on the en - emy is in short supply, which usually is the case, the strategist finds ways to compensate as best he or she can. The IT-led RMA of the past 2 decades was fueled in part by the prospect of a quality of military effec - tiveness that was believed to flow from “dominant battle space knowledge,” to deploy a familiar con - cept. 60 While there is much to be said in praise of this idea, it is not unreasonable to ask why it has been that our ever-improving battle space knowledge has been compatible with so troubled a course of events in the 2000s in Iraq and Afghanistan. What we might have misunderstood is not the value of knowledge, or of the information from which knowledge is quarried, or even the merit in the IT that passed information and knowledge around. Instead, we may well have failed to grasp and grip understanding of the whole context of war and strategy for which battle space knowledge unquestionably is vital. One must say “vital” rather than strictly essential, because relatively ignorant armies can and have fought and won despite their ig - norance. History requires only that one’s net strategic performance is superior to that of the enemy. One is not required to be deeply well informed about the en - emy. It is historically quite commonplace for armies to fight in a condition of more-than-marginal reciprocal and strategic cultural ignorance. Intelligence is king in electronic warfare, but such warfare is unlikely to be solely, or even close to solely, sovereign in war and its warfare, considered overall as they should be.¶ 4. Why the sky will not fall. More accurately, one should say that the sky will not fall because of hostile action against us in cyberspace unless we are improb - ably careless and foolish. David J. Betz and Tim Ste vens strike the right note when they conclude that “[i]f cyberspace is not quite the hoped-for Garden of Eden, it is also not quite the pestilential swamp of the imagination of the cyber-alarmists.” 61 Our understanding of cyber is high at the technical and tactical level, but re - mains distinctly rudimentary as one ascends through operations to the more rarified altitudes of strategy and policy. Nonetheless, our **scientific, technological, and tactical knowledge** and understanding **clearly indicates** that **the sky** is not falling and **is unlikely to fall in the future as a result of hostile cyber action.** This analysis has weighed the more technical and tactical literature on cyber and concludes, **not simply on balance**, that cyber alarmism has little basis save in the imagination of the alarmists. There is military and civil peril in the hostile use of cyber, which is why we must take cyber security seriously, even to the point of buying redundant capabilities for a range of command and control systems. 62 So seriously should we regard cyber danger that it is only prudent to as - sume that we will be the target for hostile cyber action in future conflicts, and that some of that action will promote disruption and uncertainty in the damage it will cause.¶ That granted, this analysis recommends strongly that the U.S. Army, and indeed the whole of the U.S. Government, should strive to comprehend cyber in context. Approached in isolation as a new technol - ogy, it is not unduly hard to be over impressed with its potential both for good and harm. But if we see networked computing as just the latest RMA in an episodic succession of revolutionary changes in the way information is packaged and communicated, the computer-led IT revolution is set where it belongs, in historical context. In modern strategic history, there has been only one truly game-changing basket of tech - nologies, those pertaining to the creation and deliv - ery of nuclear weapons. Everything else has altered the tools with which conflict has been supported and waged, but has not changed the game. The nuclear revolution alone raised still-unanswered questions about the viability of interstate armed conflict. How - ever, it would be accurate to claim that since 1945, methods have been found to pursue fairly traditional political ends in ways that accommodate nonuse of nuclear means, notwithstanding the permanent pres - ence of those means.¶ The light cast by general strategic theory reveals what requires revealing strategically about networked computers. Once one sheds some of the sheer wonder at the seeming miracle of cyber’s ubiquity, instanta - neity, and (near) anonymity, one realizes that cyber is just another operational domain, though certainly one very different from the others in its nonphysi - cality in direct agency. Having placed cyber where it belongs, as a domain of war, next it is essential to recognize that its nonphysicality compels that cyber should be treated as an enabler of joint action, rather than as an agent of military action capable of behav - ing independently for useful coercive strategic effect. There are stand-alone possibilities for cyber action, but they are not convincing as attractive options either for or in opposition to a great power, let alone a superpower. No matter how intriguing the scenario design for cyber war strictly or for cyber warfare, the logic of grand and military strategy and a common sense fueled by understanding of the course of strategic history, require one so to contextualize cyber war that its independence is seen as too close to **absurd** to merit much concern.

**Tons of hurdles to smart cities---you should assume their internal link is science fiction**

**Zeine 17** - Founder and CTO of Ossia. Wireless Power Pioneer. Physicist. Inventor.

Hatem, 6-19, The Problems With Smart Cities, Forbes, https://www.forbes.com/sites/forbestechcouncil/2017/06/19/the-problems-with-smart-cities/3/#268c6d041ffd

The "smart city" sounds like a digital utopia, a place where data eliminates first-world hassles, dangers and injustices. But there are some problems with smart cities, and no one, to my knowledge at least, has pointed them out. Press coverage from Forbes, The Wall Street Journal, The Guardian and dozens of other publications are gleefully optimistic about smart cities. No more traffic! Renewable energy for all! Fewer fires and disease outbreaks! Billions in savings! Automated vegetable gardens on roofs! These are all real possibilities. Before we get too excited, however, let’s examine the ingredients of a smart city and what they indicate about those problems. **Sensory Overload** Smart cities are based on data. If you want data, you need sensors. It’s not like roads, buildings and street lights will wake up magically and start chatting about the weather. We need sensors to see, hear, smell, taste and feel on their behalf. A platform can then aggregate all their data and use it to make (or propose) decisions at speeds exceeding human capacity. Sensors will measure temperature, traffic patterns, foot traffic, air quality and infrastructure integrity (e.g., is the bridge safe?), among many other things. Lux Research, an innovation research and advisory firm, has a report that suggests the world will deploy 1 trillion sensors by 2020. Let's put that in perspective: If you have 1 million people deploying sensors, each person needs to deploy a million of them within three years. The De-Energizer Bunny The U.S. alone buys over 3 billion batteries a year. **We have not built 1 trillion batteries in the history of humankind, yet we’re supposed to make enough batteries to power 1 trillion sensors within three years?** I doubt it. **Even if we could manufacture batteries at that scale, the resulting pollution and energy consumption would offset many of the benefits**. And tell me, who would monitor and replace the batteries in, say, 1 million public sensors scattered throughout New York City? Even the Energizer Bunny wouldn't get on board with that. Let’s say we ditch the batteries and connect sensors to wires instead. Installing 1 trillion wires is prohibitively expensive. Whether you power those sensors with solar, nuclear or fossil fuel energy, transmitting power from its source to a device is impractical. Problem No. 1 The first problem with a smart city is power. We want to install millions of sensors that can retrieve useful, potentially life-saving data. Yet with our current energy paradigms, we can’t power 1 trillion devices, let alone a million in a single city. Thus, **the smart city is a sci-fi fantasy without wireless power**

(i.e., power at a distance). Is our utopia dead in the water, then? No. There are companies (including ours) developing wireless power that resembles the functionality of Wi-Fi but for power. We can solve the problem as quickly as societies unwire power distribution. Once sensors receive power wirelessly, we’ve cleared the main obstacle to a smart city. We can then ask practical questions: How do we mitigate rush-hour traffic based on the data? How do we reduce particulate matter in our indoor and outdoor air? Where are pollutants coming from and how might we stop them? How do we prevent meat contamination at a nearby food processing plant from becoming a city-wide health crisis? Initially, we’ll retrofit cities with sensors. Eventually, we’ll construct smart cities from scratch because our existing road systems, zoning patterns and power grids aren’t made for automated, data-driven lifestyles. Autonomous cars, for instance, have different needs than the manual gas guzzlers around which we have designed our infrastructure. Problem No. 2 As we design smart cities around the data we want instead of the wiring we have, the dialogue gets more complex. Mass data aggregation will establish some truths (the source of certain problems) about how our cities run. It will lead us to score cities on different quality-of-life metrics. And that brings us to the toughest question of all: What do we value in a human habitat? That raises the second problem with a smart city: **We could create a dystopia just as easily as we could create a utopia**. The dividing line is deceivingly thin. We assume that by tapping into the collective intelligence of both devices and people we can create better living environments. I believe we can. But data is not a magical cure to all our woes. To quote author and entrepreneur Derek Sivers, “If [more] information was the answer, then we’d all be billionaires with perfect abs.” Likewise, if urban data was the answer, then collecting it would eliminate traffic, poverty, crime, etc. That’s dangerously optimistic. **We’ll need leaders to interpret and use the data wisely**. Too often, our officials pass along data like hors d'oeuvres, expecting people to take only what nourishes their worldview. That’s not good enough. Smart cities will need leaders who have the courage to defend their data, say what it means and establish it as a truth upon which cities make decisions. If officials don't stand behind their data, neither will the public.

**Internet won’t collapse – ignore their empirically denied doomsaying**

-only threat is viruses, which you don’t affect

**Dvorak 7** {John C., syndicated technology and computing analyst, Bachelors in History (California-Berkley), “Will the Internet Collapse?” PC Mag, 5/1, http://www.pcmag.com/article2/0%2c2817%2c2124376%2c00.asp}

When is the Internet going to collapse? The answer is **NEVER**. The Internet is amazing for no other reason than that **it hasn't simply collapsed**, never to be rebooted. Over a decade ago, many pundits were predicting an all-out catastrophic failure, and back then the load was nothing compared with what it is today. So how much more can this network take? Let's look at the basic changes that have occurred since the Net became chat-worthy around 1990. First of all, only a few people were on the Net back in 1990, since it was essentially a carrier for e-mail (spam free!), newsgroups, gopher, and FTP. These capabilities remain. But the e-mail load has grown to phenomenal proportions and become burdened with megatons of spam. In one year, the amount of spam can exceed a decade's worth, say 1990 to 2000, of all Internet traffic. It's actually the astonishing overall growth of the Internet that is amazing. In 1990, the total U.S. backbone throughput of the Internet was 1 terabyte, and in 1991 it doubled to 2TB. Throughput continued to double until 1996, when it jumped to 1,500TB. After that huge jump, it returned to doubling, reaching 80,000 to 140,000TB in 2002. This ridiculous growth rate has continued as more and more services are added to the burden. The jump in 1996 is attributable to the one-two punch of the universal popularization of the Web and the introduction of the MP3 standard and subsequent music file sharing. More recently, the emergence of inane video clips (YouTube and the rest) as universal entertainment has continued to slam the Net with overhead, as has large video file sharing via BitTorrent and other systems. Then VoIP came along, and IPTV is next. All the while, e-mail numbers are in the trillions of messages, and spam has never been more plentiful and bloated. Add blogging, vlogging, and twittering and it just gets worse. According to some expensive studies, the growth rate has begun to slow down to something like 50 percent per year. But that's growth on top of huge numbers. Petabytes. So when does this thing just grind to a halt or blow up? To date, we have to admit that the structure of the Net is robust, to say the least. This is impressive, considering the fact that **experts were predicting a collapse in the 1990s**. Robust or not, this Internet is a transportation system. It transports data. All transportation systems eventually need upgrading, repair, basic changes, or reinvention. But what needs to be done here? This, to me, has come to be the big question. Does anything at all need to be done, or do we run it into the ground and then fix it later? Is this like a jalopy leaking oil and water about to blow, or an organic perpetual-motion machine that fixes itself somehow? Many believe that the Net has never collapsed because **it does tend to fix itself.** A decade ago we were going to run out of IP addresses—remember? **It righted itself**, with rotating addresses and subnets. Many of the Net's **improvements are self-improvements**. **Only spam, viruses, and spyware represent incurable diseases** that could kill the organism. I have to conclude that the worst-case scenario for the Net is an outage here

or there**, if anywhere**. After all, the phone system, a more machine-intensive system, never really imploded after years and years of growth, did it? While it has outages, it's **actually more reliable than the power grid it sits on**. Why should the Internet be any different now that it is essentially run by phone companies who know how to keep networks up? And let's be real here. The Net is being **improved daily**, with newer routers and better gear being constantly hot-swapped all over the world. This is not the same Internet we had in 1990, nor is it what we had in 2000.

**Adv 2**

**Economics explains the lack of conflict better**

**Mousseau**, Poli Sci Prof @ University of Central Florida, **16**

(Michael, Grasping the scientific evidence: The contractualist peace supersedes the democratic peace, Conflict Management and Peace Science

1–18)

A weighty controversy has enveloped the study of international conflict: whether the democratic peace, the observed dearth of militarized conflict between democratic nations, **may be spurious** and accounted for by **institutionalized market** ‘‘contractualist’’ **economy**. I have offered theory and evidence that economic norms, specifically contractualist economy, appear to account for both the explanans (democracy) and the explanandum (peace) in the democratic peace research program (Mousseau, 2009, 2012a, 2013; see also Mousseau et al., 2013a, b). Five studies have responded with several arguments for why we should continue to believe that democracy causes peace (Dafoe, 2011; Dafoe and Russett, 2013; Dafoe et al., 2013; Ray, 2013; Russett, 2010). Resolution of this controversy is fundamental to the study and practice of international relations. The observation of democratic peace is ‘‘the closest thing we have to an empirical law’’ in the study of global politics (Levy, 1988: 662), and carries the **profound implication** that the **spread of democracy will end war**. **New economic norms theory**, on the other hand, yields the contrary implication that **universal democracy will not end war**. Instead, it is market-oriented development that creates **a culture of contracting**, and this culture legitimates democracy within nations and causes peace among them. **The policy implications could hardly be more divergent:** to end war (and support democracy), the contractualist democracies should **promote the economies of nations at risk** (Krieger and Meierrieks, 2015; Meierrieks, 2012; Mousseau, 2000, 2009, 2012a, 2013; Nieman, 2015). In the literature are five factual claims for why we should continue to believe that democracy causes peace: (1) an assertion that in three of the five studies that overturned the democratic peace (Mousseau, 2013; Mousseau et al., 2013a, b), the insignificance of democracy controlling for contractualist economy is due to the treatment of missing data for contractualist economy (Dafoe et al., 2013, henceforth DOR); (2) a claim of error in the measure for conflict (DOR) that appears in one of the five studies that overturned the democratic peace (Mousseau, 2013); (3) an alleged misinterpretation of an interaction term that appears in one of the five studies (Mousseau, 2009) that overturned the democratic peace, along with in inference of democratic causality from an interaction of democracy with contractualist economy (Dafoe and Russett, 2013; DOR); (4) a claim of reverse causality, of democracy causing contractualist economy (Ray, 2013); and (5) a report of multiple regressions with most said to show democratic significance after controlling for contractualist economy (DOR). This study investigates all five of these factual claims. I begin by addressing the issue of missing data by constructing two entirely new measures for contractualist economy. I then take up possible measurement error in the dependent variable by reporting tests using both my own (Mousseau, 2013) and DOR’s measures for conflict. Next, I disaggregate the data to investigate a causal interaction of democracy with contractualist economy. I then examine the evidence for reverse causality, and scrutinize the competing test models to pinpoint the exact factors that can account for differences in test outcomes. The results are consistent across all tests: there is no credible evidence supporting democracy as a cause of peace. Using DOR’s base model, **the impact of democracy is zero** **regardless** of how **contractualist economy** or **interstate conflict** is measured. There is no **misinterpreted interaction term** in any study that has overturned the democratic peace, and the disaggregation of the data yields no support for a causal interaction of democracy with contractualist economy. Ray’s (2013) evidence for reverse causality from democracy to contractualist economy is shown to be based on an **erroneous research design**. And of DOR’s 120 separate regressions that consider contractualist economy, 116 contain controversial measurement and specification practices; the remaining four are analyses of all (fatal and non-fatal) disputes, where the correlation of democracy with peace is limited to mixedeconomic dyads, those where one state has a contractualist economy and the other does not, a subset that includes only 27% of dyads from 1951 to 2001, including only 50% of democratic dyads. It is further shown that this marginal peace is a **statistical artifact** since it does not exist among neighbors where everyone **has an equal opportunity to fight**.

**No bioweapon threat – development obstacles**

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

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

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

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

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

**1NR**

**Innovation DA**

**Link turns case---rent seeking---established firms use expanded antitrust liability to stall competitive threats**

**Dorsey et al.**, Associate at Wilson Sonsini Goodrich, **‘18**

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the **incredibly costly nature** of antitrust proceedings exacerbates its **vulnerability to rent seeking**.39 Antitrust cases and investigations can **drag on for years**, entail the collecting, processing, and production of **millions of documents**, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be **invasive**, **last for years**, and impair a defendant’s **ability to adapt** to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility **of trebled damages** at the end of the day. Consider that **an unhappy competitor could embroil a rival in an antitrust quagmire** via its own litigation, or by **complaining to a government agency** and potentially **triggering an investigation**, that would divert significant amounts of that rival’s resources for years — thereby **crippling a rival** and diminishing the amount of competition it faces. With so much at stake, conditions are **ripe** for actors to engage in **just such rent-seeking** activities in an attempt to appropriate some of this vast wealth for themselves. The **empirical evidence** and **historical record** of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, **multi-faceted standard** — **provide ample support for public choice theory** and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, **what can be done** to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are **diminished** when agencies have **less discretion** (e.g. when rules are clearer) and when another body (e.g. the public, **a court**, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus **diminishes** incentives for rent seeking and corruption. When these **constraining factors are in place**, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

**AND, enforcement turns case---promotes aggrandizement over public interest**

**Dorsey et al.**, Associate at Wilson Sonsini Goodrich, **‘18**

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Third, public choice theory elucidates various factors that may contribute to rent seeking in the antitrust context. Some relate to traditional public choice insights regarding bureaucratic incentives. For instance, agency employees will generally seek to **increase the importance of their agency and themselves** — which often translates to **more government activity** intended to, among other things, **justify higher budgets**; carve out a larger **jurisdictional territory**; and, in many cases, **maximize** individual **employees’ exit options** into the private sector.38

[Begin fn 38]

38 See Posner, supra note 31, at 85-86 (“George J. Stigler proposes as a reasonable assumption that regulators act so as (**to) retain their jobs** and (b) **to obtain greater appropriations** for their agency as a way of **increasing personal power** (and frequently remuneration as well). This assumption seems reasonable in regard to commissioners who **seek reappointment** and those staff members who make a career of government service. The self-interest of such individuals would appear to dictate the **avoidance of controversy** and the **conciliation of well organized economic interests** and influential Congressmen. . . . A commissioner concerned with his future success at the bar will have **no greater incentive** to promote the consumer interest fearlessly and impartially **than one whose guiding principles are job retention** and agency aggrandizement. He will receive **no bonus upon entry** (or reentry) **into private practice** for the vigorous championing of the consumer interest. . . . On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests **would engender may do him some later harm**, while making his tenure with the Commission more **tense** and demanding than would otherwise be the case.”); Shughart II, Don’t Revise the Clayton Act, Scrap It!, 6 Cato J. 925, 928 (1987) (“Bureaucratic incentives run strongly in the direction of producing visible output . . . The more work there is for government, the more opportunities there are for the attorney staff to build the human capital that is rewarded when they subsequently take jobs in big antitrust law firms, and the larger and more secure are the antitrust bureaus.”).

[End fn. 38]

**Giving small firms interoperability would FUCK our ability to beat China.**

**USCOC 2/16/22** – lobbying group representing over 3,000 businesses

“U.S. Antitrust Legislative Proposals: A Global Perspective,” U.S. Chamber of Commerce, <https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective>

The United States is **locked in a race with China** and Europe **to scale certain foundational technologies**, such as semiconductors, and to **develop** and deploy **emerging technologies**, such as artificial intelligence and quantum computing.  **This race has both economic and national security dimensions**, given the technologies’ potential military applications, as well as their impact on economic competitiveness more broadly.

Faced with this challenge, China and the European Union (EU) are pursuing **aggressive and broad industrial policies** to alter the competitive landscape and advance their interests to achieve world-leading status in various technologies.  President Xi Jinping has stated explicitly that global tech dominance is essential to the Great Rejuvenation of the Chinese Nation, and what he hopes will be China’s reassumption of global and geopolitical preeminence.[[1]](https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective#_ftn1)   Similarly, in Europe leading voices including French President Emmanuel Macron have doubled down in their push for “technological sovereignty,” arguing that Europe needs to band together and promote European champions for key technologies, including semiconductors, electric vehicle batteries, hydrogen, and cloud computing.[[2]](https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective#_ftn2)

The resulting policy prescriptions in China and the EU involve subsidies, discriminatory regulations, and other protectionist barriers that keep U.S. competitors at bay, while promoting domestic champions. Meanwhile, **in the United States**, industrial policy is a much less significant factor.  Instead, **private companies are the driving force behind** the **innovation and research that determine how the U.S. will fare in this global competition**.

However**, Congress is considering new antitrust legislation which**, perversely, **would weaken leading U.S. technology companies** by crafting special purpose regulations under the guise of antitrust to prohibit those firms from engaging in business conduct that is widely acceptable when engaged in by rival competitors.

A series of legislative proposals – some of which already have been approved by relevant Congressional committees – would, among other things: dismantle these companies; prohibit them from engaging in significant new acquisitions or investments; **require them to disclose sensitive user data and sensitive IP and trade secrets to competitors**, including those that are foreign-owned and controlled; facilitate foreign influence in the United States; and compromise cybersecurity**.  These bills would fundamentally undermine American security interests** while exempting from scrutiny Chinese and other foreign firms that do not meet arbitrary user and market capitalization thresholds specified in the legislation.

Many members of Congress have pointed out that **these proposals could damage American interests, to the benefit of China**.  For example, at a recent markup in the Senate Judiciary Committee on S. 2992, the American Innovation and Choice Online Act, Senator Tom Cotton (R-AR) expressed “concerns with provisions in the bill that could require data sharing between American companies and bad actors under the control of the Chinese Communist Party.”  Similarly, Sen. John Cornyn (R-TX) explicitly criticized “the potential national security consequences of this bill.”  He explained that the bill “will harm American businesses and reward our adversaries, most notably the People’s Republic of China … It serves our own companies up on a platter and does nothing to combat the bad conduct of our adversaries.”  These concerns span the aisle.  Sen. Patrick Leahy (D-VT) wants to “make sure we’re not inadvertently harming our national security,” while Sen. Dianne Feinstein (D-CA) expressed concern “that this really is going to be very dangerous legislation. It may end up giving a very competitive advantage to large global businesses that narrowly escape being regulated by the bill.”  Many other members echoed these comments.

The United States has never used legislation to punish success. In many industries, scale is important and has resulted in significant gains for the American economy, including small businesses.  U.S. competition law promotes the interests of consumers, not competitors. It should not be used to pick winners and losers in the market or to manage competitive outcomes to benefit select competitors.  Aggressive competition benefits consumers and society, for example by pushing down prices, disrupting existing business models, and introducing innovative products and services.

**If enacted, the legislative proposals would drag the United States down in an unfolding global technological competition**.  **Companies** captured by the legislation **would be required to compete against integrated foreign rivals with one hand tied behind their backs**.  Those firms that are the strongest drivers of U.S. innovation in AI, quantum computing, and other strategic technologies would be hamstrung or even broken apart, while foreign and state-backed producers of these same technologies would remain unscathed and seize the opportunity to increase market share, both in the U.S. and globally.  Indeed, during the markup of S. 2992, the bill’s authors introduced a manager’s amendment in an attempt to address some of these concerns.  For instance, the amendment would have allowed covered entities to avoid sharing data with certain companies that are subject to U.S. sanctions or otherwise identified as a national security risk, but this amendment falls far short in its aim of protecting U.S. data and know-how from all or even most of our strategic competitors.

Instead of warping antitrust law to punish a discrete group of American companies, the U.S. government should focus instead on vigorous enforcement of current law and on vocally opposing and effectively countering foreign regimes that deploy competition law and other legal and regulatory methods as industrial policy tools to unfairly target U.S. companies.  **The U.S. should avoid self-inflicted wounds** to our competitiveness and national security that would result from turning antitrust into a weapon against dynamic and successful U.S. firms.

Unfortunately, U.S. antitrust regulators, led by new FTC Chair Lina Khan, are already grossly misinterpreting China’s ongoing antitrust reforms and drawing false equivalencies to justify an approach that would be deeply damaging to U.S. competitiveness, innovation, and national security.  Chair Khan recently noted during an interview with CNBC:

“I think it has been interesting to see China take a series of actions over the last year that actually suggested that they’re going to robustly enforce the antitrust laws and their anti-monopoly laws too, right? So we’re not actually seeing the type of free-for-all that was predicted. And so I think it’ll be interesting to see how that continues.[[3]](https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective#_ftn3)”

In response to a question about whether China concerns are inflated, Khan continued:

“I think it is certainly true that those arguments lose some of their force given that we’ve seen China go in a different direction.”

Khan could not be more wrong in her interpretation of China’s ongoing policy changes and actions.  China’s recently released Opinions on Promoting the Healthy and Sustainable Development of the Platform Economy (“the Opinions”)[[4]](https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective#_ftn4), in fact, appear to double down on the use of antitrust and other regulatory tools to (1) reinforce a Great Wall of data protectionism, in lockstep with other laws like the National Security Law, National Intelligence Law, Cybersecurity Law, Data Security Law, and Personal Information Protection Law; (2) strengthen industrial policy to ensure China’s seizes the commanding heights in emerging technologies by creating 10,000 Chinese “Little Giants” that benefit from subsidies, tax breaks, and exemptions from regulation[[5]](https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective#_ftn5), and (3) push domestic champions to expand and deepen China’s digital mercantilism abroad from a domestic market insulated from competition.  Proposed U.S. legislation would supplement and perfect this intensifying effort by China – as well as ongoing efforts of the EU – to weaken American firms so that their own indigenous companies have more space in the marketplace to grow and thrive.

To be clear, the U.S. Chamber of Commerce fully supports strong enforcement of current U.S. antitrust law, which prevents and punishes anticompetitive conduct and promotes consumer welfare through vigorous market competition.  Further, the Chamber does not question the need for a thoughtful debate about appropriately tailored and targeted legislation and regulation that addresses legitimate concerns that have arisen from the digital transformation of the economy.  However, the Chamber objects to the creation or modification of antitrust laws that target particular companies – in this case, U.S. technology firms – instead of anticompetitive conduct.  U.S. antitrust law should not capriciously be used to regulate or single out companies in order to manage competition, rather than promote competition in the market.  Equally important, U.S. legislative proposals should not undermine U.S. economic and security interests, especially when such measures would strengthen Chinese and other foreign rivals, without any apparent benefit to U.S. consumers and workers.

**US tech lead now, but it’s fragile - plan ONLY applies to US companies – necessarily disadvantages us vis a vis adversaries – specifically in AI and quantum**

**USCOC 2/16/22** – lobbying group representing over 3,000 businesses

“U.S. Antitrust Legislative Proposals: A Global Perspective,” U.S. Chamber of Commerce, <https://www.uschamber.com/finance/antitrust/u-s-antitrust-legislative-proposals-a-global-perspective>

The legislation would apply only to companies (“covered platform operators”) that meet specific criteria based on the number of U.S. users and market capitalization – and **at present**, under most of the bills, **only large U.S. technology companies would qualify**. The legislation would dismantle such companies; prohibit them from engaging in significant new acquisitions or investments; force them to rollback or keep from offering unique products and services that benefit consumers; require them to disclose user data to competitors, including those that are foreignowned and controlled; and facilitate foreign influence and misinformation in the United States while compromising cybersecurity. Meanwhile, with a few exceptions, **foreign firms would remain unaffected**. Additional details on the legislation are in the Annex.

Thus, the proposed antitrust legislation would undermine the United States in the technological competition with China, the EU, and other global powers. In particular, **it would erode U.S. technological leadership with respect to critical technologies**; expose U.S. citizens’ data to misuse and misappropriation by foreign actors; and undermine the cybersecurity of U.S. technology platforms. Moreover, there would be no apparent countervailing benefit in terms of consumer welfare that offsets these steep costs.

A. Undermining U.S. Technology Leadership

China is pursuing a national quest to overtake U.S. companies in domains such as artificial intelligence, quantum computing, 5G communications technology, and a range of related industries, through the global commercial success of behemoths like Huawei, Alibaba, and Tencent. In addition, the EU has launched a series of industrial policy initiatives aimed at achieving “digital sovereignty” and “strategic autonomy” in the domain of technology, as discussed above. Meanwhile, the proposed U.S. antitrust **legislation would clear away the most formidable competitors** for China and the EU: **U.S. technology companies**.

A November 2021 study by two professors at Duke University’s Fuqua School of Business details how the proposed U.S. antitrust legislation would erode U.S. competitiveness with respect to five types of technology of strategic and economic importance: quantum information science, AI, advanced communications technologies (e.g., 5G), high-performance computing (e.g., semiconductors), and robotics. The study finds that **at present, U.S. firms generally lead in these industries**, although foreign firms – particularly those from China – are challenging U.S. leadership.49 As a result, the United States is losing its historic lead in innovation – with China quickly catching up in R&D investments and R&D intensity, and Chinese firms narrowing the gap and even taking the lead in key segments critical for global technological leadership.50 The study finds that **corporate research is vital for preventing further erosion of America’s leadership**, especially in digital technology; and that commercial scale and scope enable U.S. firms to invest in scientific research.51 Indeed, companies like Google and Amazon are investing tens of billions of dollars per year in R&D in quantum computing, responsible AI, and other emerging technologies.52 The study notes that **“[c]orporate research labs can do what universities and startups cannot** – integrate science and technology to produce breakthrough innovations.”53 In addition, the study finds that “[t]o invest in large scale scientific research, and to create market-leading innovations, tech firms must be permitted to pursue large commercial scale and a wide range of product applications.”54 However, according to the study, the antitrust legislation would prevent such companies from developing new products or entering new markets, and will reduce their investments in research and further undermine U.S. leadership in emerging technologies.55

Similarly, the National Security Commission on Artificial Intelligence stated, “more and better data, fed by a larger consumer/participant base, produce better algorithms, which produce better results, which in turn produces more users, more data, and better performance.”56 Similarly, success in quantum computing requires operating at great scale and investing significant long-term resources – not just to build a fault tolerant quantum computer, but also to train a workforce to use it, and to identify applications enabled by today’s quantum computers.

However, the proposed U.S. **antitrust legislation would hamstring and even dismantle U.S. companies that are the leading investors in R&D**. It would jeopardize their scale and scope, which currently enables them to invest and innovate in strategic technologies like AI and quantum computing. According to the study by the Fuqua professors, this would “hurt American economic prosperity and security.”57

In a recent letter to Congress, 12 former U.S. national security officials expressed significant concerns about the legislative proposals, stating: “Recent congressional antitrust proposals that target specific American technology firms would degrade critical R&D priorities, allow foreign competitors to displace leaders in the U.S. tech sector at home and abroad, and potentially put sensitive U.S. data and IP in the hands of Beijing.”58 Similarly, in a recent op-ed, former National Security Advisor Robert O’Brien stated:

{T}hese bills hand increased authority to bureaucrats at the Federal Trade Commission and lay the groundwork for dismantling America’s most successful technology companies—the ones at the forefront of the race to retain U.S. dominance in fields such as quantum and AI. Chinese firms like Tencent, Bytedance, Alibaba, Huawei and Baidu are seeking to supplant U.S. companies and would have an open field world-wide and in America if these bills pass.59

Put simply, the legislation would weaken America and strengthen our rivals.

**Platforms are competitive and innovative, driving research.**

**Kennedy ’20** [Joe; July 23; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Do Internet Platforms Threaten Competition?” https://itif.org/publications/2020/07/23/monopoly-myths-do-internet-platforms-threaten-competition]

In fact, the **largest platforms** are among the economy’s **most innovative companies**, not just in their traditional offerings, but also in **cutting-edge technologies** such as cloud computing, **artificial intelligence**, drones, and supercomputing. According to a study of the world’s top 1,000 publicly owned corporations, Amazon and Alphabet (Google’s parent company) are the **top two investors** in R&D.38 Microsoft and Apple finished sixth and seventh. Facebook ranked 14th. Together, the 5 companies spent **over $70 billion on R&D** in 2018. The Economist magazine warned that regulating platforms would **douse** their innovative spirit.39

Although economic benefits are hard to measure, we know they are large. A McKinsey report estimates that using hiring platforms such as Monster.com, LinkedIn, and Upwork to match underemployed workers with job opportunities could boost U.S. gross domestic product (GDP) by $512 billion annually.40 More broadly, the platform-enabled Internet of Things could generate up to $11.1 trillion in global value by 2025, equivalent to 11 percent of current GDP.41

Polling data from 2017 supports this. On average, individuals would have required $17,530 to give up search engines for a year.42 The equivalent figures for email and maps were $8,414 and $3,648, respectively. Looking just at the top five functions, the average person attached a combined value of $31,607 to Internet services they essentially get for free. Economist Thomas Philippon estimated that the rise of ecommerce is equivalent to a permanent increase in consumption of 1 percent.43 The Economist reported that the inflation of online prices is running 1 percentage point below official inflation, saving buyers millions of dollars.44 Regulations that substantially increase the cost of providing these services may also reduce their benefits.

Despite these benefits, the European Commission has pursued antitrust investigations of the largest U.S. Internet platforms, in some cases handing out large fines. These decisions have not always been backed by sound analysis of consumer harms. In fact, The Economist characterized the European Commission’s competition arm as “an example of what happens when well-meaning energy is used to contort economic worries into a flawed legal framework.”45

2. Platforms Raise Different Antitrust Issues Than Other Businesses

Antitrust law is capable of dealing with platform issues, but, because platforms use a different business model, applying the law requires some modification.46 Because platforms exist to bring different parties together, antitrust regulators must look at all sides of a market before ruling that a specific practice harms competition, particularly in markets wherein one side is provided for free. An action that raises the price to users on one side of the market may increase total welfare, and even the welfare of the affected side, if the extra revenue is used to subsidize participation by users on another side. In fact, platforms have a **built-in stabilizer** that **limits** the **benefit of unfair competition**. A platform that raises profits by taking advantage of sellers will of course reduce participation on that side. But it will also **reduce participation** by buyers who now have **fewer sellers** to choose from. That, in turn, further reduces the platform’s attractiveness to sellers. The result is a reversal of the network benefits that normally support platforms.

Some business practices that would usually raise antitrust concerns can actually increase competition in a platform. Examples include product tying, exclusive agreements, pricing below marginal cost, and negative pricing.47 It is certainly possible for Internet platforms to abuse their market power and act uncompetitively. But in order to determine this, antitrust regulators need to undertake the careful economic analysis of all affected parties that current antitrust policy already requires of them. A study from the European Parliament recommends caution:

[C]ompetition authorities and policy makers should focus on preventing the creation of entry barriers, facilitate entry into markets, and foster innovation. Competition authorities should have a cautious attitude towards actual competition problems and to [sic] rely on the self-correcting powers of the market, provided that certain public values such as taxation, privacy and security are protected by appropriate (other) policy frameworks.48

Regulators always need to be alert for clearly anticompetitive conduct by Internet platforms, just as they are for more traditional industries. But the structure of platform markets, while different from others, is not more vulnerable to competition problems than other markets. And the current set of antitrust statutes and practices gives regulators all the powers they need to deal with any practices that clearly harm consumers.

3. Platforms Face Competition

The largest Internet platforms are involved in an increasing number of markets. In many of them, they face **strong competition** that limits **any market power** they might have. Most importantly, many of these platforms **compete against each other** for both ad revenue and the attention of their users, who can focus on only one platform at a time in the midst of both work and family demands. In other words, the **relevant market** for many platforms is not the narrow platform application itself, it is the **overall** advertising market on one side, and the **market** for user attention on the other. That latter market includes not only other Internet applications, but television, books, the radio, and other media. Players in that market also face **strong competition** in new markets such as cloud computing, autonomous vehicles, and **artificial intelligence**.

Many of the most popular platforms are **free**, often earning most of their profits by selling ads to companies that want to reach their users. This **automatically puts** them into competition with each other for the **scarce attention** of these same users. Although Google may have a dominant position in search, it is just one of many ways people can spend time online. As such, Google competes with Facebook, Fortnight, Amazon, TikTok, and many, many others for the limited amount of time their users are online.

In the advertising market, Internet companies compete against other large platforms such as television, radio, and newspapers. They face powerful advertisers using sophisticated software tools including Visual IQ and C3 Metrics to measure the performance of each dollar of ad spending. Partly as a result, the cost of Internet advertising has fallen by 40 percent since 2010.49 Internet ads are now 40 percent cheaper than print ads of equal effectiveness. And, as the current advertiser boycott of Facebook shows, advertisers can easily go elsewhere.50

In the advertising market, Internet companies compete against other large platforms such as television, radio, and newspapers.

As for the market for attention, economist David Evans cited several sources of competition for users’ attention:

[A]ttention seekers **cannot profitably** raise price above zero, must **improve** the quality of their services through **frequent introduction of new features** to prevent users from switching to rivals, face **constant threats of entry** by new attention seekers that will divert traffic from them, face **continual threats** that **new or existing attention seekers** will develop a **drastic innovation** that diverts **massive amounts of traffic** from them, and operate in a business that has **low barriers to entry and exit**.51

As Robert D. Atkinson and Michael Lind stated in Big is Beautiful:

[W]e shouldn’t **really worry** about **current concentration levels** in Internet-based network industries that provide their services for free because the relevant market from a competition perspective is not the social network or microblog network, it’s the advertising market. All these firms compete for advertising dollars and, notwithstanding their size, have little market power in the ad market.52

Platforms also operate in **very dynamic markets** for their core business. Although economies of scale and network effects may advantage a particular provider, these forces are not absolute. Platforms can experience congestion and offsetting network costs.53 Switching costs have also fallen.54 In addition, there is an **active competition** to become the **dominant platform**. The result is **even companies** that have a **dominant position** in **their specific market** must invest **large amounts of research** into **continually improving** their products in response to **constantly changing technology**. Unlike traditional monopolists, platforms have no incentive to reduce the number of their users in order to raise prices. Instead, network effects demand they continually try to attract new users. As antitrust experts Carl Shapiro and Hal Varian summarized, “The information economy is populated by temporary, or **fragile monopolies**. Hardware and software firms vie for dominance, knowing that today’s **leading technology or architecture** will, more likely than not, be **toppled in short order** by **an upstart** with **superior technology**.”55 To be sure, that competition may not come about in the short term (although the quick rise of the video sharing app TikTok suggests it can), but it usually comes about in the longer term through the development of fundamentally new technologies. And after reading multiple versions of the message from Harvard’s Clayton Christensen about disruptive innovation, most companies today live with that fear.56

**Innovation is migrating, NOT slowing.**

**Kennedy ’20** [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones]

Data on Venture Investments Suggests Tech Acquisitions and High Market Share Do Not Hurt Start-Ups

The right measure of the effect of killer zones is not the trend in the specific market wherein large tech firms operate, but in the overall tech innovation ecosystem. Even Hathaway acknowledged that the **relative declines** he observed in the narrow markets where the big firms are **strongest** could be **offset** by investments moving to **other, more promising, markets**. In fact, that appears to be exactly what has happened. From 2006 to 2019, venture capital investments in IT deals **increased steadily and significantly**. Although it leveled off in 2019, tech funding was still 54 percent above the 2017 level.

Figure 1. U.S. deal value in total and in tech (2006–2019)51

Figure 2 shows the number of technology angel and seed deals as well as the number of early stage deals. The number of **angel and seed deals** rose by almost **six-fold** 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**.

Figure 2. U.S. deal volume in tech (2006–2019)52

**Size does matter, and bigger is better. Large companies innovate more.**

**Kennedy ’20** [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones]

The Assumption That Small Firms Are **Inherently More Innovative** Than Large Firms Is **Not Borne Out** by the Evidence

One core argument made by anti-monopolists who oppose large companies and argue that kill zones and killer acquisitions are real and harmful is that small firms are inherently more innovative than large firms. As FTC Commissioner Christine Wilson argued, “[M]any today believe that small firms are inherently more innovative than large ones, so that the acquisition of a small firm by a large one necessarily reduces innovation.”45 For example, Tim Wu recently testified before Congress that innovation in technology sectors would increase if government imposed greater regulations and increased antitrust enforcement because “[o]ver the last century, competitive, open sectors—ecosystems—have proved themselves superior to those monopolized or dominated by a ‘big three’ or ‘big four.’”46

In fact, large companies **are as or more innovative** than small firms. In a 1996 paper, Wesley M. Cohen and Steven Klepper found that large firms invest **more in R&D** as a **share of sales**.47 The number of patents and innovations produced per R&D dollar decline with increasing firm size. But they argued that this reflects a mismeasurement of innovation outputs. Large firms benefit from “**cost spreading**,” because they can **spread the benefits** from **one innovation** across more units and products, leading to a **greater overall level of innovation** per **unit of R&D**. They wrote, “Not only does cost spreading provide the basis for explaining the R&D-size relationship, it also **challenges the consensus** that has emerged from the R&D literature that **large firm size** imparts **no advantage in R&D competition**.”48

More recently, in 2016, business professors Anne Marie Knott and Carl Vieregger estimated that a **10 percent increase** in the **number of employees** increases **R&D by 7.2 percent**, and a **10 percent increase** in **firm revenues** increases **R&D productivity by 0.14 percent**. This shows that large firms not only invest more in R&D activities, they also enjoy **higher returns** on **innovation output per dollar** invested in R&D.49

Other research has found that “small firms prevail in the early stages and innovation tends to concentrate in larger firms as industries evolve towards maturity.”50 In the 1990s, many small firms emerged and competed to be the winners in IT platforms. But only a few firms could emerge as winners, and the ones that did continue to invest in innovation.

**It sends massive chills that stop innovation in the tech sector---the AFF makes the FTC judge, jury, and executioner.**

**Manne and Szoka 12** – Geoffrey Manne is the founder and Executive Director of the International Center for Law & Economics, a global think tank, and Lecturer in Law at Lewis & Clark Law School

Geoffrey Manne and Berin Szoka, "Time For Congress To Stop The FTC's Power Grab On Antitrust Enforcement," Forbes, 12-20-2012, https://www.forbes.com/sites/beltway/2012/12/20/time-for-congress-to-stop-the-ftcs-power-grab-on-antitrust-enforcement/?sh=60681e151fc8

A debate is brewing in Congress over whether to allow the Federal Trade Commission to sidestep decades of antitrust case law and economic theory to define, on its own, when competition becomes “unfair.” Unless Congress cancels the FTC's blank check, **uncertainty** about the **breadth of the agency’s power** will **chill innovation**, especially in the **tech sector**. And sadly, there's no reason to believe that such expansive power will serve consumers.

Last month, Senators and Congressmen of both parties sent a flurry of letters to the FTC warning against **overstepping** the **authority** Congress granted the agency in 1914 when it enacted Section 5 of the FTC Act.

FTC Chairman Jon Leibowitz has long expressed a desire to stake out new antitrust authority under Section 5 over unfair methods of competition that would otherwise be legal under the Sherman and Clayton antitrust acts. He seems to have had Google in mind as a test case.

On Monday, Congressmen John Conyers and Mel Watt, the top two Democrats on the House Judiciary Committee, issued their own letter telling us not to worry about the larger principle at stake. The two insist that “concerns about the use of Section 5 are unfounded” because “[w]ell established legal principles set forth by the Supreme Court provide ample authority for the FTC to address potential competitive concerns in the relevant market, including search.” The second half of that sentence is certainly true: the FTC doesn't need a “standalone” Section 5 case to protect consumers from real harms to competition. But that doesn't mean the FTC won't claim such authority—and, unfortunately, there's little by way of “established legal principles” stop the agency from overreaching.

The Conyers-Watt letter cites four Supreme Court cases (Aspen Skiing, Otter Tail Power, Lorrain Journal and Indiana Federation of Dentists), the latest decided in 1986, that deal only with the Sherman Act or that reference Section 5 only as the statutory basis by which the FTC enforces, indirectly, the Sherman Act. But what conduct does Section 5 allow the FTC to prosecute beyond the Sherman Act? The fifth case cited, Sperry & Hutchinson, from 1972, was the last time the Supreme Court directly addressed this critical question, holding that the FTC “**does not arrogate excessive power** to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.” Yet, even there, the Court concluded the FTC would have prevailed under the Sherman Act—thus leaving unresolved what a standalone Section 5 case could cover. Fourteen years later, the Court dodged the question again in Indiana Federation of Dentists, noting that, although Section 5 covers something more than the Sherman and Clayton acts, the Sherman Act provided the sole basis for liability in that case. Of Section 5, the Court in Indiana Federation of Dentists said merely that “the standard of 'unfairness' **under the FTC Act** is, by necessity, **an elusive one**.”

**Elusive. Try telling that to your shareholders**—**or investors** looking for The Next Big Thing—when asked how the FTC might regulate innovative business methods!

The FTC has been down this road before—starting with the same Sperry & Hutchinson decision cited by Conyers and Watt. The FTC interpreted that 1972 decision as a **blank check** to use its authority over unfair trade practices (distinct from, but related to, its authority over unfair methods of competition) to regulate everything from funeral parlors to children's advertising. But the FTC's overreach **provoked widespread outcry**, causing the Washington Post to blast the agency as the “National Nanny.” The Democratic Congress briefly closed the agency, slashed its budget and, in 1980, ordered the Commission to establish legal limiting principles in the form of a formal policy statement on unfairness (followed in 1983 by one on deception). That statement bars the FTC from banning a practice as unfair simply because a majority of Commissioners decide it is "immoral" or in violation of public policy; instead the Commission must show that it violates public policy that is “widely-shared” and “clear and well-established” in law or that causes a substantial injury to consumers without countervailing benefits and which consumers cannot reasonably avoid. Congress enshrined this doctrine into law in 1994.

But the Commission has never issued any such policy statement about Section 5's unfair competition language—and Congress has never bothered to intervene, even though the FTC has begun exploiting this uncertainty as additional leverage in "convincing" companies to settle shaky antitrust cases. That's precisely what happened in the Intel case where, as we've explained, Intel settled a questionable complaint, probably because it concluded that that settling the case was less costly than litigating it. While such outcomes may bolster the agency’s power, they do nothing to protect consumers and serve instead to **chill business conduct** that would benefit consumers.

That dynamic is a major reason why the FTC gets away with pushing the boundaries of its authority. Litigation in court is costly enough, but the agency can always threaten companies with an administrative "Part III" litigation—meaning the company would have to spend upwards of a year litigating before the FTC's Administrative Law Judge and then the full Commission, almost certainly suffering two losses, both PR disasters, before ever getting to an independent, neutral tribunal. So it's not surprising that most companies settle. Sure, they might win in court eventually, but if the FTC is talking to you about a **standalone Section 5 case** while pressuring you to settle a case in a **consent decree**... well, “you've got to ask yourself one question: **'Do I feel lucky?**' Well, do ya, punk?”

**It's impossible for businesses to determine what conduct will be authorized post-aff---that chills procompetitive conduct and allows sweeping attacks**

**U.S. Chamber of Commerce 9** – lobbying group representing over 3,000 businesses. This submission was compiled by the staff of the U.S. Chamber of Commerce, Chris Braddock, Senior Director

U.S. Chamber of Commerce, "UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FTC ACT: Does the U.S. Need Rules “Above and Beyond Antitrust”?" September 2009, https://www.uschamber.com/assets/archived/images/documents/files/0909antrust\_0.pdf

I. Introduction

It is often asserted that the prohibition on “unfair methods of competition” contained in Section 5 of the Federal Trade Commission Act provides the FTC with flexibility to attack competitive conduct that is proper when examined under the federal antitrust laws. Although the FTC brought some early cases relying on this expansive view of Section 5, aggressive efforts to apply Section 5 during the late 1970’s and early 1980’s were **consistently rejected by the courts**. Although these courts acknowledged the FTC’s broad authority in concept, they faulted the FTC for **failing to define the improper conduct** according to **acceptable criteria**. Following these unsuccessful cases the FTC’s enthusiasm for extending Section 5 beyond established antitrust‐law boundaries appeared to wane.

With recent changes in leadership taking hold at the FTC and throughout the federal government, there are renewed calls for efforts to extend Section 5 to additional forms of competitive conduct beyond the limits of established antitrust law. The FTC is being invited— from within and without—to use Section 5 to attack diverse categories of conduct otherwise outside the scope of antitrust law. These range from “invitations to collude,” to policing commitments made by members of standard‐setting organizations, to conforming U.S. rules on single‐firm conduct to European standards.

The character of many of these proposals, as well as their scope and diversity, highlights **key disadvantages** of extending Section 5 **beyond the range of the existing antitrust laws.** It is **extremely difficult** to identify conduct that seems both: a) **deserving of condemnation** based on sound, mainstream analysis and policy, and b) capable of being defined with **sufficient consistency and objectivity** that **businesses** will **be able to** understand the definition and **rely upon** it to develop practical standards for real‐world conduct.

A policy of **adding new restrictions** on marketplace conduct enjoys **little margin for error** due to the fact that it can **easily be counterproductive**. The Chamber opposes any use of Section 5 beyond the current antitrust laws without **clear standards** that bound the use of Section 5 **narrowly** to types of conduct that are obviously not proper business behavior and could distort the competitive process.

We acknowledge that there are certain, limited forms of anticompetitive conduct that may not be covered by the antitrust laws, and thus may warrant scrutiny under Section 5. We believe “invitations to collude” are the most prominent and very well may be the only type of conduct that reaches this threshold. However, there is **real danger** if Section 5 is used to attack conduct that the FTC and others at any other point in time have viewed as fair. Section 5 should be informed by the same principles of “protecting competition not competitors” and “maximizing consumer welfare” that inform the antitrust laws. Additionally, the FTC must also **provide significant notice and guidance** to the business community (including hearings) **before** **embarking** on cases that are uniquely covered by Section 5.

**Uncertainty becomes a *force multiplier* that means firms live in *constant fear***

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

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

B. The FTC **Should Not Have This Power**240

While Congress did give the FTC very broad power, it **did not** give the FTC unbounded power. Unfortunately, the ambiguity in the agency’s power, and the ways in which the agency **uses that ambiguity**, has yielded an agency with **near boundless power** to regulate the economy **largely unconstrained** by judicial review.

To understand this, we must understand how the FTC has wielded its Section 5 authority in recent years. The scope of Section 5 is **unclear**. This is substantially because the FTC has **declined to explain** what it believes the scope to be. Lacking such explanation, **firms must live in constant fear of the agency’s potential vigilance**. The **possibility** that the agency may challenge a firm’s conduct is a **daunting one**, especially because the FTC may elect to first challenge the conduct internally through an administrative hearing.241 Should the defendant-firm lose, that decision may be appealed only to the full FTC. Until recently, the FTC never failed to uphold a complaint under its review.242 Effectively, then, it is only after multiple years and two complete rounds of litigation that the matter can be appealed to an Article III tribunal.243

In other words, if the FTC challenges a firm’s conduct, defending that conduct is **extremely expensive**.244 It is also **probabilistic** due to the **ambiguity inherent in Section 5.** The FTC has **broad power** to challenge conduct that may not be an unfair method of competition with **little concern** that a firm will attempt to defend itself. Rather, firms do a cost-benefit analysis and decide to settle with the agency, often agreeing to **decades-long oversight** of their business practices.245 In this way, the **agency wields the uncertain boundaries of Section 5 as a weapon**. The **possibility that the FTC would broadly receive Chevron deference** for its construction of these boundaries is a **force multiplier**, giving firms **even less incentive** to defend their innocent conduct.246

The most problematic aspect of the FTC’s approach to using the threat of litigation to extract consent decrees is that this approach **yields little if any** official statement of the FTC’s **interpretation** of Section 5 or any record of the FTC’s reasoning. Such records are important. They provide firms with notice of both the agency’s interpretation of Section 5 and the reasons for that interpretation. They may offer some constraints on the agency’s ability to subsequently change its interpretation. This is true even under Fox I, in which the Court gave agencies broad latitude to adopt new understandings of an ambiguous statute even in the face of prior, contrary understandings.247 If the agency has a longstanding construction of a given statute, it may need to address why it has changed that construction.248 Similarly, in explaining its basis for adopting a given construction, the agency may need to address (and contradict) the changed circumstances of prior justifications in order to change its construction—particularly where the prior policy was based on factual assumptions that have not changed.249 Perhaps most importantly, it provides Congress with information about the agency’s performance and consistency—information that is necessary both for **effective oversight** and to **indicate to Congress** where statutory changes **may be necessary**.

**Independently, the aff bypasses APA requirements for rulemaking that are essential for predictability**

**Chopra and Khan 20** – Commissioner, Federal Trade Commission; Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; former Legal Fellow, Federal Trade Commission

Rohit Chopra and Lina M. Khan, "The Case for “Unfair Methods of Competition” Rulemaking," The University of Chicago Law Review, vol. 87: 357, 2020, https://www.ftc.gov/system/files/documents/public\_statements/1568663/rohit\_chopra\_and\_lina\_m\_khan\_the\_case\_for\_unfair\_methods\_of\_competition\_rulemaking.pdf

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable.43 The APA **requires agencies** engaging in rulemaking to provide the public with **adequate notice** of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.44 An agency must publish the final rule in the Federal Register at least **thirty days before the rule becomes effective**.45 These procedural requirements promote **clear rules and provide clear notice**. As the Supreme Court has stated, a “fundamental principle in our legal system is that laws which regulate persons or entities must **give fair notice** of conduct that is forbidden or required.”46 Clear rules also help **deliver consistent enforcement and predictable results**. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior **more productively** and will allow market entrants and entrepreneurs **to compete** on more of a level playing field.

**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.**

**But, even if they win suits will succeed, it takes years which coincides with our uniqueness claims**

**Tran 2/22** – Media Analyst at Variety

Kevin Tran, "Why 2022 Might Disappoint Big Tech Antitrust Crusaders," Variety, 2-22-2022, https://variety.com/vip/why-2022-might-disappoint-big-tech-antitrust-crusaders-1235174942/

But **despite all the momentum** to rein in the power of Big Tech, 2022 may go down in the history books to antitrust crusaders and Big Tech critics as a year that showed much promise early but **ultimately failed to deliver**.

For one, several of the big probes by the FTC and DOJ into Big Tech companies are **not likely to end in 2022**. And the DOJ’s October 2020-filed lawsuit against Google for violating antitrust laws won’t go to trial until **2023**.

Meanwhile, the DOJ is currently probing Apple, but it **has not** yet **actually sued** it on antitrust grounds. The Information in October reported an Apple-DOJ antitrust suit was likely, but Politico in December reported that a decision on whether the DOJ will go to court with Apple wasn’t likely to come until March of this year.

The FTC has been pursuing an antitrust lawsuit against Facebook on the grounds that the platform has illegally maintained a social networking monopoly through anticompetitive practices, such as acquiring rivals like Instagram. While the FTC’s antitrust case against Facebook was rejected in June, a judge in January said the government agency could move forward with an amended version of the complaint.

Still, the permission granted to the FTC to move forward with the antitrust suit far from guarantees a victory to Lina Khan and Co. The judge accepting the FTC’s latest suit said the agency “may well face a tall task down the road in proving its allegations.” And it **will take years** before that case concludes, according to NYT.

In the meantime, the FTC will also be occupying its time with Amazon-related cases.

Last June, it was reported that the FTC would be investigating Amazon’s proposed deal to acquire MGM in addition to a broader investigation (which began under the Trump administration) that the agency had been conducting on the e-commerce giant’s business practices.

But some, like Cardozo law professor Sam Weinstein, see the MGM-Amazon deal as **likely to pass.**

This sheds light on why the New Yorker in early December reported that some FTC vets worry Khan “is underestimating the risks of pushing ahead with aggressive cases that are **likely to fail**.”

The broader FTC-Amazon investigation in December expanded to include the company’s cloud business. That expansion may have only pushed any end to the FTC’s years-long Amazon investigation even further out than initially anticipated.

Yes, there are different Big Tech-antitrust inquiries being conducted by other government officials and agencies.

But in the interest of not writing a piece that’s the length of a novel, this article focuses on antitrust-related probes or cases brought forth by the FTC and DOJ, which both enforce federal antitrust laws. The FTC and DOJ cases mentioned above also seem to have the most potential to spur meaningful changes in the business practices of Google, Apple, Meta and Amazon.

The ever-present government scrutiny makes it no wonder why Silicon Valley’s biggest players have spent so much on lobbying. Meta, Amazon and Alphabet, respectively, spent about $20 million, $19 million and $10 million on lobbying in 2021, all figures that were up year-over-year, according to filings from the U.S. Senate Lobbying Disclosure database.

Potentially **delaying antitrust legislative efforts** against Big Tech is also the **midterm elections**, which could cause Democrats (which overwhelmingly supported a suite of bills partly aimed at strengthening antitrust agencies) to **lose control** of either house of Congress.

**No radical action yet---Khan’s moved slowly and without controversy**

**Guilford 2/14** – Columnist for Reuters Breakingviews

Jonathan Guilford, "Lockheed deal flop is just antitrust amuse-bouche," Reuters, 2-14-2022, https://www.bloomberg.com/news/features/2022-02-09/there-are-now-1-000-unicorn-private-company-startups-worth-1-billion-or-more?utm\_campaign=news&utm\_medium=bd&utm\_source=applenews

Meanwhile, in areas that companies and their investors **feared radical change**, **little has happened**. The market priced in substantial antitrust risk to a variety of pharmaceutical mergers – all of which **passed muster**. The Department of Justice **allowed** media giant Discovery’s (DISCA.O) merger with WarnerMedia, even after members of Congress raised concerns.

Khan wants to enlarge the FTC’s notion of what constitutes an unacceptable merger, as shown by efforts to discard current guidelines for analyzing deals and start from scratch. **Yet so far, there’s no evidence of a big** **shift**. Instead Khan has **moved deliberately**, issuing enforcement actions at a **relatively slow pace** while racking up **uncontroversial, bipartisan votes** on deals.

**[B]---Even if it’s likely to occur, it’ll fail given resistance in the courts and Congress**

**Gleason 21** – Partner at JonesDay

Michael Gleason, For 15 years, Gleason has been involved in some of the most significant transactions to recently come before the antitrust agencies. He counsels clients on antitrust matters before U.S. and international enforcement agencies, including cross-border M&A transactions and government investigations, as well as antitrust litigation; has represented a variety of clients before the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), state, and international antitrust enforcers and has extensive experience in a range of industries, including agriculture, health care (providers and payers), pharmaceuticals, medical devices, software, tech platforms, chemicals, mining, defense, commodities, and food products, among others. His transactional work includes counseling clients at every stage of a deal, including premerger planning, regulatory filings, investigations, litigation, as well as post-closing investigations, Lin Kahn, J. Bruce McDonald, Craig Waldman, and Jones Day, FTC Signals Aggressive Antitrust Policy as Part of Government Pro-Enforcement Agenda, 15 July 2021, https://www.jdsupra.com/legalnews/ftc-signals-aggressive-antitrust-policy-7983021/

Those significant changes are part of a broader effort by the new administration and some in Congress that is distinctly unfriendly to large businesses. Just as the FTC changes target certain industries, including big tech and pharmaceuticals, so do bills in Congress like the Competition and Antitrust Law Enforcement Reform Act ("CALERA") proposed by Senator Amy Klobuchar and the Trust-Busting for the Twenty-First Century Act proposed by Senator Josh Hawley. And in the week following the FTC actions, President **Biden** **announced an executive order** to encourage Executive Branch departments to consider competition in their decisionmaking, with **particular emphasis** on effects on labor and on transportation, agriculture, and financial services sectors (detailed in this Commentary). The President also urged the DOJ and the FTC to **update their merger guidelines**, an effort the **antitrust agencies quickly said** **would be underway.**

We **expect the FTC to continue** on this aggressive enforcement trend, utilizing the new rule changes (and enacting others) to expand its enforcement capabilities. Chair Khan has announced a plan to hold monthly open Commission meetings, which will likely lead to more departures from longstanding FTC policy. Indeed, **the agenda for the next meeting shows** **that the Commissioners will** **vote on whether to rescind a 25-year-old rule** that lessened the burden on parties to **settle** **merger challenges**.

**Nevertheless**, **the pro-enforcement trend will face** some **resistance** **as it meets** inconsistent **precedents in the courts**, **political opposition by legislators responding to business constituents**, **and the difficulties of making quick changes** to established views among agency staff. For example, Chair Khan has argued that the current framework for antitrust analysis, specifically the "consumer welfare" standard, which focuses antitrust analysis on whether there is harm to consumers as distinct from competing producers, fails to fully serve competition policy goals. **Without legislation**, **changing antitrust jurisprudence is going to take time.** **More importantly, other changes will be required to work a sea change**, including continuing service of the current Commission majority (or continuity of their views) **beyond just a few short years**, **appointment of judges with similar views**, and persistent public support for aggressive government interference.

Six Key Takeaways

The FTC recently made a series of changes to its procedures that are in line with broader proposals across the government aimed at increasing U.S. antitrust enforcement.

The Commissioners voted to abandon its previous bipartisan commitment to tether its "unfair competition" powers under Section 5 to antitrust precedents.

The Commission changed its rulemaking procedures to allow the agency to more easily promulgate new and unprecedented antitrust regulation.

The Commissioners voted to make it easier for the agency to issue subpoenas to investigate alleged anticompetitive conduct and mergers in digital markets, pharmaceuticals, and other specific markets.

In sum, the reforms likely will result in increased enforcement activity by the FTC, chiefly in the form of new agency rulemakings, more sectoral and conduct-focused investigations, and increased enforcement under Section 5.

**Nevertheless**, **court precedents**, limited tenure of decisionmakers, and **political opposition** **will slow the FTC** in working enormous change in this **established area** of government enforcement.

**[C]---If rulemaking does occur, it takes years to implement, further driving the M&A wave before the rules are finalized**

**Deal 21** – Washington Analyst, U.S. Equity Division

Katie Deal, Biden Signals Government-Wide Push to Promote Competition. But changing rules and laws isn’t easy and would take time., August 2021, https://www.troweprice.com/financial-intermediary/us/en/insights/articles/2021/q3/biden-signals-government-wide-push-promote-competition.global-equity.html

"In our view, this EO signals a shift in the government’s approach to industry consolidation, a development that could lead to tougher reviews of proposed business combinations..."

Not surprisingly, the EO addresses two high-profile areas of concern: the power of dominant technology platforms and the problem of rising health care costs. But the EO also **encouraged** regulatory actions to **address** concerns about **consolidation** and competition in a **range of industries**, including **telecommunications**, **agriculture**, **banking**, and **transportation**. We see the potential for **headline** risk and **incremental** changes in business practices, as this EO introduces more stringent regulatory scrutiny in select industries. **In our view**, **investors** should **monitor the rulemaking process closely**—**while** **bearing in mind** that **comprehensive legislative** and **regulatory reform** **would** **take** **bipartisanship** and likely **years of rulemaking** to play out.

Nominations Suggest a More Rigorous Antitrust Approach

Many signs point toward the mega-cap technology platforms facing increased regulatory scrutiny. Consider the Biden administration’s appointments to key posts in the White House and at regulatory agencies: Jonathan Kanter (nominated to head the Justice Department’s antitrust division), Federal Trade Commission (FTC) chair Lina Khan, and Tim Wu (named to the National Economic Council)—all of whom are on the record with legal and regulatory criticisms of the tech giants’ business practices.

Much will be made of these appointees’ strategies for addressing the perceived harm caused by the influence of the biggest technology companies. But Biden’s nominations would install skilled regulatory technicians who are driven to ramp up antitrust scrutiny across industries.

Executive Order Exhibits Breadth

President Biden’s EO suggests 72 different initiatives through which more than a dozen federal agencies could pursue rulemaking to curb practices deemed to harm consumers and impede competition.

Highlights include encouraging the FTC to establish rules on data collection by technology companies and cracking down on potentially unfair practices that disadvantage the smaller businesses using these popular platforms to sell to customers. In the health care sector, the EO urges the Department of Health and Human Services to issue a plan to lower drug prices within 45 days, implement previously passed legislation to address surprise billing in hospitals, and take other steps to address affordability in health care.

Other noteworthy recommendations from the EO include making it easier and less expensive for consumers to switch telecommunication service providers, improving the transparency of airline and shipping fees, making it easier for farmers to sue large agricultural processors for underpayment and other abusive practices, and restricting the use of noncompete clauses.

**Stricter reviews of mergers and acquisitions**, with an eye toward limiting industry concentration, also **feature prominently** in the order. Possible implications for investors include a more rigorous review process for mergers and acquisitions as well as more burdensome terms and conditions for deal approval.

**But** the **Gears of Change** **Remain the Same** **and** **Still Turn Slowly**

**The EO itself does not contain enforcement mechanisms** **but** **encourages** federal agencies to **adopt** more progressive policies **given the rulemaking authorities available to them under current law**. **However, those regulations will take time to develop.** **The rulemaking process can stretch** from several months to **several years**, and the challenge of coordinating among different agencies can slow progress.

**European antitrust action against American firms won’t matter---U.S. courts are key**

**Rivero 20** – covers tech for Quartz

Nicolás Rivero, "Europe's Digital Markets Act won't topple Big Tech," Quartz, 12-14-2020, https://qz.com/1946058/europes-digital-markets-act-wont-topple-big-tech/

As US prosecutors ramp up antitrust cases against Big Tech firms, the European Union is readying its own next wave of antitrust lawsuits. On Dec. 15, the bloc will formally begin considering the Digital Markets Act, which would give regulators new firepower to go after digital platforms for alleged anticompetitive practices.

The new regulations take aim at “gatekeeper companies,” barring firms from using unfair tactics like giving their own products special treatment on platforms they control (👀 Google and Apple) or using non-public data harvested from third-party sellers to inform their own competing product lines (👀 Amazon). While the laws would likely keep corporate counsel at FAANG firms busy, they probably **won’t result** in any **fundamental changes** to the operation of the world’s most powerful online platforms: For that, **all eyes are on US courts.**

Gatekeeper companies that break the proposed European rules would face an escalating schedule of fines and the threat that regulators will restructure their business in Europe. (According to Bloomberg, the law will formally define gatekeepers in terms of revenue, number of users, and their dominance in the European single market, and would call for regulators to regularly revisit and update the list.) That sounds serious, but the **breakup threat isn’t new**. European regulators **already have the power** to restructure companies in response to antitrust concerns, and **they’ve been loath to use it.**

“The notion of breakups is **completely alien** to Europeans, because of course you have this concern about these being big American companies for which you **cannot really achieve a breakup** that is global,” said economist Cristina Caffarra, who heads the European competition wing of the consulting firm Charles River Associates. **Reorganizing companies, in other words, is up to the Americans.**

Billion-dollar **fines have similarly failed** to change Big Tech companies’ business models so far. European courts have already fined Google nearly $10 billion in three separate antitrust cases. The lawsuits challenged Google’s digital ad dominance, its practice of elevating its own shopping tool on search results, and the deals it cut with smartphone makers to get its Android operating system installed on virtually all non-Apple devices. The company has **yet to meaningfully change** any of these practices.

“Huge fines are **not going to change**, and **haven’t changed**, the companies structurally,” said Michelle Meagher, a senior policy fellow at University College London who has worked with national regulators and private firms on antitrust law. “And that’s **ultimately what needs to change** if you’re going to have a change in the **balance of power**.”

Caffarra and Meagher both agree the antitrust cases that can really impact the way Big Tech companies do business will **have to happen in the US**, where the **biggest firms are based**. American prosecutors have recently launched two cases against Google and Facebook, and are expected to file more in the coming weeks, according to the Wall Street Journal.

**Europe is structurally limited in applying remedies**

**Whalen 20** – The Washington Post's global business reporter

Jeanne Whalen, "Europe fined Google nearly $10 billion for antitrust violations, but little has changed," The Washington Post, 11-10-2020, https://www.washingtonpost.com/technology/2020/11/10/eu-antitrust-probe-google/?outputType=amp

The European Union spent a decade pursuing Google on antitrust charges, **ultimately fining the company** nearly $10 billion for using illegal tactics to abuse its dominant position on the market.

But **two years after** the bloc’s biggest rulings, **very little competition has emerged**, in part because the E.U. largely left it to Google to fix the problems, antitrust lawyers and Google competitors say.

Google’s fixes included charging a fee to rival search engines that wanted to appear on a selection menu for Android phones, a step that drew howls of protest from competitors — why should they have to pay Google to help it fix its anticompetitive behavior, they asked?

“The bad actor gets to decide what their medicine is going to be. And that’s just crazy, right?” Megan Gray, general counsel of rival search engine DuckDuckGo, said in an interview.

With the Justice Department filing its own antitrust case against Google last month, U.S. government lawyers are scrutinizing the European results. Google continues to dominate more than 90 percent of Europe’s search-engine market, just as it did before the E.U. probes began in 2010, data from the analytics firm StatCounter show. Google competitors in the online shopping business, meanwhile, complain the playing field is still tilted in the tech giant’s favor.

Some veterans of the E.U. battle say the outcome shows the difficulty of restoring competition to a market that has already tipped under the control of one giant. They also say the European Commission was **held back** by a belief that Europe didn’t **have the political standing** to **impose tougher measures**, such as a breakup, on an American company.

“As a matter of politics, the European Commission is **not going** to break up **an American icon**. **That just ain’t going to happen**,” said Thomas Vinje, an antitrust lawyer at Clifford Chance who advises an industry group that helped spark the commission’s investigation by filing a complaint against Google. The group, FairSearch, is funded by Oracle, TripAdvisor and others.

The Justice Department lawsuit hinted at possibly tougher measures, should the government win its case, asking the court to consider “structural relief,” which theoretically could include a requirement that the company sell a portion of its business.

“It’s more difficult to win a case in the U.S. than in Europe. However, the U.S. in the past has **applied more far-reaching remedies**, mandating divestitures and breakups,” said Gene Kimmelman, former chief counsel for the Justice Department’s antitrust division, who now serves as senior adviser to the nonprofit tech-policy group Public Knowledge.

**No bounded limit on authority if applied to cases where conduct doesn’t violate Sherman or Clayton**

**Creighton and Krattenmaker 9** – former Director, Bureau of Competition, Federal Trade Commission from 2003–2005, and currently a partner at Wilson Sonsini Goodrich & Rosati; former attorney in the Bureau of Competition from 2003–2007, and is currently of counsel with Wilson Sonsini Goodrich & Rosati

Susan A. Creighton and Thomas G. Krattenmaker, "Appropriate Role(s) for Section 5," The Antitrust Source, American Bar Association, February 2009, https://www.wsgr.com/a/web/26/creighton0209.pdf

3. Gap Filling Cases. Unlike “frontier” cases, where the conduct is novel but otherwise satisfies traditional Sherman Act requirements, and “yes, but” cases, where the elements of the Sherman Act would be met but for the invocation of some limiting rationale unrelated to antitrust, “gap filling” cases are ones where the conduct at issue **does not** (or arguably does not) meet one of the elements of the **Sherman Act**. Most such cases likely raise questions regarding the “agreement” element of Section 1, or the “monopoly power” element of Section 2.

Perhaps the paradigmatic example of a “gap filling” case is an invitation to collude, such as the FTC’s consent order in Valassis. 33 As alleged in the complaint, that case—which was settled without trial—involved an alleged invitation to collude in a market that constituted a durable duopoly with high barriers to entry. Invitations to collude do not fit easily within the language of either Section 1 (where is the agreement?) or Section 2 (where is the dangerous probability of success?), yet there is little doubt that attempted collusion is conduct that fits comfortably within the ambit of antitrust economic and policy analysis. The conduct, if consummated, would be illegal per se, and, even unaccepted, it may facilitate coordinated interaction by disclosing the solicitor’s preferences. Meanwhile a simple, naked invitation to collude serves no procompetitive, efficiency enhancing purpose.

Although the Valassis case was not controversial, the **risk of an unbounded application** of Section 5 is **greatest** in these “**gap-filling**” cases, and the Commission should **give careful thought** to the **imposition of stringent requirements** where “gap-filling” is the **rationale** for the **stand-alone use** of Section 5. We limit ourselves here to two further fact patterns where these issues may arise.

**Statements are useless precedents---agencies can easily overturn them, and the fact that the 2015 Policy Statement was revoked by Khan means that companies won’t trust them**

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

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

1. Can the FTC Limit its Own Power?

Led by FTC Commissioners Wright and Olhaussen, much recent discussion has focused on the need for the FTC to adopt a policy statement that defines the boundaries of its Section 5 authority.263 While there may be some value in issuing such a statement, such **statements do surprisingly little** to bind an agency as a matter of **administrative law.**

As seen in the previous discussion, **stare decisis does not apply** in the administrative context. This is one of the greatest differences between judicial and administrative rulemaking: Agencies are **not bound** by either prior judicial interpretations of their statutes or **even by their own prior interpretations**.

As seen in Fox I, an agency’s own interpretation of an ambiguous statute **imposes no special obligations** where the agency **subsequently changes its interpretation**.264 It may be necessary to acknowledge the prior policy; factual findings upon which the new policy is based that contradict findings upon which the prior policy was based may need to be explained.265 But where a statute may be interpreted in multiple ways—that is, in any case where the statute is **ambiguous**— Congress, and by extension its agencies, is **free to choose** between those alternative interpretations. The fact that an agency previously adopted one interpretation does not necessarily render other possible interpretations any less reasonable. The mere fact that one was previously adopted cannot, on its own, act as a bar to subsequent adoption of a competing interpretation.

In a contentious policy environment—that is, one where the prevailing understanding of an ambiguous law changes with the consensus of a three Commissioner majority—policy statements are not particularly compelling documents and are not afforded much deference.266 They may, however, have some purposes. For instances, they may provide regulated parties with notice as to how an agency may act in the future or assert facts that the agency will need to confront in the future should it wish to subsequently change its policy.267

But neither of these is a substantial use. A policy statement is **unlikely to demonstrate** to a court that the agency’s interpretation of a statute is sufficiently reasoned to receive deference. There are alternate—and preferred—ways to provide regulated parties with notice. And while a policy statement may provide some obstacles to an agency’s decision to change its interpretation of a statute, those obstacles are likely to be modest at best.268

**Articulation of principles fails---no robust precedent, lack of adjudication, and non-binding nature all structurally lock-in ambiguity**

**Melamed 8** – chair of the Antitrust and Competition Practice Group at WilmerHale, former Acting Assistant Attorney General

A. Douglas Melamed, "Comments submitted to the Federal Trade Commission, Workshop Concerning Section 5 of the FTC Act," Section 5 Workshop, Comment, Project No. P083900, 10-14-2008, https://www.ftc.gov/sites/default/files/documents/public\_comments/section-5-workshop-537633-00004/537633-00004.pdf

The **ambiguity cannot be overcome by careful articulation** by the Commission of new Section 5 principles. First, as the antitrust laws demonstrate, commercial practices are **too vast** **and varied** to be **unambiguously guided** by any realistically imaginable set of principles. Second, a Commission's articulation of principles would **be of limited value** **in removing** ambiguity for the additional reason that **there is nothing** in the law to prevent a subsequent Commission from **articulating different principles**. Third, if the Commission were somehow able to adopt a clear, comprehensive and enduring set of principles - by, for example, promulgating formal rules under the APA - it would **necessarily replace antitrust principles**, which evolve by a **common law process** to adapt to new market circumstances and economic learning, with **rigid, soon-to-be anticompetitive regulation.**

To be sure, the antitrust laws themselves use vague phrases, such as "restraint of trade" or "substantially lessen competition." But the **antitrust laws** have been **given meaning** through a **robust common law** process. The Sherman Act was enacted nearly 120 years ago, and the Clayton Act more than 90 years ago. In the intervening decades there have been **thousands of cases** construing their statutory provisions, and the cases and commentary have given those vague provisions substantive content and have made their meaning over a wide range of matters **sufficiently clear.**

Section 5 will **not be clarified** by a similar common law process. In the first place, the antitrust laws have had a decades-long head start, and there exists for them a body of law elaborating upon the meaning of the general statutory provisions far greater than anything imaginable for Section 5 in the foreseeable future. Moreover, it is not just the passage of time that accounts for the difference. The antitrust laws are **enforced by countless plaintiffs** - two agencies of the federal government, state governments and private parties. There are hundreds of antitrust cases each year, each of which contributes in some small way to the cumulative common law process that has given meaning to the antitrust laws. By contrast, Section 5 is enforced only by the Commission, and there is no reason to believe that the Commission could be expected to resolve more than a handful of Section 5 cases each year. In light of this **unavoidable dearth** of Section 5 cases, there could **not possibly be a sufficient body of law** to **give meaning** to the vague provisions of Section 5, **even after several years**.

The problem is **exacerbated** by the fact that the majority of government proceedings are **resolved by consent decree**, rather than by adjudication. Enforcement by consent decree is **inherently problematic** because consent decrees **reflect the views of the Commissioners** about the reach of the statute, rather than the **authoritative views of the courts**. The consent decree process typically consists of a short complaint and summary description of the case by the Commission (or the Antitrust Division), coupled with a decision by the respondent not to contest the charges. Although the truncated process serves many useful purposes, it also **inevitably leaves implicit assumptions** **unexamined** and **critical steps** (and flaws) in enforcers' analysis **unexposed**. In short, consent decrees not only do not reflect judicial determination of the pertinent legal issues, but often **do not illuminate with precision** even the views of the Commission.

The Commission's recent consent decree in the N-Data matter is illustrative.3 The Commission challenged a course of conduct by N-Data after a long investigation. The Commission decided at the conclusion of the investigation that the conduct alleged did not violate the antitrust laws because it did not injure competition. The Commission decided, however, to challenge the very same conduct under Section 5. Recent judicial decisions construing Section 5 had held that conduct can be deemed to violate Section 5 only if it injures competition, and the Commission acknowledged and appeared to acquiesce in this requirement in its statement for public comment accompanying the N-Data consent decree. The Commission has never, however, explained how the conduct alleged to be unlawful in that case could have injured competition for purposes of Section 5, given the fact that it did not injure competition for purposes of the antitrust laws. If the matter had been litigated, the Commission would have had to explain and justify its conclusion. Without such explanation, the injury-to-competition element of the Section 5 offense is almost meaningless.

Moreover, even if the Commission had explained its view of Section 5 with **sufficient clarity**, the **law would remain unacceptably vague**. Without **authoritative judicial interpretation** of Section 5, its scope will **reflect** **little more** **than** the **personal views** of a majority of the Commissioners at any point in time. The current Commission might believe, for example, that its expansive reading of Section 5 in the N-Data case is limited to the factual context there ­ standard setting - but there would be nothing to prevent a future Commission majority from applying Section 5 in a very different way. And it is **inconceivable** that there will be **enough judicial determinations** of the scope of Section 5 in the foreseeable future to **give real meaning** to the statute. The unavoidable result would be **rule by individuals, rather than law.**

In sum, if construed to reach **beyond the antitrust laws**, Section 5 would **inevitably be too vague** to **send useful signals** to the marketplace and to **provide appropriate incentives** for firms to conform their conduct to the requirements of the law. The occasional Section 5 case that would be litigated would reflect only a dispute between the then-prevailing views of the Commission and the defendant. Because of the predictable heavy reliance on consent decrees, Section 5 will come to **mean little more** than what a majority of the Commission **thinks it means** at any particular time. One Commission's determination of the meaning of Section 5 would not be binding on the next. **The result would be an unpredictable intrusion of the Commission into the marketplace that would threaten the most basic objectives of sound competition policy enabling markets to work efficiently without distortion.**

**The sky’s the limit post-aff---no limitations on Section 5 authority if interpretation is upheld**

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

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

This article suggests several possible paths to constrain the unbounded discretion offered by Section 5’s unfair methods of competition authority. Some may work in the short run—for instance, arguing that the FTC’s current approach violates constitutional Due Process and fair notice requirements. Ultimately, however, Congress has given the FTC power that is likely to be construed very **broadly** by the courts. Under existing principles of administrative law, **even if** the FTC self-imposes limits on its power, those **limits would be illusory**; the FTC would be **free to discard them** as easily as (or even easier than) it could impose them.

Constraining this power ultimately requires either congressional action or a change to the Chevron doctrine. Congressional action seems more likely, but the likelihood of either solution is debatable. Rather, it seems that we are entering a **brave new world** of administrative antitrust, in which **the sky**—or the **imagination of five FTC commissioners**—**is the limit.**

**The U.S. outpaces China in investment, hiring, patents, skill development and deep learning for AI – only we have issue specific evidence**

**Knoema 21** – Knoema Corporation is a privately owned New York-based data technology company launched in 2014, founded in 2011.

Knoema, May 11 2021, “US-China AI Competition | Who is Winning?” https://knoema.com/infographics/sxovfdc/us-china-ai-competition-who-is-winning

(5 May 2021) According to the latest [Artificial Intelligence (AI) Index Report](https://hai.stanford.edu/research/ai-index-2021) by Stanford University, in 2020 for the first time ever China surpassed the USA in the share of AI journal citations worldwide. This is not surprising given the fact that China surpassed the US several years ago in the number of AI journal papers published each year. Another fact from the UN: due to rapid economic expansion and information and communications technology (ICT) investment growth in recent decades, [China's ICT](https://knoema.com/tlnbmw/china-has-built-up-its-digital-muscles) sector today is almost as big as the ICT sector in the US. The question that is raised by these trends is — where is China in the AI race with the US?

Why AI? AI, as the core component of the modern economy based on digital platforms, is becoming the key factor of global competitiveness. The more efficient the AI component, the more added value a digital platform can generate.

Besides AI journal publications and citations, **the US still outpaces China in all other AI-development-related indicators**. For example, **the annual US AI investment exceeds AI investment in China by 138%.**

In a broader context, the R&D (research and development) **investment in the digital sector by US companies exceeds China's R&D investment in the digital sector by 237%.** And today **there are only two Chinese companies, compared with seven US companies**, among the companies worldwide that invest more than $6 billion in the digital sector each year.

Given its faster long-term economic growth, China has the potential to gradually change the balance of global AI power. However, **it is highly unlikely that China or any other country will equal the US in AI potential in the near future.**

Chart, radar chart

Description automatically generated

**America's maintaining tech leadership now, but antitrust expansion cedes tech dominance.**

**Abbott et al. '21** [Alden; 3/10/21; Senior Research Fellow, formerly served on the Federal Trade Commission’s General Counsel, J.D. from Harvard Law School, M.A. in Economics from Georgetown University; "Aligning Intellectual Property, Antitrust, and National Security Policy," https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf/]

The U.S. government has recognized that “**5G** is a **critical strategic technology** [such that] nations that master advanced **communications** technologies and ubiquitous **connectivity** will have a long-term **economic** and **military advantage**.”8 The U.S. has had a substantial **technological edge** over our military and intelligence **rivals** in foundational **R&D** for **5G** and other **next-gen**eration technologies. U.S. **companies** have long been **leaders** in the development of previous generations of core **mobile standards** (2G, 3G, 4G, and LTE). This **technological leadership** has made it possible for U.S. companies to ensure the **security** and **integrity** of the **hardware** and **software** products that make up the **backbone** of the U.S. telecommunication systems. This leadership **must continue** for the U.S. government to more effectively **anticipate** potential **security risks** and take the necessary steps to **protect** national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through **innovation**, **patenting**, and **standard setting**, but they are **not alone** in the global community of high-tech companies.12 Backed by their nations’ leadership, **Chinese** and **Korean** companies have also invested heavily in developing the **core technologies** for 5G.13

The willingness of U.S. companies to **invest** in R&D is **threatened**, however. The development of 5G is a bit like a **race**, with the companies who develop the **best technology** coming out ahead. While U.S. companies are savvy and talented competitors in this race, **aggressive** and **unwarranted** use of **antitrust** law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put **obstacles** in these companies’ paths and **hinder** their ability to **lead**.

III. Overly Aggressive Antitrust Enforcement Hinders American Technological Leadership and Threatens National Security

As companies from around the world develop the **technology** and **standards** for 5G mobile devices and networks, American companies are **under threat** by aggressive **antitrust enforcement** that ultimately **redounds** to the **benefit** of these **foreign companies**, which are **economic competitors** in countries that are also **military competitors** of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine **intellectual property** rights by **forcing companies** to **license** their products on non-market-based terms. One prominent example in U.S. history is when the **D**epartment **o**f **J**ustice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 **patents** held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

Predatory **antitrust enforcement** actions **threaten** the ability of U.S. companies to continue to **be leaders** in 5G technological development. China and other nations with similarly restrictive regulatory frameworks can weaken the ability of the **U**nited **S**tates to **compete** in **global markets** by exacting high **monetary penalties** from U.S. intellectual property owners or forcing the transfer of their intellectual property to domestic commercial rivals. As a penalty for violations of its competition laws, China can impose exorbitant fines that range up to 10% of a foreign company’s entire revenue in the prior year.22 This is not a legal rule observed in the breach; it has already resulted in fines just shy of $1 billion.23

Another way in which courts in China and other foreign countries are harming U.S. companies is through the use of anti-suit injunctions. One example of this is in the recent patent infringement lawsuit brought by InterDigital, an American high-tech company that has developed key technologies in wireless telecommunication, against Chinese company Xiaomi. In June 2020, Xiaomi filed a lawsuit in the Wuhan Intermediate Court in China requesting that the court set global licensing rates for InterDigital’s patents on standardized technologies. In July 2020, InterDigital sued Xiaomi in India for infringement of InterDigital’s Indian patents. The Wuhan Intermediate Court then ordered InterDigital to stop its lawsuit with its request for an injunction in India. The Chinese court further prohibited InterDigital from suing Xiaomi and requesting an injunction or damages in the form of reasonable licensing rates, or even to enforce a previously-issued injunction, in any other country. If InterDigital does not comply with this worldwide injunction against pursuing legal relief for the violation of its patents in any other country, the company faces a significant fine in China. The type of judicial order issued by the Wuhan court is known as an anti-suit injunction and its purpose is to force an intellectual property dispute to play out solely in a Chinese court at the behest of the Chinese government. These court orders demonstrate China’s desire to become the source of 5G innovation and to dictate the licensing terms of the technology, and the anti-suit injunctions hamstring U.S. companies like InterDigital from enforcing their intellectual property rights anywhere in the world.

The unfair use of antitrust enforcement and related legal actions like anti-suit injunctions to weaken U.S. **i**ntellectual **p**roperty **r**ights around the world risks diminishing U.S. **global competitiveness** in critical technologies like **5G**, and further **empowers China** and **others** to **expand their influence** over the evolving 5G technological ecosystem. To the extent the U.S. **cedes its dominance** in 5G **standards development**, China will continue its **focused efforts** to fill that void. **Huawei**, a China-based company, has increased its R&D spending while growing its **share of patents** on the standardized technologies comprising 5G.24 The President’s Council on Science and Technology issued a report concluding that Chinese actions in the **semiconductor** industry, which include a range of policies backed by over $100 billion in government funds, threaten U.S. leadership in the industry and **present risks** to U.S. national security.25 China’s “Made in China 2025” plan called for China to become a leader in 5G technology, including in the development of the standards for the technology, by 2020.26 The plan expressly favors Chinese domestic producers, calling for raising the domestic content of core components in high-tech industries like 5G to 70% by 2025.27

This issue, however, extends far beyond simply the **ability** and **willingness** of U.S. companies to engage in the requisite R&D to participate in the **5G race**. Reduced U.S. influence on 5G standard-setting would force the U.S. government to rely on **untrusted foreign companies** for its 5G **product supply**. The Department of the Treasury has expressed **concern** about the “well-known” U.S. national **security risks** posed by Huawei and other Chinese telecommunications companies.28

**Breakthroughs by big tech are accessible and critical – small firms are hopeless.**

**Vanian ’20** [Jonathan; August 4; citing Dakota Foster, Visiting Researcher at Georgetown's Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London; Fortune, “How antitrust investigations impact U.S. A.I. supremacy,” https://fortune.com/2020/08/04/how-antitrust-investigations-impact-u-s-a-i-supremacy/]

**Antitrust inquiries** into U.S. tech giants could **upend** the development of **a**rtificial **i**ntelligence.

Last week, lawmakers interrogated the CEOs of Apple, Alphabet, Amazon, and Facebook about whether their companies have become too powerful. House members drilled in on Big Tech's acquisitions (they allegedly stifle innovation) and their collection of huge amounts of data (it gives the companies a huge advantage over rivals in developing A.I. and improving their products).

But even if lawmakers agree Big Tech is too big, they are in a quandary about what to do about it. Should they break the companies up? Fine them? Do nothing?

As antitrust expert Dakota Foster recently explained in a paper for Georgetown University's Center for Security and Emerging Technology, what Congress decides could be critical to the federal government. Research and technology from **major tech companies** both directly and indirectly benefits the Pentagon. Tech giants often **open source** their A.I. research, which means that the federal government can **use the findings for free**. The companies also sell cloud computing and A.I. services to government agencies.

By taking action, lawmakers risk **hurting** the **ability of tech companies** to develop A.I., Foster warned Fortune. They may end up **cut**ting spending into A.I. research, and thereby achieve **fewer technological breakthroughs**.

In the past, the government would have been easily able to dump Big Tech in favor of contractors like Lockheed Martin and Raytheon, Foster explained. But in recent years, the tech giants have **leapfrogged** the defense industry's A.I. skills, she said.

Members from both political parties are concerned that slowing progress by Big Tech in A.I. may benefit China. That country is investing heavily in A.I., with the goal of becoming the world’s leader 2030.

Whatever the case, the federal government shifting to using **smaller U.S. tech companies** as an alternative to Big Tech isn't **particularly realistic**. The data used by the **upstarts for A.I. projects** isn't as complete as what the tech giants have. Furthermore, the small fry **lack the money** to pay for the **tremendous amount** of computing power required for A.I. projects. At the same time, they face a **tougher time** attracting the **necessary talent**, she explained.

**Small companies won’t go through DOD procurement.**

**Foster ’20** [Dakota and Zachary Arnold; May; Visiting Researcher at Georgetown's Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London; Research Fellow at the Center for Security and Emerging Technology, J.D. at Yale Law School; Center for Security and Emerging Technology, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” <https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf>]

Contracting with the Pentagon is **difficult**, **expensive**, and **time-consuming**. Smaller AI firms may be **less able to navigate** the **federal procurement process**, effectively preventing the Pentagon from **accessing** their technology. The few DOD programs that **do partner** with smaller firms are under **scrutiny** for their efficacy.

The **high barriers of entry**, coupled with an **unstable budgetary environment** and **the high certification costs** of **federal contracting**, favor **larger companies**.148 Simply put, large firms have **more resources** and **deeper institutional knowledge** to bring to the **federal contracting process**.

**Siloes data collection.**

**Foster ’20** [Dakota and Zachary Arnold; May; Visiting Researcher at Georgetown's Center for Security and Emerging Technology, graduate student in the Department of War Studies at King’s College London; Research Fellow at the Center for Security and Emerging Technology, J.D. at Yale Law School; Center for Security and Emerging Technology, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” <https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf>]

Data is a **core ingredient** in AI development, **especially for** AI algorithms using **machine learning approaches** (such as neural networks). Currently, in order to build **machine learning models** that **successfully identify** patterns, AI researchers need **large volumes of data**.37 Models trained on **larger datasets** are **more accurate**,38 advantaging **big firms** with **more data and users**.39 Breaking up these companies would **diffuse** large datasets, potentially slowing or preventing AI advances that could **benefit the Pentagon**. Even though datasets amassed by commercial companies may not always have immediate use for the Defense Department, we expect that most of Big Tech’s data can directly or indirectly support innovation relevant to the Pentagon.40

**2NR**

## T Expand the Scope

**Their first card in the 1AC says “Dominant digital platforms shut out competition by restricting** (APIs)**” – those APIs are NOT exempt because there are antitrust cases that are happening NOW, and are being evaluated on their MERITS, not thrown out.**

**Riggins 16**, "Did this Public API AntiTrust Case Set Precedent for Uber?," ProgrammableWeb, https://www.programmableweb.com/news/did-public-api-antitrust-case-set-precedent-uber/analysis/2016/07/08

**Can you have a public API but put restrictions on it?** Well, we assume that’s what terms and conditions were made for. But, to what extent must those terms and conditions **comply with antitrust law?** Or, at least allow for competitive applications of your API if your company doesn’t qualify as a monopoly? Can your application programming interfaces truly be “public” if your terms and conditions disallow application contexts deemed to be competitive to your business interests?

These are the questions coming up in the API legal space, most **notably with**[**Uber, which, for one developer, has withdrawn access to its API**](https://www.programmableweb.com/news/uber-accused-anti-competitive-behavior-over-api-restrictions/analysis/2016/06/09) based on terms and conditions that some view as an **illegal effort to lock out the competitors**. However, the lawsuit-ridden San-Fran-based online transportation network company may see a silver lining in last month’s North Carolina Superior Court’s dismissal of [SiteLink Software, LLC v. Red Nova Labs, Inc.](http://www.ncbusinesscourt.net/opinions/2016_NCBC_43.pdf" \t "_blank) in which similar issues are covered

**The clear test is whether motions to dismiss pre-trial are dismissed**

**Stewart 80** – United States District Court, New York Southern

Charles E. Stewart Jr., "In re Ocean Shipping Antitrust Litigation," 500 F. Supp. 1235, United States District Court for the Southern District of New York, 10-15-1980, accessed via Nexis Uni

In our view, the existence of the tariff filing system is not repugnant to the antitrust laws. Courts have **limited their exemptions from antitrust laws** to industries where the regulatory agency controls and aggressively exercises the power of review. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 385, 93 S. Ct. 647, 660, 34 L. Ed. 2d 577 (1973). The FMC wields relatively weak power to supervise tariffs. Unlike in Keogh, the regulatory agency here has not determined that the challenged rates are reasonable. Finally, it is not clear that the FMC is empowered to provide the type of relief sought in this litigation. See 46 U.S.C. § 817. We note that the FMC has taken the position that no immunity is conferred other than that specified in § 15.

In sum, we find that the implementation of unapproved agreements, including activities involving the establishment of rates that are filed as tariffs, is **not immune from the antitrust laws**. **Accordingly**, **defendants' motion to dismiss is denied.**

**In dismissing on immunity grounds, the court assumes that the plaintiffs claims are all true, but doesn’t state a claim to relief (which is what 2NC Hartigan refers to)**

**McRae et al. 14** – Marcellus Mcrae and Roxanna Iran, Gibson Dunn & Crutcher LLP, with Holly B. Biondo and Elizabeth Richardson-Royer with Practical Law Litigation

Marcellus McRae, Roxanna Iran, Holly B. Biondo, and Elizabeth Richardson-Royer, "Initial Stages of Federal Litigation: Overview," Practical Law, Reuters, 2014, https://www.gibsondunn.com/wp-content/uploads/documents/publications/McRaeIranFederalLitigation.pdf

**Pre-answer Motion to Dismiss**

The most common type of pre-answer motion is the motion to dismiss. A pre-answer motion to dismiss may be made on any of the grounds listed in FRCP 12(b). Courts may also **consider other grounds for dismissal** raised in a pre-answer motion to dismiss, including **immunity** or failure to exhaust administrative remedies. As noted above, certain defenses may be waived if they are not included in a motion to dismiss (or answer). These defenses are:

* Lack of personal jurisdiction.
* Improper venue.
* Insufficient process.
* Insufficient service of process.

(FRCP 12(h)(1).)

Some courts require pre-answer motions to dismiss to be made within 21 days of service of the complaint. Other courts require only that they be made before the deadline for filing responsive pleadings, whether that deadline is within 21 days or later.

**In ruling on a motion to dismiss**, the **court must accept** the nonmoving party's **allegations as true** and **usually may not consider extrinsic evidence.** However, any party may request that the court take judicial notice of certain facts not set out in the pleadings. **To survive a motion to dismiss**, a complaint must contain **sufficient facts to state a claim to relief** that is **plausible on its face** (see Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)).

If the court denies (or partially denies) the motion to dismiss or postpones judgment until trial, the moving party must file a responsive pleading within 14 days after receiving notice of the court's action (FRCP 12(a)(4)(A)).

**Specifically true in antitrust---exemptions or immunities define scope by excluding claims through pretrial dismissal**

**Marcus et al. 4** – Judge (Ct. of App., 11th Cir.), chair of the Federal Judicial Center

Stanley Marcus; Judge John G. Koeltl (S.D.N.Y.); Judge Barefoot Sanders (N.D. Tex.); Judge J. Frederick Motz (D. Md.); Sheila Birnbaum, Esq. (N.Y., N.Y.); Judge Lee H. Rosenthal (S.D. Tex.); Frank A. Ray, Esq. (Columbus, Ohio); Judge Fern M. Smith (N.D. Cal.) "Manual for Complex Litigation, Fourth," Federal Judicial Center, 2004, accessed via Nexis Uni

Issues that may arise in antitrust litigation and may be **appropriate for pretrial resolution** include the following:

- Subject-matter jurisdiction. Jurisdictional issues that may be capable of summary resolution under Federal Rule of Civil Procedure 56 or by a separate Rule 42 evidentiary hearing are (1) whether the requisite effect on interstate commerce can be established n1732 and (2) whether the claim is **within the reach of the antitrust laws**. n1733

[[Begin FN 1733]]

n1733 **Compare** Hunt v. Mobil Oil Corp., 550 F.2d 68, 73, 79 (2d Cir. 1977) (**pretrial dismissal** based on "act of state" doctrine), with Int'l Ass'n of Machinists & Aerospace Workers v. Org. of the Petroleum Exporting Countries, 649 F.2d 1354, 1361-62 (9th Cir. 1981) ("act of state" doctrine **applied after trial**).

[[Begin FN 1733]]

- Standing. A motion under Rule 12 or 56 or by a separate trial under Rule 42 can sometimes resolve the legal issues of whether the claimant enjoys standing to maintain a claim for damages n1734 and whether injury to competition can be demonstrated.

- Exemptions, immunities. The **application of antitrust laws** may be **barred or limited by statutory exemptions or immunities**, such as those applicable to the insurance industry n1735 or organized labor, n1736 where restraints are imposed or authorized by state action, n1737 or where collective solicitation of governmental action has occurred. n1738 The application of the antitrust laws may also be circumscribed by the primary or exclusive jurisdiction of a regulatory agency.