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#### Business practices are ongoing conduct defined by the behaviors of many market participants

MacIntosh 97 (KERRY LYNN MACINTOSH-Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University. “LIBERTY, TRADE, AND THE UNIFORM COMMERCIAL CODE: WHEN SHOULD DEFAULT RULES BE BASED ON BUSINESS PRACTICES?” *William and Mary Law Review*, vol. 38, no. 4, May 1997, p. 1465-1544. HeinOnline accessed online via KU libraries, date accessed 8/27/21)

These new and revised articles reflect a strong trend toward choosing default rules4 that codify existing business practices.5 [[BEGIN FOOTNOTE 5]] 5. In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2). [[END FOOTNOTE 5]] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

**Prohibition requires forbidding a practice—the plan is only a hindrance**

**Van Eaton** et al **17** (Joseph Van Eaton, Gail Karish Gerard Lavery Lederer, lawyers for BEST BEST & KRIEGER, LLP. Michael Watza, KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK, “BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C”, COMMENTS OF SMART COMMUNITIES SITING COALITION, March 8, 2017 , https://tellusventure.com/downloads/policy/fcc\_row/smart\_communities\_siting\_coaltion\_comments\_mobilitie\_8mar2017.pdf)

2. What are at issue legally are prohibitions and effective prohibitions, and not hindrances, as the Commission seems to suggest in its Notice. The term “prohibit” is not defined in the Act, but it has an ordinary meaning: to formally forbid (something) by law, rule, or other authority; or to “prevent, stop, rule out, preclude, make impossible.” A mere “hindrance” “is simply not **in accord with** the ordinaryand fairmeaning” ofthe termprohibit,104 and can provide no basis for additional Commission intrusions on local authority over wireless facilities. Much of what Mobilitie complains about is a “hindrance” at most (and usually a hindrance magnified by its own actions).

**Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’**

Stevens 90 (John Paul Stevens- Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals **assumed** that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the **per se rule** **prohibiting** such activity "is only a rule of 'administrative convenience and efficiency,' **not** a **statutory command**." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of **judicial** interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as **any other** **statutory** commands. Moreover, while the per se rule against price fixing and boycotts is indeed **justified** in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified **only** by such concerns. The **per se rules** also reflect a **long-standing judgment** that the **prohibited practices** by their **nature** have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are **agreements** whose nature and necessary effect are **so plainly anticompetitive** that **no** elaborate **study** of the industry is needed to establish their illegality -- they are 'illegal **per se.'** In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in **antitrust** law serve purposes analogous to per se restrictions upon, for example, **stunt flying** in congested areas or **speeding**. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps **most** violations of such rules **actually** cause **no harm**. No doubt many **experienced** drivers and pilots can operate much more safely, even **at prohibited speeds**, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be **enforced** against these skilled persons **without proof** that their conduct was **actually harmful or dangerous**.

In part, the justification for **t**hese per se rules is rooted in administrative convenience. They are also **supported**, however, by the observation that every speeder and every stunt pilot poses **some threat to the community**. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### The rule of reason is the opposite of a prohibition

Loevinger 61 (Honorable Lee Loevinger- Assistant Attorney General in charge of the Antitrust Division. “THE RULE OF REASON IN ANTITRUST LAW” , *Section of Antitrust Law* , 1961, Vol. 19, PROCEEDINGS AT THE ANNUAL MEETING, ST. LOUIS, MISSOURI, AUGUST 7 THROUGH 11, 1961 (1961), pp. 245-251, JSTOR accessed online via KU libraries, date accessed 9/13/21)

Running through the history of antitrust law are two contrapuntal themes: A prohibition of restraint of trade and a principle lately called the "rule of reason" which limits the prohibition. The legal rule against restraint of trade began in the 15th century in cases holding that a contract by which a man agreed not to practice his trade or profession was illegal.1 However, in the course of development of the common law, it became established that agreements which were ancillary to the sale or transfer of a trade or business and which were limited so as to impose a restriction no greater than reasonably necessary to protect the purchaser's interest.2

Thus, when the Sherman Act incorporated the common-law principles on this subject into federal statutory law 3 by adopting the concept of restraint of trade, it presumably imported both the principle that restrictions on competition are illegal and also the principle that in some circumstances a showing of reasonableness will legalize restrictions on competition. Nevertheless, when the question was first presented to the United States Supreme Court under the Sherman Act, it was clearly held (despite later disavowals4 ) that the justification of reasonableness was not available as a defense to a combination which had the effect of restraining trade.' Indeed, it was intimated that the question of reasonableness was not open to the courts in these actions at common law.6 However, when the Court reviewed this matter in Standard Oil Co. v. United States,7 it said in fairly explicit terms both that the Sherman Act prohibited only contracts or acts which unreasonably restrained competition and that the standard of reasonableness had been applied to all restraints of trade at the common law. The Court's assertion is somewhat weakened by the fact that it construed the rule of reason not as applying a standard for judging the character or consequences of the challenged conduct, but as a technique involving the application of human intelligence, or reason, to the problem of making a judgment about whether the conduct does restrain trade.'

#### VOTE NEG:

#### FIRST---Ground---balancing tests devastate core links, because they allow the practice when it’s beneficial. AND, creates a moving target, because the disallowed behavior is context-dependent. And bidirectionality---rule of reason creates legally protected practices

#### “Per se” is the only shot at unique links—topical affs impose rules not standards

Crane 7 Daniel A. Crane is Assistant Professor, Benjamin N. Cardozo School of Law, Yeshiva University, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007), https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss1/3

In recent years, there has been a marked transition away from rules and toward standards in collaborative conduct cases. This occurred in an obvious way beginning in the 1970s as the Burger and then Rehnquist courts overruled Warren court precedents that had condemned a variety of business agreements as per se illegal. As common business practices such as vertical territorial allocations, 37 maximum resale price setting, 38 expulsions of members from industry associations, 39 and manufacturer acquiescence in a retailer's demand to terminate a competing retailer that was deviating from the manufacturer's MSRP40 went from the per se rule to the rule of reason, the domain of rules shrunk and the domain of standards grew. Significantly, the Court declined the Chicago School's call to move vertical restraints from per se illegality to per se legality. In State Oil, Justice O'Connor-who is also fond of balancing tests in constitutional law 4 -went out of her way to make clear that the Court was not holding "that all vertical maximum price fixing is per se lawful.' 42 Vertical restraints would still require scrutiny, but under the multi-factored rule of reason. The transition from rules to standards did not take place solely due to a juridical shift of particular business practices from one category to another. Instead, the entire judicial rhetoric of antitrust has moved in a more nuanced, standard-based direction over the past few decades. With few exceptions, 43 the courts have stopped creating new categories of per se illegal conduct, even though commercial circumstances and practices evolve over time and litigation frequently explores new areas of commercial behavior. Since the mid-1970s, the Supreme Court seems to have frozen the canon of per se illegal practices, without necessarily pushing all other behavior into rule of reason. Instead, arguably beginning with National Society of Professional Engineers v. FTC'4 in 1978, the Court adopted what later became known as the "quick look" approach. In subsequent cases like NCAA v. Board ofRegents45 and California 46 Dental Ass'n v. FTC, the Court described the quick look approach as involving an initial court determination, based on a "rudimentary understanding of economics, ' , 47 that the practice at issue has obvious anticompetitive effects, which puts the defendant to the burden of immediately putting forth a 48 procompetitive justification for the practice.

#### SECOND---limits---they lead to a wave of legal standard affs that avoid generics

### 1NC — CP

#### The United States federal government should regulate emerging technology by creating a new federal agency solely responsible for the regulation and management of artificial intelligence.

#### The United States federal government should:

#### Increase public and private investments in labor-market training, public employment services, and social services

#### Upgrade national rules and institutions relating to work

#### Increase public and private investment in labor-intensive economic sectors.

#### The United States federal government should pass the Consumer Protection and Recovery Act

#### The United States federal government should:

#### — Denounce President Trump, and corruption of his administration as anti-democratic.

#### — Promote studies that describe economic inequality

#### First plank solves AI through stable regulations that can be modeled

Toews 20 — Rob; AI contributor. (“Here Is How The United States Should Regulate Artificial Intelligence” Forbes. June 28, 2020. https://www.forbes.com/sites/robtoews/2020/06/28/here-is-how-the-united-states-should-regulate-artificial-intelligence/?sh=2e7955e27821)

The time has come to create a federal agency for artificial intelligence.

Across the AI community, there is growing consensus that regulatory action of some sort is essential as AI’s impact spreads. From [deepfakes](https://www.forbes.com/sites/robtoews/2020/05/25/deepfakes-are-going-to-wreak-havoc-on-society-we-are-not-prepared/#14c06ca97494) to [facial recognition](https://www.nytimes.com/2020/06/09/technology/facial-recognition-software.html), from autonomous vehicles to algorithmic bias, AI presents a large and growing number of issues that the private sector alone cannot resolve.

[In the words of](https://www.ft.com/content/3467659a-386d-11ea-ac3c-f68c10993b04) Alphabet CEO Sundar Pichai: “There is no question in my mind that artificial intelligence needs to be regulated. It is too important not to.”

Yet there have been precious few concrete proposals as to what this should look like.

The best way to flexibly, thoroughly, and knowledgeably regulate artificial intelligence is through the creation of a dedicated federal agency.

The Fourth Branch

Though many Americans do not realize it, the primary manner in which the federal government enacts public policy today is not Congress passing a law, nor the President issuing an executive order, nor a judge making a ruling in a court case. Instead, it is federal agencies like the FDA, SEC or EPA implementing rules and regulations.

Though barely contemplated by the framers of the U.S. Constitution, federal agencies—collectively referred to as “the administrative state”—have in recent decades come to assume a dominant role in the day-to-day functioning of the U.S. government.

There are good reasons for this. Federal agencies are staffed by thousands of policymakers and subject matter experts who focus full-time on the fields they are tasked with regulating. Agencies can move more quickly, get deeper into the weeds, and adjust their policies more flexibly than can Congress.

Imagine if, every time a pharmaceutical company sought government approval for a new drug, or every time a given air pollutant’s parts-per-million concentration guidelines needed to be revised, Congress had to familiarize itself with all of the relevant technical details and then pass a law on the topic. Government would grind to a halt.

Like pharmaceutical drugs and environmental science, artificial intelligence is a deeply technical and rapidly evolving field. It demands a specialized, technocratic, detail-oriented regulatory approach. Congress cannot and should not be expected to respond directly with legislation whenever government action in AI is called for. The best way to ensure thoughtful, well-crafted AI policy is through the creation of a federal agency for AI.

How would such an agency work?

One important principle is that the agency should craft its rules on a narrow, sector-by-sector basis rather than as one-size-fits-all mandates. As R. David Edelman [aptly argued](https://www.washingtonpost.com/outlook/2020/01/13/heres-how-regulate-artificial-intelligence-properly/), AI is a “tool with various applications, not a thing in itself.”

#### Second set solves growth

Ryder & Samans 19 –– Guy; Director-General, International Labour Organization. Richard; Director of Research, International Labour Organization. (“3 ways countries can boost social inclusion and economic growth” World Economic Forum. June 17, 2019. [https://www.weforum.org/agenda/2019/06/3-ways-countries-can-boost-social-inclusion-and-economic-growth/)](https://www.weforum.org/agenda/2019/06/3-ways-countries-can-boost-social-inclusion-and-economic-growth/)%20)

The commission recommended three practical steps – all of which involve investing more in people – that countries can take to improve social inclusion and economic growth simultaneously. Investing more in people is not only essential to strengthen countries’ social contracts with citizens at a time of rapid technological change. It can also form the basis of a new, more human-centered growth and development model that may be the best hope for sustaining the world economy’s momentum as the two growth engines on which many countries have relied for years or even decades – extraordinary macroeconomic stimulus and export-led industrial production – continue to lose steam.

First, countries should increase public and private investment in their citizens’ capabilities, which is the most important way they can durably lift their rate of productivity growth. Some governments chronically underinvest in access to quality education and skills development. But policymakers everywhere need to do more as populations age and automation disrupts both manufacturing, on which developing economies have traditionally relied to industrialize, and services, in which much advanced-economy employment is concentrated. The commission therefore called on countries to build a universal framework to support lifelong learning – including stronger and better-financed labor-market training and adjustment policies, expanded public employment services, and a universal social-protection floor.

Second, governments, together with employers’ and workers’ organizations, should upgrade national rules and institutions relating to work. These influence the quantity and distribution of job opportunities and compensation, and thus the level of purchasing power and aggregate demand within the economy. Specifically, the commission called for a Universal Labor Guarantee under which all workers, regardless of their contractual arrangement or employment status, would enjoy fundamental rights, an “adequate living wage” as defined in the ILO’s founding constitution 100 years ago, maximum limits on working hours, and health and safety protection at work.

Moreover, collective representation of workers and employers through structured social dialogue should be ensured as a public good and actively promoted by government policies. From parental leave to public services, policies need to encourage the sharing of unpaid care work in the home to support gender equality in the workplace. Strengthening female voices and leadership, eliminating violence and harassment at work, and implementing pay transparency policies are also important in this regard.

Third, countries should increase public and private investment in labor-intensive economic sectors that generate wider benefits for society. These include sustainable water, energy, digital, and transport infrastructure, care sectors, the rural economy, and education and training. The Business and Sustainable Development Commission [has estimated](http://businesscommission.org/news/release-sustainable-business-can-unlock-at-least-us-12-trillion-in-new-market-value-and-repair-economic-system) that achieving the UN Sustainable Development Goals could generate $12 trillion of market opportunities in four areas alone – food and agriculture, cities, energy and materials, and health and wellbeing – and create up to 380 million jobs by 2030. Capitalizing on these possibilities could help countries to compensate for the labor-displacing and potentially demand-suppressing effects of automation and economic integration.

#### Third plank solves scamming — that’s the recutting of Mermin on case

#### Fourth plank solves nationalism

### 1NC — DA

#### The DOJ has just committed to focusing enforcement on shipping cartels now and they’re key to compliance

Consadine 9/8/21, Attorneys in Maritime and Transportation Group for Seward & Kissell LLC. ( Shipping Companies Beware: Antitrust Challenges Ahead as DOJ Focuses On Industry, <https://www.sewkis.com/publications/shipping-companies-beware-antitrust-challenges-ahead-as-doj-focuses-on-industry/>

In response to U.S. President Joseph Biden’s July 9, 2021 Executive Order to enhance competition and antitrust enforcement, the U.S. Federal Maritime Commission (“FMC”) entered into a Memorandum of Understanding (“MOU”) with the Antitrust Division of the U.S. Department of Justice (“DOJ”) to facilitate criminal investigations of violations of U.S. laws. Given that shipping companies and their employees may be separately charged by DOJ regardless of their physical location and face draconian penalties upon conviction, it is incumbent for all shipping companies – foreign and domestic – to monitor these recent developments and take steps to minimize the likelihood of harmful consequences, including by establishing or enhancing existing compliance programs. Overview of the MOU On July 12, 2021, the FMC and DOJ signed its first interagency MOU to foster cooperation in the enforcement of antitrust and other laws related to the maritime industry. Key provisions of the MOU provide that the agencies will: i) share information and materials relevant to the competitive conditions in the U.S.-international ocean liner shipping industry, including terminal services provided to ocean liners, and ii) confer, at least annually, to discuss and review enforcement and regulatory matters. Unlike the FMC, DOJ has the authority to bring criminal charges against alleged offenders of antitrust laws. In the past, DOJ has made its presence known by issuing statements regarding certain alliance agreements (vessel-sharing agreements); this MOU raises the stakes as it suggests more intense scrutiny by DOJ. FMC Activity, Audit Program and Recent Litigation On July 19, 2021, within days of the Executive Order and the signing of the MOU, the FMC also disclosed the Vessel-Operating Common Carrier Audit Program to review carrier compliance with FMC’s detention and demurrage rule. As part of this new audit program, the FMC will audit the top nine carriers by market share ― i.e., Maersk, MSC, CMA CGM, COSCO Group, Hapag-Lloyd, ONE, Evergreen, HMM and Yang Ming. Initially, the FMC will request information from the carriers to create a database of quarterly reports on detention and demurrage practices, and will follow with individual carrier interviews. The audit may also focus on other aspects of these companies’ practices and operations, such as billing, appeals procedures, penalties assessed by the lines, and any other restrictive practices. Significantly, the FMC has already been auditing carriers to address issues concerning intermodal congestion related to COVID-19 and to identify operational solutions to cargo delivery system challenges. The FMC is apparently poised to investigate eight carriers ― CMA CGM, Hapag-Lloyd, HMM, Matson, MSC, OOCL, SM Line and Zim ― that were identified as having implemented congestion-related surcharges. In August, the FMC requested information about these surcharges from these carriers. The FMC’s inquiry may focus on whether surcharges were implemented following proper notice, if their purpose was clearly defined, and whether there were clear events or conditions that triggered or terminated the surcharges. The FMC suggested enforcement action may occur if tariffs are improperly established. Shipping customers are also imploring the FMC to investigate shipping practices. On July 28, 2021, MCS Industries, a Pennsylvania-based home furnishings manufacturer, filed an administrative proceeding against COSCO and MSC, alleging that the carriers had violated provisions of the Shipping Act and refused to honor their service contracts, calling for the FMC to conduct an investigation of these companies’ shipping practices. COSCO and MSC have denied the allegations and noted, among other things, that MCS’s complaint should be heard in the fora specified in its respective service contracts with the carriers. An administrative law judge was appointed to hear the matter, the outcome of which should be closely watched by industry participants. DOJ Antitrust Landscape DOJ’s coordinated efforts with the FMC have implications for the shipping industry as DOJ antitrust prosecutions have been both expansive and punitive. DOJ’s jurisdiction includes foreign business activities that have a “substantial and intended effect in the U.S.” That broad reach has impacted numerous companies throughout the world in various industries ranging from auto parts to air cargo. Companies in such industries have paid millions of dollars in penalties and many of their employees have been imprisoned. The shipping industry has not been spared. In a long-running investigation, a Norwegian shipping company and its executives were indicted for their participation in an antitrust conspiracy focused on the allocation of customers and routes, rigging bids, and fixing prices for the sale of international ocean shipments of roll-on, roll-off cargo to and from the United States. The company pled guilty and was sentenced to pay a $21 million fine; four individuals have already been sentenced to serve prison terms. Four other companies also pled guilty for their roles in the conspiracy, leading to the assessment of more than $255 million in criminal fines. Importance of Compliance Programs Given these developments, it is important for all shipping companies to establish effective compliance programs. Since 2019, DOJ has resolved certain criminal investigations without charges where DOJ concluded that the companies under investigation have implemented adequate and effective compliance programs. This leniency policy was implemented to incentivize companies to prioritize antitrust compliance and to be proactive in detecting and reporting anticompetitive behavior. Under this policy, DOJ will not automatically grant leniency to companies that merely maintain a compliance program. Rather, DOJ will determine whether the compliance plan is adequate. If deemed adequate, even where unlawful conduct has occurred, more lenient treatment is potentially available. In determining the adequacy of compliance plans, DOJ’s Guidance on Corporate Compliance Programs is instructive. That Guidance details the components of an effective compliance program, including whether the company at issue has devoted sufficient antitrust compliance resources, conducted training, created effective reporting systems, and tailored the compliance program to the company’s business and industry. Conclusion For those companies operating under DOJ jurisdiction, the existence of an effective compliance program minimizes the likelihood of an investigation and decreases the resulting penalties where violations occur. With the FMC and DOJ now committing to collaborating in investigating the shipping industry, it is crucial to follow developments arising from this collaboration and to implement a substantial compliance program to curtail the occurrence of improper conduct and to minimize penalties should misconduct occur.

#### Antitrust is zero sum — new priorities trades off with existing ones

Rosenberg 20, Chuck Rosenberg is a former U.S. attorney, senior FBI official and chief of the Drug Enforcement Administration. (Chuck, “Why the Attorney General's Meddling on Antitrust Issues Matters,” <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters>)

Third, by focusing on frivolous cases, meritorious cases wither. Remember, the Antitrust Division has limited resources to assess more than 2,000 proposed mergers each year. They can look closely at only a small fraction of that number. But, as Elias noted, [a]t one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices. There is a zero-sum game aspect to that arrangement. You cannot simply add more capacity to do all the important things that need to be done. If you are directed to do something frivolous, then something meritorious may be overlooked.

#### The DOJ would be pulled into the FTC’s mess

Macy & Lee 17, \*Creighton J., Attorney, Baker McKenzie. Formerly served as chief of staff and senior counsel in the Department of Justice Antitrust Division, working as a senior advisor to the acting assistant attorney general on civil and criminal antitrust enforcement and policy matters, as well as budget and personnel issues. \*\*Craig Y., Attorney, Baker McKenzie. Leads the Firm’s global cartel task force (12-14-2017, "When Merger Review Turns Criminal", *American Bar Association*, https://www.americanbar.org/groups/business\_law/publications/blt/2017/12/07\_lee/)

But that separation of criminal and civil enforcement sections at the Antitrust Division does not create walls or silos. The different criminal offices often work together on large investigations and trials. Similarly, the size of many civil investigations requires pulling resources from the various civil sections, as well as from the Antitrust Division’s Appellate, International, and Competition Policy and Advocacy sections. But the collaboration does not end there. Coordination between the civil and criminal sections is the norm. Section managers meet regularly to discuss matters and often consult on an informal basis. Cross‑pollination occurs at the trial attorney level as attorneys are detailed to other sections for specific matters or periods of time. And understanding this collaboration between the civil and criminal sections is vital to attorneys and their clients subject to the merger review process. A recent case not only shows how in sync the Antitrust Division’s criminal and civil sections are, but also highlights the implications of that collaboration.

In December 2014, two packaged seafood companies announced their proposed merger. As is customary to the review process, the parties submitted documents to one of the Antitrust Division’s civil sections. What followed was anything but routine. However, based on the level of collaboration within the Antitrust Division, it should not have been unexpected.

From document review to charges for price-fixing

The Antitrust Division’s civil attorneys reviewed the documents submitted by the parties and uncovered information that raised concerns of price‑fixing. When the parties walked away from the deal on December 3, 2015, then-Assistant Attorney General Bill Baer’s statement in the press release made a veiled reference to their problematic documents. He said, “Our investigation convinced us—and the parties knew or should have known from the get-go—that the market is not functioning competitively today, and further consolidation would only make things worse.”

The parties’ abandonment of the deal did not end the Antitrust Division’s investigation. Instead, the civil attorneys conducting the merger review shared their findings with their criminal counterparts. A criminal section proceeded to open a price‑fixing investigation based on the shared materials. That investigation has borne fruit and is ongoing. To date, three individuals and one company have been charged for participation in a price‑fixing conspiracy. Criminal antitrust violations, such as price-fixing, have serious implications. Not only are the criminal penalties substantial, but companies can be subject to civil suits with treble damages (15 U.S.C. § 15.).

For individuals, the maximum penalties are 10 years in prison and a $1 million fine. For corporations, the maximum fine is $100 million. Fines for both individuals and corporations can exceed the statutory maximum amount by up to twice the gain derived or twice the loss by victims. See, e.g., Price Fixing, Bid Rigging and Market Allocation: An Antitrust Primer, Department of Justice Antitrust Division, available at https://www.justice.gov/atr/priceifxing-bid-rigging-and-market-al location-schemes (discussing the Sherman Act).

While it is not public what specific information was contained in the documents that raised the attention of the reviewing attorneys, or exactly how the process happened, the Antitrust Division did state that the criminal investigation was triggered by “information and party materials produced in the ordinary course of business.” Until more information is revealed, several questions remain, including whether similar criminal investigations based on documents submitted for merger review could be waiting to surface.

The packaged seafood matter is not the first criminal case to stem from a civil investigation and likely will not be the last. The hand‑in‑hand coordination between the civil and criminal sections of the Antitrust Division will continue. Companies need to be increasingly aware of the risks that ordinary course documents present, not just in impacting merger approval but also in criminal implications. Merger review does not exist in a vacuum. Once documents fall into the Antitrust Division’s (or FTC’s) hands, parties can expect that they will be closely reviewed with an eye toward both civil and criminal actions. Documents always tell a story—and attorneys need to be sure that the story told is one to support a proposed deal and not a criminal investigation.

Similarly, the FTC and Antitrust Division share a close working relationship. We will continue to explore and monitor the collaboration between those two agencies as well as with state attorneys general. We also plan to address the collaboration among competition agencies around the world. Stay tuned.

#### Shipping cartels are crushing U.S. maritime industry

O’Shea 17, an attorney who works on transportation and infrastructure issues, (Sean, October 3, 2017, Congress Must Stop Foreign Ocean Carriers From Harming U.S. Economy, https://morningconsult.com/opinions/congress-must-stop-foreign-ocean-carriers-from-harming-u-s-economy/)

But America’s maritime industry will not be able to continue to attract private investors and lenders to build infrastructure to meet this future economic demand unless Congress takes action now to end price-fixing and other anticompetitive practices by foreign ocean carriers that stifle industry profits, put jobs at risk and stifle private investment in much-needed port infrastructure upgrades. In particular, carriers immunized from antitrust regulation are also ordering enormous, new 22,000-container ships that will require new cranes and shore facilities, but they will not provide long-term volume guarantees necessary for ports to finance these capital improvements through regular commercial markets. Aside from this obvious legislative restoration of reasonable balance to enable private industry to meet demands, the two equally unacceptable outcomes are to do without the infrastructure and pay the economic penalty when bottlenecks occur, or look to taxpayer-funded solutions.

#### Maritime industry key to naval readiness

Clark et al 20, Senior Fellow at the Center for Strategic and Budgetary Assessments. (Bryan, with Timothy A. Walton Research Fellow at the Center for Strategic and Budgetary Assessments, and Adam Lemon a former Research Assistant at the Center for Strategic and Budgetary Assessments, STRENGTHENING THE U.S. DEFENSE MARITIME INDUSTRIAL BASE A PLAN TO IMPROVE MARITIME INDUSTRY’S CONTRIBUTION TO NATIONAL SECURITY, <https://csbaonline.org/uploads/documents/CSBA8199_Maritime_Industrial_FINAL.pdf>)

The U.S. maritime industry is essential to American prosperity and security. Since their nation’s founding, Americans have gone to sea for trade, to harvest resources from the oceans, and to advance the country’s interests. By building and repairing ships, training mariners, operating shipping networks, and sustaining ports and waterways, the U.S. maritime industry makes possible the economic benefits of access to the sea. In an era of great power competition, a robust maritime industry, and the policies that support it, are increasingly important to U.S. national security. Private shipyards build and repair U.S. warships, sometimes alongside civilian vessels. U.S. shipping companies and their civilian mariners transport military personnel, equipment, and supplies overseas. And private dredging, salvage, towing, intermodal transport, and harbor services companies ensure the operation of America’s military and commercial ports and waterways.

#### Naval power independently solves every impact

Eaglen & McGrath 11 – (Mackenzie Eaglen is Research Fellow for National Security in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation; Bryan McGrath is a retired naval officer and the Director of Delex Consulting, Studies and Analysis in Vienna, Virginia. On active duty, he commanded the destroyer USS Bulkeley (DDG 84) and served as the primary author of the current maritime strategy; “Thinking About a Day Without Sea Power: Implications for U.S. Defense Policy”; The Heritage Foundation; D.A. February 12th 2020, [Published May 16th 2011]; <https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy>)

Global Implications. Under a scenario of dramatically reduced naval power, the United States would cease to be active in any international alliances. While it is reasonable to assume that land and air forces would be similarly reduced in this scenario, the lack of credible maritime capability to move their bulk and establish forward bases would render these forces irrelevant, even if the Army and Air Force were retained at today’s levels. In Iraq and Afghanistan today, 90 percent of material arrives by sea, although material bound for Afghanistan must then make a laborious journey by land into theater. China’s claims on the South China Sea, previously disputed by virtually all nations in the region and routinely contested by U.S. and partner naval forces, are accepted as a fait accompli, effectively turning the region into a “Chinese lake.” China establishes expansive oil and gas exploration with new deepwater drilling technology and secures its local sea lanes from intervention. Korea, unified in 2017 after the implosion of the North, signs a mutual defense treaty with China and solidifies their relationship. Japan is increasingly isolated and in 2020–2025 executes long-rumored plans to create an indigenous nuclear weapons capability.[[11]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn11) By 2025, Japan has 25 mobile nuclear-armed missiles ostensibly targeting China, toward which Japan’s historical animus remains strong. China’s entente with Russia leaves the Eurasian landmass dominated by Russia looking west and China looking east and south. Each cedes a sphere of dominance to the other and remains largely unconcerned with the events in the other’s sphere. Worldwide, trade in foodstuffs collapses. Expanding populations in the Middle East increase pressure on their governments, which are already stressed as the breakdown in world trade disproportionately affects food importers. Piracy increases worldwide, driving food transportation costs even higher. In the Arctic, Russia aggressively asserts its dominance and effectively shoulders out other nations with legitimate claims to seabed resources. No naval power exists to counter Russia’s claims. India, recognizing that its previous role as a balancer to China has lost relevance with the retrenchment of the Americans, agrees to supplement Chinese naval power in the Indian Ocean and Persian Gulf to protect the flow of oil to Southeast Asia. In exchange, China agrees to exercise increased influence on its client state Pakistan. The great typhoon of 2023 strikes Bangladesh, killing 23,000 people initially, and 200,000 more die in the subsequent weeks and months as the international community provides little humanitarian relief. Cholera and malaria are epidemic. Iran dominates the Persian Gulf and is a nuclear power. Its navy aggressively patrols the Gulf while the Revolutionary Guard Navy harasses shipping and oil infrastructure to force Gulf Cooperation Council (GCC) countries into Tehran’s orbit. Russia supplies Iran with a steady flow of military technology and nuclear industry expertise. Lacking a regional threat, the Iranians happily control the flow of oil from the Gulf and benefit economically from the “protection” provided to other GCC nations. In Egypt, the decade-long experiment in participatory democracy ends with the ascendance of the Muslim Brotherhood in a violent seizure of power. The United States is identified closely with the previous coalition government, and riots break out at the U.S. embassy. Americans in Egypt are left to their own devices because the U.S. has no forces in the Mediterranean capable of performing a noncombatant evacuation when the government closes major airports. Led by Iran, a coalition of Egypt, Syria, Jordan, and Iraq attacks Israel. Over 300,000 die in six months of fighting that includes a limited nuclear exchange between Iran and Israel. Israel is defeated, and the State of Palestine is declared in its place. Massive “refugee” camps are created to house the internally displaced Israelis, but a humanitarian nightmare ensues from the inability of conquering forces to support them. The NATO alliance is shattered. The security of European nations depends increasingly on the lack of external threats and the nuclear capability of France, Britain, and Germany, which overcame its reticence to military capability in light of America’s retrenchment. Europe depends for its energy security on Russia and Iran, which control the main supply lines and sources of oil and gas to Europe. Major European nations stand down their militaries and instead make limited contributions to a new EU military constabulary force. No European nation maintains the ability to conduct significant out-of-area operations, and Europe as a whole maintains little airlift capacity. Implications for America’s Economy. If the United States slashed its Navy and ended its mission as a guarantor of the free flow of transoceanic goods and trade, globalized world trade would decrease substantially. As early as 1890, noted U.S. naval officer and historian Alfred Thayer Mahan described the world’s oceans as a “great highway…a wide common,” underscoring the long-running importance of the seas to trade.[[12]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn12) Geographically organized trading blocs develop as the maritime highways suffer from insecurity and rising fuel prices. Asia prospers thanks to internal trade and Middle Eastern oil, Europe muddles along on the largesse of Russia and Iran, and the Western Hemisphere declines to a “new normal” with the exception of energy-independent Brazil. For America, Venezuelan oil grows in importance as other supplies decline. Mexico runs out of oil—as predicted—when it fails to take advantage of Western oil technology and investment. Nigerian output, which for five years had been secured through a partnership of the U.S. Navy and Nigerian maritime forces, is decimated by the bloody civil war of 2021. Canadian exports, which a decade earlier had been strong as a result of the oil shale industry, decline as a result of environmental concerns in Canada and elsewhere about the “fracking” (hydraulic fracturing) process used to free oil from shale. State and non-state actors increase the hazards to seaborne shipping, which are compounded by the necessity of traversing key chokepoints that are easily targeted by those who wish to restrict trade. These chokepoints include the Strait of Hormuz, which Iran could quickly close to trade if it wishes. More than half of the world’s oil is transported by sea. “From 1970 to 2006, the amount of goods transported via the oceans of the world…increased from 2.6 billion tons to 7.4 billion tons, an increase of over 284%.”[[13]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn13) In 2010, “$40 billion dollars [sic] worth of oil passes through the world’s geographic ‘chokepoints’ on a daily basis…not to mention $3.2 trillion…annually in commerce that moves underwater on transoceanic cables.”[[14]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn14) These quantities of goods simply cannot be moved by any other means. Thus, a reduction of sea trade reduces overall international trade. U.S. consumers face a greatly diminished selection of goods because domestic production largely disappeared in the decades before the global depression. As countries increasingly focus on regional rather than global trade, costs rise and Americans are forced to accept a much lower standard of living. Some domestic manufacturing improves, but at significant cost. In addition, shippers avoid U.S. ports due to the onerous container inspection regime implemented after investigators discover that the second dirty bomb was smuggled into the U.S. in a shipping container on an innocuous Panamanian-flagged freighter. As a result, American consumers bear higher shipping costs. The market also constrains the variety of goods available to the U.S. consumer and increases their cost. A Congressional Budget Office (CBO) report makes this abundantly clear. A one-week shutdown of the Los Angeles and Long Beach ports would lead to production losses of $65 million to $150 million (in 2006 dollars) per day. A three-year closure would cost $45 billion to $70 billion per year ($125 million to $200 million per day). Perhaps even more shocking, the simulation estimated that employment would shrink by approximately 1 million jobs.[[15]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn15) These estimates demonstrate the effects of closing only the Los Angeles and Long Beach ports. On a national scale, such a shutdown would be catastrophic. The Government Accountability Office notes that: [O]ver 95 percent of U.S. international trade is transported by water[;] thus, the safety and economic security of the United States depends in large part on the secure use of the world’s seaports and waterways. A successful attack on a major seaport could potentially result in a dramatic slowdown in the international supply chain with impacts in the billions of dollars.[[16]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn16)

### 1NC — CP

#### The United States federal government should ensure worker welfare through enhanced regulations that do not expand the scope of its core antitrust laws.

#### The counterplan solves and competes

Shelanski 18, Professor of Law @ Georgetown (Howard, “Antitrust and Deregulation,” Yale Law Journal)

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incen- tives and discipline necessary to keep prices low, output high, and innovation moving forward.8 But sometimes market forces alone cannot ensure efficiency and economic welfare—for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, in- novation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which “antitrust may help maintain com- petition.”9 Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through “skill, foresight and industry.”10 Thus, competition authorities like the FTC and the DOJ’s Antitrust Division review mergers, inves- tigate single-firm conduct, and prosecute collusion.11 Private plaintiffs can pur- sue civil antitrust liability through suits in the federal courts.12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm’s activity is “substantially to lessen competition, or to tend to create a monopoly,”13 or to constitute a “contract, combination, . . . or conspir- acy” in restraint of trade,14 or to “monopolize, or attempt to monopolize” any line of business.15 Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure—and Congress has often done so. With such statutory authority, “[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles.”16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers.17 The 1992 Cable Act gave the FCC authority to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry’s market structure.18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecom- munications industry. More recently, the FCC issued,19 and then repealed, 20 “network neutrality” regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition.21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries.22 In contrast to the case-by-case approach of antitrust, regulation typically im- poses ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone com- panies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to custom- ers of competing networks.23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency’s enforcement decision is usually on the regulated party. Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures.24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act.25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has “willful[ly]” acquired or maintained other than “as a consequence of a su- perior product, business acumen, or historic accident.”26 Alternatively, with au- thority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies,27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots.28

### 1NC — DA

#### Status quo cooperation coming now is necessary to prevent runaway global warming

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When President Trump announced his intentions to formally withdraw the United States from the Paris Climate Accord, dozens of major companies stepped into the breach, promising to still work toward meeting the Paris emissions [\*221] targets. 5 Such a position--business leaders joining concerted international action in rebuke of a sitting President--was once unprecedented. Milton Friedman, the influential architect of free market economic theory, warned that business leaders should not act as "unwitting puppets of the intellectual forces" that promote desirable social ends, such as pollution reduction. 6Corporate executives were supposed to ignore "the catchwords of the contemporary crop of reformers" and instead focus on "mak[ing] as much money as possible." 7This shareholder profit paradigm persisted for decades, fueling the conditions that led to the Great Recession 8and even making for-profit companies liable for not putting shareholder profits above all else. 9But now that obligation is changing, and not a moment too soon. By the time the Business Roundtable, an association of major company executives, formally acknowledged that corporate purpose needed to consider benefits to communities and employees in addition to shareholders, 10 the writing had been on the wall for quite some time. Corporations were speaking up in previously unexpected ways and focusing on more than just profit, encouraged by major voices in the business community. 11For example, major tech companies leapt into action when Indiana passed a 2015 bill widely seen as discriminatory against LGBT persons, denouncing the law and threatening boycotts of the state. 12The cloud-computing giant Salesforce, which had between 2,000 and 3,000 employees in Indiana, 13exerted significant leverage in forcing an amendment to the law by cancelling all company programs in and travel to Indiana. 14More corporate boycotts greeted North Carolina and Georgia [\*222] when they passed similar anti-LGBT legislation. 15Additionally, in the wake of recent mass shootings, Dick's Sporting Goods 16and Walmart 17cut back sales of certain firearms and ammunition, arguably doing more in a single decision to address the gun violence epidemic than Congress has been able to do in decades. 18 The growth of corporate activism can be traced to broader societal changes, such as the increased connectivity of people and markets in the Internet age. 19At the same time, governmental gridlock and increasing political polarization have undermined the capacity of government institutions to function efficiently and greatly weakened public trust in government. 20 Corporations are filling this gap as traditional government services become increasingly privatized. 21The growing corporate role in society has fed on itself, with increased stakes and visibility of corporate activism resulting in outsized political power and legal rights. Corporate-associated spending on politics has reached unprecedented, jaw-dropping levels. 22 It is increasingly clear that America cannot address the existential reality of climate change without corporate buy-in, if not corporate leadership. It is beyond the scope of this Article to discuss the extent of the climate crisis or the necessary corporate response; it is enough to say that each passing week brings bad news about the extent of already irreversible damage from climate change. 23 While the future costs of climate change will be immense, the costs of acting now to limit warming to habitable levels are also significant, on the measure of $ 3.5 trillion a year. 24While governments around the world are expected to lead the necessary spending, a large portion of those costs will inevitably fall on [\*223] companies, either through direct taxes like a carbon tax or increased costs of compliance, such as ending reliance on coal. 25Even as global governmental efforts falter, 26 corporations are committing to act, both together 27 and independently. 28The high costs of corporate climate engagement, both to the companies themselves and to our society, 29have to be worth the last best chance to mitigate catastrophic climate change.

#### BUT perceptions of new unpredictable, antitrust prohibition will crush cooperation essential to stop runaway climate

ICC 20 International Chamber of Commerce, COMPETITION POLICY AND ENVIRONMENTAL SUSTAINABILITY1 26 November, 2020, https://iccwbo.org/content/uploads/sites/3/2020/12/2020-comppolicyandenvironmsustainnability.pdf

The solution to sustainability “collective action” problems is appropriate coordination.10 Coordination may be most efficient if in the form of environmental (or social) regulations, carbon emissions taxes, emission rights trading systems, rules for responsible sourcing and support for innovation including permanent extraction of carbon from the atmosphere. The problem is that regulation and taxation are often politically controversial, uncoordinated amongst governments, delayed, inadequate, or ineffective. For instance, environmental taxes are less than the net present social costs of pollution, and emission rights trading systems for the time being exist only in a limited number of jurisdictions, cover only a small portion of the economy, and are traded at a price well below the social cost of carbon. 3.2. In this light, if we want to have a chance to limit the temperature increase to 1.5 degrees Celsius above the pre-industrial level (as per the objective at the United Nations Framework Convention on Climate Change in 2015 i.e. the Paris Agreement) or to achieve the UN SDGs, the private sector must do its part, and cooperate where appropriate. Many firms will be reluctant to cooperate for fear of running foul of competition law or for fear of restrictive or unpredictable enforcement of competition law.

#### There is no fear now BUT that is predicated off of the federal judiciary consistently and predictably reducing antitrust prohibition now

Crane 21 Daniel A. Crane Frederick Paul Furth, Sr. Professor of Law, University of Michigan 1-28-2021 Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021) https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr

In sum, from the courts’ earliest forays into interpreting the Sherman Act up through contemporary antitrust jurisprudence, the courts have manifested a systematic tendency to interpret the substantive antitrust statutes contrary to their texts, legislative histories, and often their spirit.236 Sometimes, as with the rule of reason and labor exemption, the judicial disregard of text and purpose has occurred fairly immediately. In other cases, as with the Robinson-Patman and Celler-Kefauver Acts, an initial period of statutory fidelity has slipped gradually into a period of statutory infidelity. In some cases, as with respect to section 5 of the FTC Act and section 3 of the Clayton Act, the courts continue to proclaim their fidelity after they functionally move to infidelity. In many cases, the courts stop pretending after a while and admit quite candidly that they are taking liberties with the statute. If this antitrust antitextualism is merely the product of common-law methodology, one would expect to see movement away from the statute’s text in both permissive and restrictive directions, or, to put it more crassly, both in favor of big capital and against it. But the movement has all been in one direction: loosening a congressional check on big capital. Thus, the rule of reason allowed courts to bless large combinations of capital that the courts deemed reasonable; narrowing the labor exemption frustrated labor’s ability to countervail capital’s power; restricting the private right of action for treble damages significantly curtailed the private-litigation check on business; judicial narrowing of the Clayton Act’s exclusive dealing and tying restrictions allowed (mostly big) firms to exploit market power; reading “unfair” out of the FTC Act eliminated section 5 as a check on business morality; eviscerating the Robinson-Patman Act protections for small and independent businesses favored large and powerful businesses; and requiring proof of likely price increases and technical relevant market definition in merger cases immunized many large-scale mergers from legal challenge. Throughout the history of American antitrust law, the courts have shown a systematic tendency to read down the antitrust statutes in favor of big capital.

#### Warming causes extinction — it’s a conflict multiplier.

Kareiva 18, Ph.D. in ecology and applied mathematics from Cornell University, director of the Institute of the Environment and Sustainability at UCLA, Pritzker Distinguished Professor in Environment & Sustainability at UCLA, et al. (Peter, “Existential risk due to ecosystem collapse: Nature strikes back,” *Futures*, 102)

In summary, six of the nine proposed planetary boundaries (phosphorous, nitrogen, biodiversity, land use, atmospheric aerosol loading, and chemical pollution) are unlikely to be associated with existential risks. They all correspond to a degraded environment, but in our assessment do not represent existential risks. However, the three remaining boundaries (climate change, global freshwater cycle, and ocean acidification) do pose existential risks. This is because of intrinsic positive feedback loops, substantial lag times between system change and experiencing the consequences of that change, and the fact these different boundaries interact with one another in ways that yield surprises. In addition, climate, freshwater, and ocean acidification are all directly connected to the provision of food and water, and shortages of food and water can create conflict and social unrest. Climate change has a long history of disrupting civilizations and sometimes precipitating the collapse of cultures or mass emigrations (McMichael, 2017). For example, the 12th century drought in the North American Southwest is held responsible for the collapse of the Anasazi pueblo culture. More recently, the infamous potato famine of 1846–1849 and the large migration of Irish to the U.S. can be traced to a combination of factors, one of which was climate. Specifically, 1846 was an unusually warm and moist year in Ireland, providing the climatic conditions favorable to the fungus that caused the potato blight. As is so often the case, poor government had a role as well—as the British government forbade the import of grains from outside Britain (imports that could have helped to redress the ravaged potato yields). Climate change intersects with freshwater resources because it is expected to exacerbate drought and water scarcity, as well as flooding. Climate change can even impair water quality because it is associated with heavy rains that overwhelm sewage treatment facilities, or because it results in higher concentrations of pollutants in groundwater as a result of enhanced evaporation and reduced groundwater recharge. Ample clean water is not a luxury—it is essential for human survival. Consequently, cities, regions and nations that lack clean freshwater are vulnerable to social disruption and disease. Finally, ocean acidification is linked to climate change because it is driven by CO2 emissions just as global warming is. With close to 20% of the world’s protein coming from oceans (FAO, 2016), the potential for severe impacts due to acidification is obvious. Less obvious, but perhaps more insidious, is the interaction between climate change and the loss of oyster and coral reefs due to acidification. Acidification is known to interfere with oyster reef building and coral reefs. Climate change also increases storm frequency and severity. Coral reefs and oyster reefs provide protection from storm surge because they reduce wave energy (Spalding et al., 2014). If these reefs are lost due to acidification at the same time as storms become more severe and sea level rises, coastal communities will be exposed to unprecedented storm surge—and may be ravaged by recurrent storms. A key feature of the risk associated with climate change is that mean annual temperature and mean annual rainfall are not the variables of interest. Rather it is extreme episodic events that place nations and entire regions of the world at risk. These extreme events are by definition “rare” (once every hundred years), and changes in their likelihood are challenging to detect because of their rarity, but are exactly the manifestations of climate change that we must get better at anticipating (Diffenbaugh et al., 2017). Society will have a hard time responding to shorter intervals between rare extreme events because in the lifespan of an individual human, a person might experience as few as two or three extreme events. How likely is it that you would notice a change in the interval between events that are separated by decades, especially given that the interval is not regular but varies stochastically? A concrete example of this dilemma can be found in the past and expected future changes in storm-related flooding of New York City. The highly disruptive flooding of New York City associated with Hurricane Sandy represented a flood height that occurred once every 500 years in the 18th century, and that occurs now once every 25 years, but is expected to occur once every 5 years by 2050 (Garner et al., 2017). This change in frequency of extreme floods has profound implications for the measures New York City should take to protect its infrastructure and its population, yet because of the stochastic nature of such events, this shift in flood frequency is an elevated risk that will go unnoticed by most people. 4. The combination of positive feedback loops and societal inertia is fertile ground for global environmental catastrophes Humans are remarkably ingenious, and have adapted to crises throughout their history. Our doom has been repeatedly predicted, only to be averted by innovation (Ridley, 2011). However, the many stories of human ingenuity successfully addressing existential risks such as global famine or extreme air pollution represent environmental challenges that are largely linear, have immediate consequences, and operate without positive feedbacks. For example, the fact that food is in short supply does not increase the rate at which humans consume food—thereby increasing the shortage. Similarly, massive air pollution episodes such as the London fog of 1952 that killed 12,000 people did not make future air pollution events more likely. In fact it was just the opposite—the London fog sent such a clear message that Britain quickly enacted pollution control measures (Stradling, 2016). Food shortages, air pollution, water pollution, etc. send immediate signals to society of harm, which then trigger a negative feedback of society seeking to reduce the harm. In contrast, today’s great environmental crisis of climate change may cause some harm but there are generally long time delays between rising CO2 concentrations and damage to humans. The consequence of these delays are an absence of urgency; thus although 70% of Americans believe global warming is happening, only 40% think it will harm them (http://climatecommunication.yale.edu/visualizations-data/ycom-us-2016/). Secondly, unlike past environmental challenges, the Earth’s climate system is rife with positive feedback loops. In particular, as CO2 increases and the climate warms, that very warming can cause more CO2 release which further increases global warming, and then more CO2, and so on. Table 2 summarizes the best documented positive feedback loops for the Earth’s climate system. These feedbacks can be neatly categorized into carbon cycle, biogeochemical, biogeophysical, cloud, ice-albedo, and water vapor feedbacks. As important as it is to understand these feedbacks individually, it is even more essential to study the interactive nature of these feedbacks. Modeling studies show that when interactions among feedback loops are included, uncertainty increases dramatically and there is a heightened potential for perturbations to be magnified (e.g., Cox, Betts, Jones, Spall, & Totterdell, 2000; Hajima, Tachiiri, Ito, & Kawamiya, 2014; Knutti & Rugenstein, 2015; Rosenfeld, Sherwood, Wood, & Donner, 2014). This produces a wide range of future scenarios. Positive feedbacks in the carbon cycle involves the enhancement of future carbon contributions to the atmosphere due to some initial increase in atmospheric CO2. This happens because as CO2 accumulates, it reduces the efficiency in which oceans and terrestrial ecosystems sequester carbon, which in return feeds back to exacerbate climate change (Friedlingstein et al., 2001). Warming can also increase the rate at which organic matter decays and carbon is released into the atmosphere, thereby causing more warming (Melillo et al., 2017). Increases in food shortages and lack of water is also of major concern when biogeophysical feedback mechanisms perpetuate drought conditions. The underlying mechanism here is that losses in vegetation increases the surface albedo, which suppresses rainfall, and thus enhances future vegetation loss and more suppression of rainfall—thereby initiating or prolonging a drought (Chamey, Stone, & Quirk, 1975). To top it off, overgrazing depletes the soil, leading to augmented vegetation loss (Anderies, Janssen, & Walker, 2002). Climate change often also increases the risk of forest fires, as a result of higher temperatures and persistent drought conditions. The expectation is that forest fires will become more frequent and severe with climate warming and drought (Scholze, Knorr, Arnell, & Prentice, 2006), a trend for which we have already seen evidence (Allen et al., 2010). Tragically, the increased severity and risk of Southern California wildfires recently predicted by climate scientists (Jin et al., 2015), was realized in December 2017, with the largest fire in the history of California (the “Thomas fire” that burned 282,000 acres, https://www.vox.com/2017/12/27/16822180/thomas-fire-california-largest-wildfire). This catastrophic fire embodies the sorts of positive feedbacks and interacting factors that could catch humanity off-guard and produce a true apocalyptic event. Record-breaking rains produced an extraordinary flush of new vegetation, that then dried out as record heat waves and dry conditions took hold, coupled with stronger than normal winds, and ignition. Of course the record-fire released CO2 into the atmosphere, thereby contributing to future warming. Out of all types of feedbacks, water vapor and the ice-albedo feedbacks are the most clearly understood mechanisms. Losses in reflective snow and ice cover drive up surface temperatures, leading to even more melting of snow and ice cover—this is known as the ice-albedo feedback (Curry, Schramm, & Ebert, 1995). As snow and ice continue to melt at a more rapid pace, millions of people may be displaced by flooding risks as a consequence of sea level rise near coastal communities (Biermann & Boas, 2010; Myers, 2002; Nicholls et al., 2011). The water vapor feedback operates when warmer atmospheric conditions strengthen the saturation vapor pressure, which creates a warming effect given water vapor’s strong greenhouse gas properties (Manabe & Wetherald, 1967). Global warming tends to increase cloud formation because warmer temperatures lead to more evaporation of water into the atmosphere, and warmer temperature also allows the atmosphere to hold more water. The key question is whether this increase in clouds associated with global warming will result in a positive feedback loop (more warming) or a negative feedback loop (less warming). For decades, scientists have sought to answer this question and understand the net role clouds play in future climate projections (Schneider et al., 2017). Clouds are complex because they both have a cooling (reflecting incoming solar radiation) and warming (absorbing incoming solar radiation) effect (Lashof, DeAngelo, Saleska, & Harte, 1997). The type of cloud, altitude, and optical properties combine to determine how these countervailing effects balance out. Although still under debate, it appears that in most circumstances the cloud feedback is likely positive (Boucher et al., 2013). For example, models and observations show that increasing greenhouse gas concentrations reduces the low-level cloud fraction in the Northeast Pacific at decadal time scales. This then has a positive feedback effect and enhances climate warming since less solar radiation is reflected by the atmosphere (Clement, Burgman, & Norris, 2009). The key lesson from the long list of potentially positive feedbacks and their interactions is that runaway climate change, and runaway perturbations have to be taken as a serious possibility. Table 2 is just a snapshot of the type of feedbacks that have been identified (see Supplementary material for a more thorough explanation of positive feedback loops). However, this list is not exhaustive and the possibility of undiscovered positive feedbacks portends even greater existential risks. The many environmental crises humankind has previously averted (famine, ozone depletion, London fog, water pollution, etc.) were averted because of political will based on solid scientific understanding. We cannot count on complete scientific understanding when it comes to positive feedback loops and climate change.

## 1NC — Inequality

### 1NC — AT: Economy

#### Recessions don’t uniquely cause wars

* War can occur at any stage of expansion, crisis, recession, and recovery
* Doesn’t happen at one particular stage, despite recessions being quick
* Decision to go to war based on military gains – not germane to recession
* Econ explanation for war is downward pressure – happens during prosperity because of unfounded worry for recessions

Liao 19 [Jianan Liao, Shenzhen Nanshan Foreign Language School, China. Business Cycle and War: A Literature Review and Evaluation. Advances in Economics, Business and Management Research, volume 68. Copyright 2019]

First, war can occur at any stage of expansion, crisis, recession, recovery, so it is unrealistic to assume that wars occur at any particular stage of the business cycle. On the one hand, although the domestic economic problems in the crisis/recession/depression period break out and become prominent in a short time, in fact, such challenge exists at all stages of the business cycle. When countries cannot manage to solve these problems through conventional approaches, including fiscal and monetary policies, they may resort to military expansion to achieve their goals, a theory known as Lateral Pressure. [13] Under such circumstances, even countries in the period of economic expansion are facing downward pressure on the economy and may try to solve the problem through expansion. On the other hand, although the resources required for foreign wars are huge for countries in economic depression, the decision to wage wars depends largely on the consideration of the gain and loss of wars. Even during depression, governments can raise funding for war by issuing bonds. Argentina, for example, was mired in economic stagflation before the war on the Malvinas islands (also known as the Falkland islands in the UK). In fact, many governments would dramatically increase their expenditure to stimulate the economy during the recession, and economically war is the same as these policies, so the claim that a depressed economy cannot support a war is unfounded. In addition, during the crisis period of the business cycle, which is the early stage of the economic downturn, despite the economic crisis and potential depression, the country still retains the ability to start wars based on its economic and military power. Based on the above understanding, war has the conditions and reasons for its outbreak in all stages of the business cycle.

Second, the economic origin for the outbreak of war is downward pressure on the economy rather than optimism or competition for monopoly capital, which may exist during economic recession or economic prosperity. This is due to a fact that during economic prosperity, people are also worried about a potential economic recession. Blainey pointed out that wars often occur in the economic upturn, which is caused by the optimism in people's mind [14], that is, the confidence to prevail. This interpretation linking optimism and war ignores the strength contrast between the warring parties. Not all wars are equally comprehensive, and there have always been wars of unequal strength. In such a war, one of the parties tends to have an absolute advantage, so the expectation of the outcome of the war is not directly related to the economic situation of the country. Optimism is not a major factor leading to war, but may somewhat serve as stimulation. In addition, Lenin attributed the war to competition between monopoly capital. This theory may seem plausible, but its scope of application is obviously too narrow. Lenin's theory of imperialism is only applicable to developed capitalist countries in the late stage of the development capitalism, but in reality, many wars take place among developing countries whose economies are still at their beginning stages. Therefore, the theory centered on competition among monopoly capital cannot explain most foreign wars. Moreover, even wars that occur during periods of economic expansion are likely to result from the potential expectation of economic recession, the "limits of growth" [15] faced during prosperity — a potential deficiency of market demand. So the downward pressure on the economy is the cause of war.

#### Growth is unsustainable — pursuit causes extinction and turns war.

Trainer 20, PhD from University of Sydney. Conjoint Lecturer in the School of Social Sciences, University of New South Wales (Ted, The Simpler Way: Collected Writings of Ted Trainer, *The Simplicity Institute*, pp. 3-6)

1. Unsustainability

The way of life we have in rich countries is grossly unsustainable. There is no possibility of all people on Earth ever rising to rich world per capita levels of consumption of energy, minerals, timber, water, food, phosphorous etc. These rates of consumption are generating numer-ous alarming global problems, now threatening our survival and the survival of other species. Most people have no idea of the magnitude of the overshoot – of how far we are beyond sustainable levels of re-source use and environmental impact. If all the estimated 9.8 billion people living on earth in 2050 were to consume resources at the pres-ent per capita rate in rich countries, world annual resource production rates would have to be about eight times as great as they are now.

For instance, the ‘Ecological Footprint’ analysis indicates that the amount of productive land required to provide one person in Australia with food, water, energy and settlement area is about 6.6 ha (Global Footprint Network, 2019). If 9.8 billion people were to live as Australians do, approximately 65 billion ha of productive land would be required. However, the total amount of productive land available is only 12 billion ha. If we assume one third of this should be set aside for nature (see, e.g., Baillie Yang, 2018) the amount available for humans might be about 8 billion ha. In other words, our rich world per capita footprint is about eight times as big as it would ever be possible for all of the world’s people to sustainably share.

Figures for some other items indicate much worse ratios. For instance, the top 10 nations consuming iron ore and bauxite (from which we ob-tain aluminium and steel) have per capita use rates that are respectively around 65 and 90 times the rates for all the other nations (Wiedmann et al., 2015). Mineral ore grades are falling. All people could not rise to present rich world levels of mineral use. The same case can be made with respect to just about all other resources and ecosystem services, such as agricultural land, forests, fisheries, water and biomass.

These simple figures clearly demonstrate the impossibility of all people ever having the material ‘living standards’ we have taken for granted in rich countries like Australia. We are not just a little beyond sustainable levels of resource demand and ecological impact – we are far beyond sustainable levels. Rich world practices, systems and ‘living standards’ are grossly unsustainable, and can never be extended to all the world’s people. Again, few people seem to grasp the magnitude of the over-shoot. We must face up to dramatic reductions in our present per capita levels of production and consumption.

1.1. Now add the absurd commitment to economic growth

The main worry is not the present level of resource use and ecological impact discussed above, it is the level we will rise to given the obsession with constantly increasing the amount of production and consumption. The supreme goal in all countries is to raise incomes, ‘living standards’ and GDP as much as possible, constantly and without any idea of a limit. That is, the most important goal is economic growth.

Consider the implications. If we assume a) a 3% p.a. economic growth, b) a population of 9.8 billion, c) all the world’s people rising to the living standards we in the rich world would have in 2050 given 3% p.a. growth – in that scenario, the total volume of world economic output would be 20 times as great as it is now and doubling every 23 years thereafter.

So even though the present levels of production and consumption are grossly unsustainable, the determination to have continual increase in income and economic output will multiply these towards absurd and impossible levels in coming decades.

Why analyse in terms of 9.8 billion rising to rich world levels? Because a) it is not morally acceptable to assume that they remain much poorer than we are, and b) that’s what everyone aspires to, so we had better think about whether it is viable.

1.2 But what about technical advance?

When confronted by global sustainability problems most people just assume that technical advance and ‘green growth’ will solve them, enabling us to go on living with ever-increasing levels of affluence. They do not realise that the magnitude of the problems rules this out.

The core ‘tech-fix’ faith is that resource demand and environmental impacts can be ‘decoupled’ from economic growth, i.e., that produc-tion and consumption can go on increasing while resource demand is sufficiently reduced. This is extremely implausible (see Part Three of this anthology for more detail). How likely is it that the world’s amount of production could be multiplied by 20 while resource use and environmental impacts are reduced by, say, 50% – i.e., a factor 40 reduction? None of the thirty or more reports over the last 20 years show any global reduction at all; they all show that as GDP rises so do the impacts. The recent review essay by Hickel and Kallis (2019) pro-vides a powerful critique of ‘green growth’ (see also Ward et al., 2016).

1.3 Global problems should be seen in terms of ‘limits to growth’

The ‘limits to growth’ perspective (Meadows et al., 1972) is essential if we are to understand the most serious global problems facing us:

The environmental problem is basically due to the fact that far too much producing and consuming is going on, taking too many resources rom nature and dumping too many wastes back into nature. We are eliminating species mainly because we are taking or ruining so much habitat. The environmental problems cannot be solved in an economy that is geared to providing ever-rising production, con-sumption, ‘living standards’ and GDP (see the next essay, ‘Why this economy must be scrapped’, for more detail).

Third World poverty and underdevelopment are inevitable if a few living in rich countries insist on taking far more of the world’s re-sources than all could have. The Third World can never develop to rich world levels of consumption, because there are far too few re-sources for that. (For more detail on this issue, see the essay ‘Third World development’ in Part Two.)

Conflict and war are inevitable if all aspire to rich world rates of consumption, and if rich countries insist on limitless growth on a planet with limited resources. Rich countries now have to support repressive regimes willing to establish policies that enable our cor-porations to ship out cheap resources, use Third World land for export crops, exploit cheap labour etc. This means we must be ready to get rid of regimes and to invade and run countries that threaten to follow policies contrary to our First World interests. Our rich world living standards could not be as high as they are if a great deal of repression and violence was not taking place, and rich countries contribute significantly to this. If we are determined to remain affluent, we should remain heavily armed! (This issue is developed in the essay in part Two called ‘If you want affluence, prepare for war’.)

Social cohesion is deteriorating and quality of life is being damaged. This is so even in the richest nations, because the supreme goals are raising business turnover, incomes and the GDP, not meet-ing needs, building community and improving the quality of life. (Some details of this decline in quality of life and the benefits of an alternative way to live are discussed in Part Four.)

### 1NC — AT: Inequality

#### No correlation between increased antitrust and inequality

**Dorsey et al. 19** , [Elyse Dorsey](https://regproject.org/person/elyse-dorsey/)- adjunct professor at Antonin Scalia Law School at George Mason University. She previously served as Counsel to the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. [Geoffrey A. Manne](https://regproject.org/person/geoffrey-a-manne/)- president and founder of the International Center for Law and Economics (ICLE), a nonprofit, nonpartisan research center based in Portland, Oregon. He is also a distinguished fellow at Northwestern Law School’s Searle Center on Law, Regulation, & Economic Growth. [Jan M. Rybnicek](https://regproject.org/person/jan-rybnicek/)- Counsel in the antitrust, competition and trade group of Freshfields Bruckhaus Deringer LLP. [Kristian Stout](https://fedsoc.org/contributors/kristian-stout-1)- Associate Director at the International Center for Law and Economics (ICLE), has expertise in technology and innovation policy. [Joshua D. Wright](https://regproject.org/person/joshua-d-wright/)- University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University. Professor Wright also holds a courtesy appointment in the Department of Economics. (4/15/2019, “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement,” *Regulatory Transparency Project*, <https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/> Date Accessed: 10/8/2021)

Second, consider the empirical evidence supporting a causal link between antitrust enforcement and inequality. This proffered link remains, thus far, largely theoretical and undeveloped empirically. Populist papers advocating for increased antitrust as a salve for increasing inequality do not offer empirical support for their preferred course of treatment. But other authors have begun to explore empirically the proposed tie between antitrust enforcement and inequality. Wright et al., for instance, present time series regressions relating measures of inequality to antitrust enforcement measures.[88](https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/" \l "_ftn45) While the authors acknowledge the standard reasons that these analyses cannot isolate, with confidence, causation, their work provides a useful foray into the empirical basis for the notion that antitrust enforcement and inequality are causally linked. The authors examine data from DOJ investigations between 1984 and 2016, focusing first on merger investigations, given the populist emphasis on merger activity, and then broadly examine all DOJ investigations for a more general enforcement measure. Their results do not offer “much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality.”[89](https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/" \l "_ftn46)

### 1NC — AT: Solt — Nationalism

#### Income inequality doesn’t cause nationalism

Bosancianu 17 (Constantin Manuel Bosancianu, Doctoral School of Political Science, Central European University, Nador u. 9, H-1051 Budapest, Hungary “A Growing Rift in Values? Income and Educational Inequality and Their Impact on Mass Attitude Polarization”, Social Science Quarterly , Volume 98, Issue 5, November 2017, Pages 1587–1602, Accessed 3/3/18, N.G.)

The analyses presented so far have tended to refute the hypotheses I have outlined in the beginning: economic inequality is not associated with increased attitude polarization, regardless of whether I examine the dispersion, bimodality, or consolidation of Left-Right self-placement with respect to income groups in the population. Although for dispersion and bimodality the estimates for income inequality tend to be in the direction expected, they are not statistically significant once educational inequality is controlled for. A conservative interpretation, pending a larger sample, is that there is no significant association between inequality and attitude polarization. The evidence is in line with analyses from the context of the United States, finding little connection between inequality and income-based partisan sorting (Dettrey and Campbell, 2013) or polarization in preferences for redistribution between income groups (Luttig, 2013). The models presented in the previous section also offer a refutation of the RD framework, inasmuch as it applies to mass attitude polarization, as well as of the political economic models presented in the beginning. Rising income inequality neither increases nor decreases the level of attitude polarization in a country; rather, the two appear to be unconnected. The reasons for this have already been presented: it is unlikely for small-to-medium shifts in inequality over a period of 20–30 years to be properly assessed by individuals who most often than not have difficulties naming members of the government, or the parties that form the governing coalition. A recent set of studies confirms that individuals in the United States and Australia woefully underestimate the degree of economic inequality in their society (Norton and Ariely, 2011; Norton et al., 2014). If this insight holds for other nations as well, it is to be expected that variations in attitude polarization are not connected in any way to the level of income inequality in the country. An additional contribution of the analysis conducted here is the strong cross-national impact that educational inequality has on attitude polarization: when controlling for it, the effect of income inequality on either attitude dispersion or bimodality largely disappears. Although economic inequality has been included in a variety of models used to predict attitudes toward redistribution, turnout, political engagement, or social trust, my analysis reveals that treating inequality as a completely exogenous factor is likely to yield biased findings. The effect of educational inequality is likely felt on both income inequality and attitude polarization, but, unlike the former, it does not depend on unrealistic expectations concerning the ability of voters to recognize glacial trends in inequality over decade-long periods. Most likely, educational inequality exerts an impact by shaping the socioeconomic circumstances of individuals at different educational levels, which, in turn, influences their prevailing policy orientations and values, particularly with respect to redistributive issues. These attitudes are some of the more important questions over which political competition is carried out, and form the foundation of Left-Right identification: the extent to which income differences result in harder work and a boost in productivity, or constitute a social harm; the extent to which government intervention in the economy maintains equality in the provision of goods and services, or rather leads to inefficiency and financial waste. Larger educational inequality leads to a growing divergence in these attitudes, which could subsequently make way for increased social tensions and breakdown in civil debate if allowed to continue unabated. The findings offer an additional cautionary tale for studies that attempt to model in vacuo the impact of income inequality on any individual-level political behavior or attitude.8 A wide range of factors can be presumed to be causes of both income inequality and attitude shift: changes in the population structure or in the relative importance of economic sectors, or the policies that have brought about welfare state retrenchment (an externality of which is educational inequality). Lack of proper consideration for the sources of economic inequality, and for the potential influences of these sources on the phenomenon to be explained, cannot produce an adequate picture of the true effects of inequality on democratic dynamics. As I have shown here, controlling for what could be considered a causal determinant of income inequality, the impact of the Gini index on attitude polarization largely disappears.

### 1NC — AT: LIO

#### Liberal order resilient---assumes the internal link.

Mousseau 19, PhD, Professor @ the University of Central Florida. (Michael, 7/29/19, “The End of War: How a Robust Marketplace and Liberal Hegemony Are Leading to Perpetual World Peace”, *International Security*, Volume 44, Issue 1, <https://www.mitpressjournals.org/doi/full/10.1162/isec_a_00352?mobileUi=0&amp>) \*Contractualist societies = system in which individuals normally obtain securities, including incomes and financial securities, through contracts with strangers in a market; i.e. liberalism

Reports of the demise of the liberal order, however, are greatly exaggerated. First, Hungary and Poland are newly contractualist states. The sociological nature of economic norms theory means that contractualist values should be more firmly rooted in older contractualist societies than in newer ones. This is corroborated with the natural experiment of Germany: in 1962 West Germany embraced contractualism (see table 1), but it was only after 1991 that East Germany could have become contractualist, when massive investments from the Federal Republic caused incomes in the marketplace to become higher than incomes obtainable from status relationships. Today, Germany’s populist movement is concentrated in the eastern part of the country and is largely nonexistent in the western part,83 which corroborates the expectation that some newly contractualist societies retain some of their status values even after a generation of robust opportunity in the marketplace. Deeper changes in values may not occur until generational cohorts initially socialized into status or axial economies have passed on. Second, the electorates in most of the thirty-five contractualist states listed in table 1 in 2010 have not experienced substantial increases in populist sentiment. Italy’s Five Star movement is often called populist but largely because of its anti-immigrant stance. Although an embrace of immigrants would seem consistent with contractualist values, opposition to large numbers of immigrants is arguably a rational response to what is essentially a huge external shock that has intensified in recent years. Britons voted to leave the European Union, but largely because they believed they were being treated unfairly in it. The rejection of unfair terms of trade, whether perceived correctly or not, is consistent with contractualist values. Third, the strength of institutions far exceeds that of any one person, including the president of the United States. Liberal values and institutions are rooted in contractualist economic norms and will not disappear simply because some leaders choose not to abide by them. For instance, although Trump may want the United States to withdraw from the North Atlantic alliance, this is not a view shared by Congress and the American people. Even members of Trump’s administration have often restrained him in ways consistent with contractualist values and institutions.84 In economic norms theory, the only way the United States’ contractualist values could shift to status or axial values would be through radical economic change. As mentioned above, economics is ultimately at the mercy of politics, as an influential coalition of rent-seekers could potentially collapse a contractualist economy by failing to sustain the highly inclusive marketplace or uphold the state’s credibility in enforcing of contracts. In recent years, the U.S. economy has begun tilting toward rent-seekers, given the growing role of private money in electoral campaigns and the increasing sophistication of rent-seekers in masking their activities though the manipulation of public opinion, including through their concentrated ownership of media outlets. Such rentierism could precipitate a change in U.S. values if it results in a retraction of the market substantial enough that newer generations began to obtain higher wages in newfound status networks than in the marketplace. In this way, the Trump phenomenon may reflect a pathology in U.S. governing institutions; but at least so far, it arguably has not extended to the American people. Most of Trump’s supporters seem to be drawn to him not for his expressions of status values, but for his pledges to fight a “rigged” system and create well-paying jobs. Whether or not Trump means what he says, many of his supporters saw a vote for him as an act of protest against the increasing corruption occurring in the United States, a clear contractualist expression.85 Although a collapse of the U.S. economy and transition to an axial or a status economy is always possible, the feedback loop of popular insistence on economic growth and a highly inclusive marketplace makes this unlikely. Aside from an external shock (such as nuclear war or climate devastation), such a transition could happen only if the rentiers somehow manage to remain in power long enough to institutionalize a permanently underemployed underclass. Fourth, even if the U.S. economy were to collapse and the United States became an axial or a status power, the combined economic might of all the other contractualist countries in the world is nearly twice that of the United States. The soft power of the United States in world politics lies not in its power to persuade, but in it being the largest of the contractualist states, and in its willingness to provide the public good of global security since the collapse of the pound sterling in late 1946. If the United States withdrew from its leadership role, the remaining contractualist powers would fill the vacuum. None of them has an economy relatively large enough to enable it to act as a natural leader and principal provider of global security, but it is the temperament of these states that they can easily form an international organization to coordinate and act on their shared security interests, even if some may choose to free ride. Fifth, current events need to be viewed within a larger context. Fernand Braudel pinpoints the rise of the modern world economy as starting around the year 1450 in northwestern Europe.86 The first contractualist economy emerged more than two centuries ago. Since then, contractualist states have confronted numerous shocks and threats to their systems, including the American Civil War, the Great Depression, two world wars, and the Cold War. The present populist mini-wave and pathologies in U.S. democracy are mere trifling episodes in a larger historical frame.

## 1NC — FTC Credibility

### 1NC — AT: Scamming

#### They’ll hide identities or operate from countries that won’t cooperate

McKenzie 17, Colonel U.S. Airforce. (Tim, Is Cyber Deterrence Possible? https://media.defense.gov/2017/Nov/20/2001846608/-1/-1/0/CPP\_0004\_MCKENZIE\_CYBER\_DETERRENCE.PDF

Cyber-criminal activity is the largest group of cyber threats and one of the most difficult to effectively deter. This group of hackers ranges in sophistication from low ability (i.e., script kiddies) to elite-level hackers motivated by financial gain. Our ability to punish and deter this group is sometimes limited and largely dependent on law enforcement and effective cooperation from foreign nations. Sophisticated hackers will seek out places where governance and policy conditions facilitate masking their identities.20 Punishing this group can be complex for several reasons. First, as discussed, accurately attributing the source of cyber attacks is problematic and sometimes time-consuming. Second, the sheer volume of activity makes prosecuting all cases impractical. According to a 2013 US Government Accountability Office report on cybersecurity, the number of computer security incidents that federal agencies reported to the United States Computer Emergency Readiness Team (US-CERT) over a six-year period increased from 5,503 in 2006 to 48,562 in 2012 (a 782 percent increase).21 According to the Internet Crime Complaint Center’s 2010 Internet Crime Report, the Federal Bureau of Investigation received 303,809 Internet crime complaints resulting in 1,420 prepared criminal cases—which led to a mere six convictions.22 In addition to the low conviction rate, cybercrimes are among the most underreported forms of criminality. One estimate suggests that only 17 percent of companies report cybercrime-related losses to law enforcement.23 Hackers with criminal or financial intent have to weigh the possibility of being caught and prosecuted for their crimes against the potential profits. Skilled hackers who know how to hide their identities and locations will continue to conduct these crimes until identification, attribution, and prosecution of cybercrimes increase. Our ability to deter political hacktivist groups is low for all the same reasons. Hacktivists are activists motivated by politics or religion or the desire to expose that of a wrongdoing or exact revenge. The DOD will have a minimal role in deterring these groups since the threat of military action is not a likely or credible response. Until we can discernibly increase the risk of prosecution, we cannot expect to have an effective US national-level cyberdeterrence strategy against criminal hackers or political hacktivists.

#### This card is advocating for passing the Consumer Protection and Recovery Act---not that increased trust in the FTC makes scams magically disappear — KU is green

Testimony of Ted Mermin 21. Executive Director Center for Consumer Law & Economic Justice UC Berkeley School of Law. Before the United States House of Representatives Committee on Energy & Commerce Subcommittee on Consumer Protection and Commerce Hearing on “The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers”. https://docs.house.gov/meetings/IF/IF17/20210427/112501/HHRG-117-IF17-Wstate-MerminT-20210427.pdf

10. Trust the FTC. This final step informs all the others. There can be no doubt that there is more work to do protecting consumers than the FTC currently has the tools or resources to accomplish. There is also no doubt that the FTC has been trammeled in ways that its sister agencies, federal and state, have not. Whatever the reason, it is high time to retire the “zombie ideas” about the FTC – that the Commission is unnecessary, or overreaching, or heavy-handed, or inefficient.23 It is time, as one commissioner stated in Senate testimony last week, to “turn the page on the FTC’s perceived powerlessness.”24

For an American public eager for greater – not lesser – protection from increasingly sophisticated scam artists, deceptive advertisers, and privacy violating tech companies, building an effective FTC is an easy decision. It can and should be for this committee as well.

IV. Conclusion

This subcommittee meets at a remarkable historical moment, when the COVID-19 pandemic has revealed the profound need for a robust Federal Trade Commission just days after the Supreme Court made action by Congress an absolute necessity. This is a perilous time, with the chief protector of American consumers rendered nearly powerless just when those consumers are experiencing a heightened threat resulting from a once-in-a-century pandemic. The Consumer Protection and Recovery Act provides a critical first step toward restoring authority and effectiveness to the nation’s leading consumer protection agency.

Swift action to restore the FTC’s traditional 13(b) authority means that when constituents contact your office, and tell your staff that they have lost their life’s savings to a work-at-home scam, or their identity has been stolen and someone has opened accounts in their name, or they just spent their stimulus payment on a supposed cure for COVID for their grandmother who’s on a respirator – there will still be an agency to refer them to. No one wants that staffer to have to add: “Well, we could send you to the FTC, but they don’t actually have the power to get you your money back.”

Inaction or delay will mean no recovery for millions of wronged American consumers. The time to pass the Consumer Protection and Recovery Act is now.

### 1NC — AT: Emerging Tech

#### No emerging tech impact.

Sechser et al. ‘19 (\*Todd S. Sechser is the Pamela Feinour Edmonds and Franklin S. Edmonds, Jr. Discovery Professor of Politics and Public Policy at the University of Virginia and Senior Fellow at the Miller Center of Public Affairs; \*\*Neil Narang is an Associate Professor of Political Science at the University of California, Santa Barbara; \*\*\*Caitlin Talmadge is Associate Professor of Security Studies in the School of Foreign at Georgetown University; “Emerging technologies and strategic stability in peacetime, crisis, and war”; *Journal of Strategic Studies*, 42:6; pg. 728-729)

Yet the history of technological revolutions counsels against alarmism. Extrapolating from current technological trends is problematic, both because technologies often do not live up to their promise, and because technologies often have countervailing or conditional effects that can temper their negative consequences. Thus, the fear that emerging technologies will necessarily cause sudden and spectacular changes to international politics should be treated with caution. There are at least two reasons to be circumspect.

First, very few technologies fundamentally reshape the dynamics of international conflict. Historically, most technological innovations have amounted to incremental advancements, and some have disappeared into irrelevance despite widespread hype about their promise. For example, the introduction of chemical weapons was widely expected to immediately change the nature of warfare and deterrence after the British army first used poison gas on the battlefield during World War I. Yet chemical weapons quickly turned out to be less practical, easier to counter, and less effective than conventional high-explosives in inflicting damage and disrupting enemy operations.6 Other technologies have become important only after advancements in other areas allowed them to reach their full potential: until armies developed tactics for effectively employing firearms, for instance, these weapons had little effect on the balance of power. And even when technologies do have significant strategic consequences, they often take decades to emerge, as the invention of airplanes and tanks illustrates. In short, it is easy to exaggerate the strategic effects of nascent technologies.7

Second, even if today’s emerging technologies are poised to drive important changes in the international system, they are likely to have variegated and even contradictory effects. Technologies may be destabilising under some conditions, but stabilising in others. Furthermore, other factors are likely to mediate the effects of new technologies on the international system, including geography, the distribution of material power, military strategy, domestic and organisational politics, and social and cultural variables, to name only a few.8 Consequently, the strategic effects of new technologies often defy simple classification. Indeed, more than 70 years after nuclear weapons emerged as a new technology, their consequences for stability continue to be debated.9

# 2NC

## T — Per Se

#### It’s a distinction with a difference---‘rule of reason’ and ‘per se’ have precise meanings AND access literature with completely different base assumptions.

Beschle 87 (Donald L. Beschle- Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law. March. CURRENT TOPIC IN ANTITRUST: "What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality., 38 Hastings L.J. 471)

In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis.

The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term "per se." However, since terms carry with them not only precise meanings, but also more general attitudes, "per se" must be replaced with a term which does not carry the permissive connotations which have become associated with the "rule of reason."

The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement.

#### Per se is akin speed limit whereas the rule of reason is akin to weighing whether a driver drove unreasonably fast and if that had negative effects

Sucke 9, Associate Professor of Law @ U-Tenn (Maurice, “Does the Rule of Reason Violate the Rule of Law?,” UC Davis Law Review, Lexis)

But who has created this predicament? The Supreme Court. Over the past ninety years, the Court has supplied the Sherman Antitrust Act’s legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.10 Under the Court’s per se illegal rule, certain restraints of trade are deemed illegal without consideration of any defenses. These restraints are so likely to harm competition and to lack significant procompetitive benefits that, in the Court’s estimation, “they do not warrant the time and expense required for particularized inquiry into their effects.”11 Under the per se rule, once a plaintiff proves an agreement among competitors to engage in the prohibited conduct, the plaintiff wins.12 But the Court evaluates all other restraints under the rule of reason. This standard involves a flexible factual inquiry into a restraint’s overall competitive effect and “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”13 The rule of reason also “varies in focus and detail depending on the nature of the agreement and market circumstances.”14 “Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”15 Despite its label, the rule of reason is not a directive defined ex ante (such as a speeding limit).16 Instead, the term embraces antitrust’s most vague and open-ended principles, making prospective compliance with its requirements exceedingly difficult.

**Per se is the only way to prohibit *practices***

Cooter 94 (Robert Cooter-Prof of Law, Boalt Hall, School of Law, University of California at Berkeley. EPSTEIN/TITLE VII SYMPOSIUM: “Market Affirmative Action,” 31 San Diego L. Rev. 133)

Although cartels are inherently unstable, the U.S. antitrust framework does not merely withhold enforcement from contracts to create cartels. In addition, the original U.S. legislation, which was enacted at the end of the nineteenth century, outlaws cartels and other "conspiracies against trade." 46 The courts have interpreted the law to **prohibit certain** collusive **practices ("per se prohibitions**"), such as retail price maintenance, regardless of whether collusion occurred in fact. 47 These prohibitions greatly increase the difficulty of sustaining a cartel. 48 Similarly, U.S. civil rights laws prohibit business practices involving "disparate treatment" of those persons belonging to any one or more protected classes. 49 The illegality of conducting certain business transactions with the intent to discriminate greatly increases the difficulties involved in explicit discrimination, especially in large organizations.

**Only per se illegality forbids practices---rules of reason forbid acts which fail a balancing test.**

**Beschle 87** (Donald L. Beschle-Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law. March. CURRENT TOPIC IN ANTITRUST: "What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality., 38 Hastings L.J. 471)

None of these positions has been accepted by the courts, possibly due to the apparent intent of Congress to maintain strict sanctions against resale price maintenance. 145 However, if antitrust theorists continue to criticize the anomaly of treating only one form of vertical restraint as per se illegal, the most likely way this conflict will be resolved is by the Supreme Court reversing its position on vertical price fixing. With respect to **tying** arrangements, legislative support of **unwavering prohibition** is **less recent**, if not less clear, and the Court has already come **close** to **abandoning the per se concept**. Four Justices already support rule of reason treatment for such practices. 146 Given the likely changes in the composition of the Court in the near future, **rule of reason** analysis may be adopted as the test for tying arrangements as well as other vertical restraints. 147

Less attention has been paid in recent literature to per se rules involving boycotts and horizontal market division. With respect to boycotts, this sanguinity may reflect the perception that the surviving per se rule is so limited that it has relatively little impact on antitrust enforcement. 148 Few significant cases have involved **horizontal** market division, unaccompanied by price fixing, since the unambiguous classification of such **practices** as per se illegal in 1972. 149 Still, some have criticized the application of **per se rules** in these cases. Topco remains, in the view of some, a classic example of how horizontal market division can occasionally have procompetitive results. 150

Only with respect to the classic per se offense, horizontal price fixing, has criticism been rare. Nevertheless, an occasional voice has been raised to argue that per se analysis should be abandoned even with respect [\*500] to this "hard core" Sherman Act violation. 151 Although there is little reason to believe that courts will seriously reconsider the designation of horizontal price fixing as per se illegal, the mere existence of such arguments indicates the strength of the movement against per se analysis. Even when criticism of per se rules does not lead to their explicit abandonment, it helps to create an atmosphere in which the surviving per se rules are continually narrowed through judicial circumscription. The expanded use of the **rule of reason** leads, then, to **more permissive** judicial **treatment** for those types of conduct **once** treated as **clearly anti-competitive**. 152

Of course, the critics of per se analysis have not had the field entirely to themselves. Those advocating strict application of the Sherman and Clayton Acts have counterattacked, putting forward both relatively narrow defenses of particular per se rules 153 and broad defenses of the concept of per se illegality. 154 Some advocates of broad application of per se rules argue that economic efficiency is the dominant goal of antitrust analysis and attempt to demonstrate that efficiency is not promoted by practices traditionally labelled per se illegal. 155 Others contend that efficiency must yield to, or at least share the spotlight with, other values that call for strict application of antitrust prohibitions even in the face of possible efficiency losses from such enforcement. 156

It is not surprising that defenders of the per se concept are losing ground, both in the academic literature and in the courts. This situation, however, is much less a reflection of any defect in the general position advocating vigorous antitrust enforcement than an indication of a fundamental flaw in the concept chosen to implement that position. From the earliest days of antitrust, advocates of vigorous enforcement have made strong and appealing arguments for listing certain types of conduct as [\*501] clearly and invariably forbidden. 157 Not only would this categorization make enforcement of the antitrust laws quicker and more certain, it would also serve to deter far more anticompetitive behavior. Certainty and judicial economy are no doubt valid concerns, and vigorous enforcement of the antitrust laws is certainly consistent with the spirit of the public and the legislators who adopted them. 158

But the use of the concept of per se illegality has been unfortunate. To the extent that the term means what it says -- that certain practices will invariably be illegal -- it is difficult to defend. If a practice is to be classified as invariably illegal, it should be so designated only upon a showing that it will always (or at least almost always) cause harm outweighing any benefits which it may produce. Some courts have so held, stating that the per se label will be reserved for practices which will always, or almost always, fail the standard test of antitrust analysis, the rule of reason. 159

Absolutes, however, even when qualified with the word "almost," are hard to prove. In an area as complex as the effect of concerted business practices on competition, numerous counterexamples, both hypothetical and actual, may be advanced to rebut the contention that any such practice invariably injures competition. To defend per se illegality, then, is to defend something almost inevitably indefensible. The only possible way to defend the concept effectively is to resort to the course currently being taken by the Supreme Court: to narrow the categories so far as to make the question of categorization almost as complex as full rule of reason analysis. At that point, the defense of the per se concept becomes merely an exercise in semantics.

If the concept of per se illegality is indefensible, except when so refined as to make it largely irrelevant, why continue to defend it at all? Why not simply abandon the field to the rule of reason? It seems clear that the battle over the per se rules is **less** a clash over those **specific rules** than a battle over **basic attitudes toward antitrust enforcement**. For better or worse, per se rules have become linked in most minds with **vigorous** enforcement; to **favor one** is to **favor the other**. The **rule of reason**, on the other hand, is associated with a **tolerant** attitude toward antitrust defendants. Rule of reason analysis often -- perhaps **usually** -- leads to a [\*502] finding of **no liability**. Its complexity and uncertainty can deter plaintiffs from even attempting to challenge behavior which many would say should be challenged. Since, to so many, rule of reason analysis means a type of antitrust enforcement under which **much anticompetitive activity** will be **permitted**, per se analysis is defended, not so much for its own virtues, but rather because of fears of the permissive nature of its sole obvious rival.

**A standard *REMVOES A PROHIBITION.* Only per-se is a prohibition**

**Seita and Tamura 94** (Alex Y. Seita, Professor of Law, Albany Law School of Union University. B.S. 1973, California Institute of Technology; J.D. 1976, M.B.A. 1980, Stanford University, & Jiro Tamura, Associate Professor of Law, Keio University. B.A. 1981, M.A. 1983, Keio University; LL.M. 1985, Harvard University, [“The Historical Background of Japan's Antimonopoly Law,” 1994 U. Ill. L. Rev. 115, 177-178](https://advance.lexis.com/api/document/collection/analytical-materials/id/3S3T-WD60-00CW-508X-00000-00?page=177&reporter=8130&cite=1994%20U.%20Ill.%20L.%20Rev.%20115&context=1516831))

The combined effort of business and bureaucrats led to a further weakening of the AML in 1953. 411 The 1953 Amendments made the following major changes in the AML to reduce or eliminate various restrictions on business activities: (1) deletion of the **prohibition** against certain concerted activities; 412 (2) deletion of the prohibition  [\*178]  against private control organizations; 413 (3) deletion of the restriction on undue substantial disparities in bargaining power; 414 (4) deletion of the restriction on debenture holding; 415 (5) restriction on stockholding, interlocking directorates, mergers, or transfers of business only when they substantially restrained competition or employed unfair business practices; 416 and (6) approval of resale price maintenance contracts, depression cartels, and rationalization cartels under certain conditions. 417 All of the changes served to lessen or potentially lessen competition.

Upon the elimination of the restriction on undue substantial disparities in bargaining power, for example, economic concentration of power in and of itself was no longer a problem for business. The **elimination** of the **prohibition** against certain concerted activities meant that cartel behavior was **no longer illegal per se**. Most significantly, the authorization of depression and rationalization cartels under the Antimonopoly Law, with JFTC permission, **legalized cartels** under **certain conditions**. 418 Thus **the rule of reason**, **rather than per se illegality**, now governed cartel behavior. 419

**B---The central controversy in antitrust now is whether or not to return to per se prohibitions---there’s plenty of AFF ground but dividing the topic in this way is the only way we get link uniqueness and avoid bidirectionality.**

**Lipsky Jr. 21** (Abbott B. Lipsky Jr.-Adjunct Professor, Antonin Scalia Law School, George Mason University. "Biden Administration Antitrust" <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nh243> )

Given these historic economic and technical achievements, the consensus U.S. approach to antitrust that has prevailed since the time of General Dynamics and Sylvania deserves a victory lap. Paradoxically, however, the long-standing and solid consensus in favor of the post-Sylvania approach to antitrust now finds itself subject to hostile challenge on several fronts. Toward the end of the Obama administration, a Report of the **C**ouncil of **E**conomic **A**dvisers [242] suggested that U.S. competition was in decline. In June 2019 the House Judiciary Committee began an “Investigation of Competition in Digital Markets,” which resulted (inter alia) in the issuance of a Majority Staff Report and Recommendations (“MSRR”) on October 6, 2020. [243] Although the Committee took no official action on any of the MSRR’s long list of specific legislative proposals, the MSRR is essentially a Cassandra-style assessment of the present state of U.S. competition policy, bemoaning the allegedly **weak and declining** state of U.S. competition, attributing this to unsound **judicial reasoning** and failures of prosecutorial **conviction** at the federal **antitrust** agencies, and concluding with a long list of **suggestions** for action that would essentially **return U.S. antitrust** enforcement to its pre-1974 status, **with heavy use of per se rules**, structural presumptions, **and a long list of specific prohibitions** on the activities of the digital technology leaders (e.g., structural separation of distinct platform activities, line-of-business restrictions). Unsurprisingly, the thrust of the MSRR was **echoed** by a Democrat think tank report authored by veterans of the **Clinton** and **Obama** administration antitrust agencies. The latter report, Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress, [244] begins with the bold but unsupported and largely immaterial assertion that, “Excessive market power plagues the U.S. economy.” (Unsupported because the analysis cited is notably unpersuasive, and because whether such power is “excessive” can only be judged in relation to the competitive merits of the underlying conduct. Immaterial because market power resulting from breakthrough innovation that meets immense competitive success based on rapid and widespread consumer acceptance should not be reprehended under any responsible understanding of sound antitrust doctrine.) Broadly speaking, “Restoring Competition” echoes the analysis and many of the prescribed remedies offered by the MSRR.

8. The antitrust record of the **Biden** administration should be judged **primarily** on the strength and success of its resistance to the unsupported analysis and generally inappropriate recommendations of **these** two **reports**. Given the obvious current tension between radical and moderate elements of the Democrat Party, it is **anyone’s guess** as to how the White House will perceive and deal with these proposals to reject the unmistakable lessons of more than a century of antitrust enforcement history. The most promising course would be for the incoming administration to make agency leadership appointments and adopt policies reinforcing the clear and basic lessons of the ill-starred mid-century experiment (1943–1973) with structural presumptions, **per se rules** and willful ignorance of economic analysis. The worst-case scenario would be for the administration to create—by act or omission—any opening for a return to the primitive antitrust aggression that grew out of the New Deal. Finally, the Biden administration should recognize that many elements of the discredited formalistic antitrust approaches of the mid-20th century U.S. are now being promoted by antitrust authorities around the world. To ensure the integrity and success of the legal and regulatory environment for continuing U.S. innovation leadership, the Biden administration should encourage and assist foreign antitrust regimes in avoiding the same misguided enforcement instincts that overcame the U.S. antitrust system during the days of the per se/structuralist craze.

## CP — Advantage

## Adv — Inequality

#### COVID proves.

Walt 20, Belfer professor of international relations at Harvard University. (Stephen, May 13th, “Will a Global Depression Trigger Another World War?” *Foreign Policy*, <https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/>, Accessed 04-20-2021)

But war could still be much less likely. The Massachusetts Institute of Technology’s Barry Posen has already considered the likely impact of the current pandemic on the probability of war, and he believes COVID-19 is more likely to promote peace instead. He argues that the current pandemic is affecting all the major powers adversely, which means it isn’t creating tempting windows of opportunity for unaffected states while leaving others weaker and therefore vulnerable. Instead, it is making all governments more pessimistic about their short- to medium-term prospects. Because states often go to war out of sense of overconfidence (however misplaced it sometimes turns out to be), pandemic-induced pessimism should be conducive to peace.

Moreover, by its very nature war requires states to assemble lots of people in close proximity—at training camps, military bases, mobilization areas, ships at sea, etc.—and that’s not something you want to do in the middle of a pandemic. For the moment at least, beleaguered governments of all types are focusing on convincing their citizens they are doing everything in their power to protect the public from the disease. Taken together, these considerations might explain why even an impulsive and headstrong warmaker like Saudi Arabia’s Mohammed bin Salman has gotten more interested in winding down his brutal and unsuccessful military campaign in Yemen.

Posen adds that COVID-19 is also likely to reduce international trade in the short to medium term. Those who believe economic interdependence is a powerful barrier to war might be alarmed by this development, but he points out that trade issues have been a source of considerable friction in recent years—especially between the United States and China—and a degree of decoupling might reduce tensions somewhat and cause the odds of war to recede.

## Adv — FTC

# 1NR

## DA — Warming

#### Warming’s a conflict multiplier.

Scheffran 16, Professor at the Institute for Geography at the University of Hamburg and head of the Research Group Climate Change and Security in the CliSAP Cluster of Excellence and the Center for Earth System Research and Sustainability, et al (Jürgen, “The Climate-Nuclear Nexus: Exploring the linkages between climate change and nuclear threats,” <http://www.worldfuturecouncil.org/file/2016/01/WFC_2015_The_Climate-Nuclear_Nexus.pdf>)

Climate change and nuclear weapons represent two key threats of our time. Climate change endangers ecosystems and social systems all over the world. The degradation of natural resources, the decline of water and food supplies, forced migration, and more frequent and intense disasters will greatly affect population clusters, big and small. Climate-related shocks will add stress to the world’s existing conflicts and act as a “threat multiplier” in already fragile regions. This could contribute to a decline of international stability and trigger hostility between people and nations. Meanwhile, the 15,500 nuclear weapons that remain in the arsenals of only a few states possess the destructive force to destroy life on Earth as we know multiple times over. With nuclear deterrence strategies still in place, and hundreds of weapons on ‘hair trigger alert’, the risks of nuclear war caused by accident, miscalculation or intent remain plentiful and imminent. Despite growing recognition that climate change and nuclear weapons pose critical security risks, the linkages between both threats are largely ignored. However, nuclear and climate risks interfere with each other in a mutually enforcing way. Conflicts induced by climate change could contribute to global insecurity, which, in turn, could enhance the chance of a nuclear weapon being used, could create more fertile breeding grounds for terrorism, including nuclear terrorism, and could feed the ambitions among some states to acquire nuclear arms. Furthermore, as evidenced by a series of incidents in recent years, extreme weather events, environmental degradation and major seismic events can directly impact the safety and security of nuclear installations. Moreover, a nuclear war could lead to a rapid and prolonged drop in average global temperatures and significantly disrupt the global climate for years to come, which would have disastrous implications for agriculture, threatening the food supply for most of the world. Finally, climate change, nuclear weapons and nuclear energy pose threats of intergenerational harm, as evidenced by the transgenerational effects of nuclear testing and nuclear power accidents and the lasting impacts on the climate, environment and public health by carbon emissions.

#### Their author says warming is bad and we should try to solve it

Kerr et al. 19 – Dr. Amber Kerr, Energy and Resources PhD at the University of California-Berkeley, known agroecologist, former coordinator of the USDA California Climate Hub. Dr. Daniel Swain, Climate Science PhD at UCLA, climate scientist, a research fellow at the National Center for Atmospheric Research. Dr. Andrew King, Earth Sciences PhD, Climate Extremes Research Fellow at the University of Melbourne. Dr. Peter Kalmus, Physics PhD at the University of Colombia, climate scientist at NASA’s Jet Propulsion Lab. Professor Richard Betts, Chair in Climate Impacts at the University of Exeter, a lead author on the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) in Working Group 1. Dr. William Huiskamp, Paleoclimatology PhD at the Climate Change Research Center, climate scientist at the Potsdam Institute for Climate Impact Research. [Claim that human civilization could end in 30 years is speculative, not supported with evidence, 6-4-2019, https://climatefeedback.org/evaluation/iflscience-story-on-speculative-report-provides-little-scientific-context-james-felton/]

There is no scientific basis to suggest that climate breakdown will “annihilate intelligent life” (by which I assume the report authors mean human extinction) by 2050. However, climate breakdown does pose a grave threat to civilization as we know it, and the potential for mass suffering on a scale perhaps never before encountered by humankind. This should be enough reason for action without any need for exaggeration or misrepresentation! A “Hothouse Earth” scenario plays out that sees Earth’s temperatures doomed to rise by a further 1°C (1.8°F) even if we stopped emissions immediately. Peter Kalmus, Data Scientist, Jet Propulsion Laboratory: This word choice perhaps reveals a bias on the part of the author of the article. A temperature can’t be doomed. And while I certainly do not encourage false optimism, assuming that humanity is doomed is lazy and counterproductive. Fifty-five percent of the global population are subject to more than 20 days a year of lethal heat conditions beyond that which humans can survive Richard Betts, Professor, Met Office Hadley Centre & University of Exeter: This is clearly from Mora et al (2017) although the report does not include a citation of the paper as the source of that statement. The way it is written here (and in the report) is misleading because it gives the impression that everyone dies in those conditions. That is not actually how Mora et al define “deadly heat” – they merely looked for heatwaves when somebody died (not everybody) and then used that as the definition of a “deadly” heatwave. North America suffers extreme weather events including wildfires, drought, and heatwaves. Monsoons in China fail, the great rivers of Asia virtually dry up, and rainfall in central America falls by half. Andrew King, Research fellow, University of Melbourne: Projections of extreme events such as these are very difficult to make and vary greatly between different climate models. Deadly heat conditions across West Africa persist for over 100 days a year Peter Kalmus, Data Scientist, Jet Propulsion Laboratory: The deadly heat projections (this, and the one from the previous paragraph) come from Mora et al (2017)1. It should be clarified that “deadly heat” here means heat and humidity beyond a two-dimension threshold where at least one person in the region subject to that heat and humidity dies (i.e., not everyone instantly dies). That said, in my opinion, the projections in Mora et al are conservative and the methods of Mora et al are sound. I did not check the claims in this report against Mora et al but I have no reason to think they are in error. 1- Mora et al (2017) Global risk of deadly heat, Nature Climate Change The knock-on consequences affect national security, as the scale of the challenges involved, such as pandemic disease outbreaks, are overwhelming. Armed conflicts over resources may become a reality, and have the potential to escalate into nuclear war. In the worst case scenario, a scale of destruction the authors say is beyond their capacity to model, there is a ‘high likelihood of human civilization coming to an end’. Willem Huiskamp, Postdoctoral research fellow, Potsdam Institute for Climate Impact Research: This is a highly questionable conclusion. The reference provided in the report is for the “Global Catastrophic Risks 2018” report from the “Global Challenges Foundation” and not peer-reviewed literature. (It is worth noting that this latter report also provides no peer-reviewed evidence to support this claim). Furthermore, if it is apparently beyond our capability to model these impacts, how can they assign a ‘high likelihood’ to this outcome? While it is true that warming of this magnitude would be catastrophic, making claims such as this without evidence serves only to undermine the trust the public will have in the science. Daniel Swain, Researcher, UCLA, and Research Fellow, National Center for Atmospheric Research: It seems that the eye-catching headline-level claims in the report stem almost entirely from these knock-on effects, which the authors themselves admit are “beyond their capacity to model.” Thus, from a scientific perspective, the purported “high likelihood of civilization coming to an end by 2050” is essentially personal speculation on the part of the report’s authors, rather than a clear conclusion drawn from rigorous assessment of the available evidence.

#### In the present system the courts consistently and predictably water down antitrust enforcement against prohibitions

Crane 21 Daniel A. Crane Frederick Paul Furth, Sr. Professor of Law, University of Michigan 1-28-2021 Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021) https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital. Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.6 This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that.

#### Courts provide a shield against antitrust prohibition now

Hanley 21 Daniel A. Hanley is a policy analyst at the Open Markets Institute. April 6, 2021, How Antitrust Lost Its Bite And how to give it teeth again., https://slate.com/technology/2021/04/antitrust-hearings-congress-legislation-bright-line-rules.html

Comprehensive empirical analysis has revealed that the rule of reason has been a rubber stamp for even the most egregious antitrust conduct. A 2009 analysis revealed that 97 percent of cases analyzed under the rule of reason result in victories for defendants. That means corporations are effectively shielded from most antitrust violations.

#### Its unique—the courts are weakening antitrust enforcement now

Baer et al 20 Bill Baer visiting fellow in governance studies at The Brookings Institution, Jonathan B. Baker research professor of law at American University Washington College of Law, Michael Kades director for markets and competition policy at the Washington Center for Equitable Growth, Fiona Scott Morton professor of applied economics at the Massachusetts Institute of Technolog, Nancy L. Rose professor of economics at the Yale University School of Management, Carl Shapiro professor of the graduate school at the Haas School of Business and the Department of Economics at the University of California, Berkeley , and Tim Wu professor of law, science and technology at Columbia Law School. Restoring competition in the United States, https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf

Over the past 40 years, the federal courts have increasingly advanced a skeptical and cramped view of the antitrust laws. They often rely on economic assumptions that, at best, are no longer valid and, at worst, never were.10 As a result, the courts increasingly saddle plaintiffs with inappropriate burdens, making it unnecessarily difficult to prove meritorious cases and allowing anticompetitive conduct to escape condemnation.11 In two recent merger cases, for example, courts expressed doubt that a company would use its enhanced market power to increase its profits.12 Courts too often reject the best, direct evidence of anticompetitive harm, and instead require an elaborate analysis of indirect evidence of market definition, market share, and market power.13 In the recent Federal Trade Commission v. Qualcomm Inc. case, the U.S. Court of Appeals for the Ninth Circuit even concluded, bizarrely, that harm to customers is not a relevant anticompetitive harm.14 Together, flawed legal precedent and erroneous economic reasoning create a daunting hurdle to effective antitrust enforcement. The resulting harm goes far beyond the effects in individual cases. None of this is what Congress intended when it passed the Sherman Antitrust Act of 1890 and subsequent antitrust laws over the course of the 20th century. Without further legislative direction, the courts are almost certain to continue to narrow antitrust protections. Market power will increase. More consumers and companies will buy goods and services from dominant firms. More small business and workers will sell to, or work for, firms with monopsony power. Less innovation will occur. And the negative byproducts of market power—increased inequality, less diversity of voices, and increased concentration of political power—will worsen.

#### Perception of stricter antitrust enforcement by courts will chill corporate climate activism

Balmer 20 Paul Balmer is an associate in Tonkon Torp’s Litigation Department. He graduated from the University of California, Berkeley, School of Law in 2020, where he was the Senior Articles Editor of Ecology Law Quarterly and Treasurer of the Election Law Society, ARTICLE: COLLUDING TO SAVE THE WORLD: HOW ANTITRUST LAWS DISCOURAGE CORPORATIONS FROM TAKING ACTION ON CLIMATE CHANGE, 47 Ecology L. Currents 219 Export Citation 2020 Reporter 47 Ecology L. Currents 219 \*

III. ANTITRUST SCRUTINY FRUSTRATES CORPORATE ACTION ON CLIMATE CHANGE, FROM DETERGENT TO CARS The chilling effect of looming antitrust scrutiny is especially concerning when it comes to climate change. Climate change is a unique problem, not only in that it requires uniform, ideally coordinated action, but the positive effects of addressing climate change are uniquely abstract, intangible, and distant. While the costs of climate change to business are not easily predicted, 52the benefits of slowing or stopping climate change are most easily understood as mitigating expected losses, not generating positive economic gains. For example, limiting carbon emissions does not directly result in cheaper goods, in general. 53This lack of clear consumer benefits leads to several distinct problems for corporate climate action. A 2011 European Commission case demonstrates the challenges facing firms that try to raise sustainability standards while still making a profit. 54Competitors Procter & Gamble (P&G) and Unilever were fined over €300 million for agreeing on price and market share for new, more environmentally sustainable laundry detergent products. 55The firms had launched a voluntary effort to reduce environmental impacts by reducing packaging material, size, and washing machine energy use by creating a concentrated detergent that worked well in cold water. 56Worried about a "first mover disadvantage" in a market where consumers did not necessarily understand the benefits of concentrated detergent, the companies coordinated on the new product launches and agreed on ideal pricing. 57Though reduced energy use and reduced packaging waste are facially beneficial for society, P&G and Unilever ran afoul of competition laws by trying to mitigate--not exploit for profit--the effects of the new products on the market. 58This example questions the exhaustive focus on consumer price. The P&G and Unilever judgment is an increasingly relevant example as [\*227] companies make investments and commitments--often with competitors--that raise their own costs even as they help the world address climate change. Will those companies be scrutinized for passing on some of those costs to consumers? Should they be? In 2019, four automakers--Ford, Volkswagen North America, Honda, and BMW--announced an agreement with California to continue to meet stringent fuel efficiency standards in the future, even as the Trump Administration mulled plans to roll back nationwide standards. 59California, which can set its own auto emissions standards, has eagerly used its position as a large consumer market with progressive values to advance climate change goals. 60According to the July 2019 deal, the automakers will produce fleets with an average fuel efficiency of fifty miles per gallon by 2026--nearly the target agreed to during the Obama Administration. 61The Trump Administration had previously announced plans to freeze fuel efficiency requirements at a thirty-seven miles per gallon fleet average in 2020, 62setting up a direct conflict. In September 2019, DOJ trumpeted an antitrust investigation into those four automakers, alleging that the agreement among rivals could violate competition law. 63Letters from the DOJ asked the four companies to meet with the Antitrust Division regarding the "formation" of the deal. 64Delrahim doubled down on the probe in congressional testimony 65and in a USA Today op-ed, insisted that the "moral aspirations" of an agreement among competitors do not matter if there are anticompetitive effects. 66Delrahim warned of consumer harm, via higher prices, that would result from the deal. 67And higher prices certainly seem like the necessary result of meeting the stricter efficiency standards, regardless of cost savings to the planet or even to the consumer over the long term. 68President [\*228] Trump also focused on consumer price, asserting that the new standards would raise the cost of a car by more than $ 3,000. 69 The DOJ probe was widely denounced as political retribution, with no legitimate antitrust case to be made. Nevertheless, the mere threat of antitrust scrutiny can have dangerous effects. Antitrust scholar Herbert Hovenkamp noted that the automaker deal could still constitute an "agreement" under the Sherman Act, even though DOJ would face "significant hurdles" in establishing an antitrust violation. 70If the automakers "had discussed the [fuel efficiency] standards with one another and then voted to implement them," that would satisfy the first element of an antitrust offense. 71There are strong arguments that such an agreement among competitors should be legal either as form of political advocacy 72or by virtue of the state action doctrine, which permits anticompetitive conduct that has been authorized and is supervised by a state. 73Hovenkamp argued that the automaker agreement would likely be legal because compliance would increase the costs for the firms to manufacture cars, but not increase consumer prices. 74But if the automakers were to instead pass that increased cost on to consumers, that could result in a finding of liability. It is all too easy to imagine that the four automakers would choose not to internalize the costs of compliance with the fuel efficiency standards, but instead would choose to raise car prices to commensurate with the increased manufacturing costs. 75And any agreement on car price--even to keep prices the same, as P&G and Unilever did--could easily be considered collusive price-fixing and per se illegal. The Supreme Court has been clear that the "reasonableness" of set prices cannot cure their illegality. 76Further, the agreement could have the result of deterring a "low-cost, high-emissions entrant [\*229] from entering the market," 77which could be considered a per se illegal exclusionary group boycott, even though the agreeing automakers lack market power to enforce a boycott. 78And even if analyzed under rule of reason, there is no guarantee that the agreement could be successfully defended on the grounds that reducing emissions are good for society. In fact, as explained above, such abstract and distant benefits are exactly the type of justifications courts reject as being too divorced from the goals of antitrust policy. Even though DOJ quietly dropped the investigation in February 2020, 79the market results of the probe itself were almost immediate and significant. In October 2019, just weeks after the antitrust investigation began, other major automakers joined the Trump Administration as parties in litigation over California's right to set its own vehicle emissions standards, 80even though automakers had once stood united behind the Obama Administration's higher fuel efficiency standards. 81DOJ's abandoned investigation had sent a clear message to automakers: do not collude on car standards that will raise prices for consumers, or you will be investigated. With the threat of antitrust enforcement off the table for now, the Trump Administration finalized its dramatically lower fuel efficiency rule in March 2020. 82 Despite the naked political motive and the arguably weak legal argument for antitrust enforcement against the four automakers in this case, the specter of antitrust liability will not be limited to the auto industry. At a time when companies are making serious commitments to address climate change, even the most progressive companies are likely to think twice about making commitments with competitors on any industry standard that could lead to higher consumer prices. Companies could be discouraged from moving forward on climate, at a time when bold action is needed most.

#### The creation of fear of antitrust enforcement and unpredictable courts will crush climate activism

ICC 20 International Chamber of Commerce, Making competition law part of the solution to the climate challenge News • Paris, 10/12/202, <https://iccwbo.org/media-wall/news-speeches/making-competition-law-part-of-the-solution-to-the-climate-challenge/>

Issued on the eve of the fifth anniversary of the landmark Paris Agreement, the paper highlights how competition law – and, more specifically, the fear of unnecessarily restrictive antitrust enforcement – currently inhibits companies from working together to reduce their carbon footprints. There are signs that many businesses are eager to partner on sustainability efforts – recognising that co-operation is vital to achieve meaningful scale in addressing climate change and other environmental challenges. However, a growing body of evidence suggests that perceived competition law risks ultimately deter them from doing so. Commenting on the release of the paper, Simon Holmes – a member of the UK Competition Appeal Tribunal and one of the lead authors of the ICC paper – said: “Companies want to do more, but the fear of unnecessarily restrictive or unpredictable competition law enforcement can discourage them from reaching their sustainability goals. Competition policy cannot solve everything, but it can play an important role in helping business be cleaner, greener and more socially responsible.”

#### Fear of antitrust enforcement chills cooperation

ICC 20 International Chamber of Commerce, COMPETITION POLICY AND ENVIRONMENTAL SUSTAINABILITY1 26 November, 2020, <https://iccwbo.org/content/uploads/sites/3/2020/12/2020-comppolicyandenvironmsustainnability.pdf>

Fear of competition law certainly seems to be a factor which deters or chills collaboration in this area. For example, the Fairtrade Foundation published a set of interviews showing that business executives see competition law (and potential enforcement) as a barrier to sustainable collaborative efforts.33 As another example, several firms find it helpful to state that any sustainable activities involving cooperation occur only in a “pre-competitive” phase.34

#### Fear of Increased per se Antitrust Enforcement chills corporate climate activism—perception of increased per se enforcement is a link

Balmer 20 Paul Balmer is an associate in Tonkon Torp’s Litigation Department. He graduated from the University of California, Berkeley, School of Law in 2020, where he was the Senior Articles Editor of Ecology Law Quarterly and Treasurer of the Election Law Society, ARTICLE: COLLUDING TO SAVE THE WORLD: HOW ANTITRUST LAWS DISCOURAGE CORPORATIONS FROM TAKING ACTION ON CLIMATE CHANGE, 47 Ecology L. Currents 219 Export Citation 2020 Reporter 47 Ecology L. Currents 219 \*

II. ANTITRUST SCRUTINY OF CORPORATE COLLABORATION As corporations pursue socially responsible strategies--whether on climate change or other social causes--the threat of antitrust enforcement looms. This threat discourages collaboration among competitors, even to meet goals that are objectively positive for society. 30 Much of this chilling effect comes from the inconsistent and evolving nature of antitrust enforcement and a general lack of bright-line rules. Section 1 of the Sherman Act, the 1890 seminal antitrust law, prohibits "[e]very contract, combination, . . . or conspiracy in restraint of trade or commerce." 31Although every competitive action, and certainly every contract and agreement, restrains trade in some manner, courts have enforced section 1 to prevent "unreasonably restrictive" contracts, combinations, and conspiracies. 32Unreasonable restraints on trade, in turn, include those that "reduce output, raise price, or diminish competition with respect to quality, innovation, or consumer choice." 33But how those various bad outcomes interact, or when to prioritize lower prices over other antitrust goals, is unsettled and subject to frequent debate. 34 [\*224] Courts apply two different levels of analysis to challenged contracts, combinations, or conspiracies that restrain trade. The first type of analysis categorically rejects certain types of restraint as "per se unlawful" without a more searching inquiry into the economic context of the challenged conduct. 35 The second analysis is under the "rule of reason," a more detailed burden-shifting framework that considers procompetitive benefits of the conduct alongside an economic analysis of the restraint's harmful effects in a given market. 36Over time, courts have moved towards applying the rule of reason. 37Nevertheless, uncertainty over whether courts will consider an agreement per se unlawful has significant consequences for corporate collaboration for social good. Both price-fixing and group boycotts are often considered per se illegal, regardless of ethical merit. While unlawful price-fixing can be as blatant as competitors setting the price of a common good to increase profits, unlawful price-fixing also encompasses "agreements to artificially reduce output," which will in turn raise consumer prices. 38Professor Inara Scott uses the example of the volatile and scantly regulated coffee market, where coffee farmers could conceivably agree on environmental, labor, and price standards in order to reduce volatility and reduce retail prices. 39But such agreement, even to reduce prices, is likely to be considered per se illegal price-fixing. 40Similarly, conservation agreements to harvest fewer fish from a shared area--artificially reducing output--could be considered per se unlawful price-fixing because of the outcome on consumer price, regardless of the conservation goals. 41Likewise, the laudable policy goals of a group boycott had no impact on its per se illegality in Federal Trade Commission v. Superior Court Trial Lawyers Association, where a legal group's refusal to represent indigent defendants until their compensation increased was held unlawful. 42The protest succeeded in forcing the city government to increase compensation, but they still lost in court: the Supreme Court held that though the rates had been "unreasonably low" and the boycott's cause was "worthwhile," it was nonetheless a classic restraint of trade. 43In Professor Scott's coffee market example, a cooperative of coffee roasters likely could not refuse to work with a certain roaster in protest of objectionable practices, whether using child labor or wasteful techniques; 44this kind of group [\*225] boycott to encourage a competitor to adopt "greener" practices risks per se illegal classification. Because courts cannot even consider the obviously beneficial goals of those types of agreements, corporations would be wise to avoid them entirely.

#### Expanding enforcement under rule of would endanger cooperative agreements to solve warming

Koga 20 Dailey C. Koga J.D. Candidate, University of Washington School of Law, Class of 2021, COMMENT: TEAMWORK OR COLLUSION? CHANGING ANTITRUST LAW TO PERMIT CORPORATE ACTION ON CLIMATE CHANGE, 95 Wash. L. Rev. 1989, Dec 2020, Lexis/Nexis

Take the automakers' agreement as an example of how this kind of analysis could work. Imagine that the four car manufacturers had agreed amongst themselves to increase emissions standards rather than each independently conferring with California. Under current antitrust law, it is unlikely that this agreement would be illegal per se because it does not explicitly fix prices or reduce quantity. But under a rule of reason or quick look analysis, the agreement would almost certainly fail. Courts would first examine whether the automakers have market power and whether the agreement has anticompetitive effects. The four automakers at issue here likely have market power, 301and it would be fairly simple for the government to argue that the agreement would have anticompetitive effects - the agreement could increase the price of automobiles and reduce the number of options on the market. Assuming the court found [\*2023] anticompetitive effects, the automakers would then have the opportunity to put forth procompetitive justifications. Under current antitrust law, it is hard to imagine what those procompetitive justifications could be. Increased innovation may represent the most effective argument, but because the automakers would not actually add a new type of product to the market, that argument would likely be unsuccessful.

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## DA — Warming

#### Nordhaus is wrong – flawed data and tipping points

Keen 20 – Steve; Honorary Economics Professor, University College London. Revere Award winner from the Real World Economic Review for being the economist most likely to prevent a future financial crisis. (“Nobel prize-winning economics of climate change is misleading and dangerous – here’s why” The Conversation. September 9, 2020. https://theconversation.com/nobel-prize-winning-economics-of-climate-change-is-misleading-and-dangerous-heres-why-145567)//SR

While climate scientists [warn that](https://therealnews.com/stories/michael-mann-we-are-even-closer-to-climate-disaster-than-ipcc-predicts) climate change could be [catastrophic](https://www.nature.com/articles/d41586-019-03595-0), economists such as 2018 Nobel prize winner William Nordhaus assert that it will be nowhere near as damaging. In a [2018 paper](https://www.aeaweb.org/articles?id=10.1257/pol.20170046) published after he was awarded the prize, Nordhaus claimed that 3°C of warming would reduce global GDP by just 2.1%, compared to what it would be in the total absence of climate change. Even a 6°C increase in global temperature, he claimed, would reduce GDP by just 8.5%. If you find reassurance in those mild estimates of damage, be warned. In a [newly published paper](https://www.tandfonline.com/doi/full/10.1080/14747731.2020.1807856), I have demonstrated that the data on which these estimates are based relies upon seriously flawed assumptions. Nordhaus’s celebrated work, which, according to the [Nobel committee](https://www.nobelprize.org/prizes/economic-sciences/2018/summary/), has “brought us considerably closer to answering the question of how we can achieve sustained and sustainable global economic growth”, gives governments a reason to give climate change a low priority. His estimates imply that the costs of addressing climate change exceed the benefits until global warming reaches 4°C, and that a [mild carbon tax](https://www.nobelprize.org/uploads/2018/10/nordhaus-slides.pdf) will be sufficient to stabilise temperatures at this level at an overall cost of less than 4% of GDP in 120 year’s time. Unfortunately, these numbers are based on empirical estimates that are not merely wrong, but irrelevant. Nordhaus (and about 20 like-minded economists) used [two main methods](https://www.aeaweb.org/articles?id=10.1257/jep.23.2.29) to derive sanguine estimates of the economic consequences of climate change: the “enumerative method” and the “statistical method”. But my research shows neither stand up to scrutiny. The ‘enumerative method’ In the enumerative method, to quote neoclassical climate change economist [Richard Tol](https://www.aeaweb.org/articles?id=10.1257/jep.23.2.29), “estimates of the ‘physical effects’ of climate change are obtained one by one from natural science papers … and added up”. This sounds reasonable, until you realise that the way this method has been deployed ignores industries that account for 87% of GDP, on the [assumption](https://academic.oup.com/ej/article-abstract/101/407/920/5188437?redirectedFrom=PDF) that they “are undertaken in carefully controlled environments that will not be directly affected by climate change”. Nordhaus’s [list of industries](https://academic.oup.com/ej/article-abstract/101/407/920/5188437?redirectedFrom=PDF) that he assumed would be unaffected includes all manufacturing, underground mining, transportation, communication, finance, insurance and non-coastal real estate, retail and wholesale trade, and government services. It is everything that is not directly exposed to the elements: effectively, everything that happens indoors or underground. Two decades after Nordhaus [first made this assumption in 1991](https://academic.oup.com/ej/article-abstract/101/407/920/5188437), the economics section of the [IPCC Report](https://www.ipcc.ch/report/ar5/wg2/) repeated it: Economic activities such as agriculture, forestry, fisheries, and mining are exposed to the weather and thus vulnerable to climate change. Other economic activities, such as manufacturing and services, largely take place in controlled environments and are not really exposed to climate change. This is mistaking the weather for the climate. Climate change will affect all industries. It could turn fertile regions into deserts, force farms – and the cities they support – to move faster than topsoil can develop, create storms that can blow down those “carefully controlled environments”, and firestorms that burn them to the ground. It could force us to eliminate the use of fossil fuels before we have sufficient renewable energy in place. The output of those “carefully controlled environments” will fall in concert with the decline in available energy. The assumption that anything done indoors will be unaffected by climate change is absurd. And if this is wrong, then so are the conclusions based upon it. The same applies to the “statistical method”. As I explained in [a previous article](https://theconversation.com/4-c-of-global-warming-is-optimal-even-nobel-prize-winners-are-getting-things-catastrophically-wrong-125802), this method assumes that the relationship between temperature and GDP today could be used to predict what will happen as the whole planet’s climate changes. But while temperature isn’t a particularly important factor in economic output today, climate change will do much more than simply raise individual countries’ temperature by a few degrees – the disruption it will cause is enormous. The damage function Nonetheless, these optimistic estimates were used to calibrate Nordhaus’s so-called “damage function”, a simple equation that predicts a small and smooth fall in GDP

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from a given rise in temperature. But climate change will not be a smooth process: there will be tipping points. Nordhaus justified using a smooth equation by incorrectly [claiming](https://books.google.co.uk/books/about/The_Climate_Casino.html?id=TRf7AAAAQBAJ&redir_esc=y) that climate scientists, including [Tim Lenton](https://www.pnas.org/content/105/6/1786) from the University of Exeter, had concluded that there were “no critical tipping elements with a time horizon less than 300 years until global temperatures have increased by at least 3°C”. In fact, Lenton and his colleagues identified Arctic summer sea ice as a critical tipping point that was likely to be triggered in the next decade or two by changes of between [0.5°C and 2°C](https://www.pnas.org/content/105/6/1786): We conclude that the greatest (and clearest) threat is to the Arctic with summer sea-ice loss likely to occur long before (and potentially contribute to) GIS [Greenland ice sheet] melt. The reason these mistakes are so significant is that, despite the flawed assumptions on which it is based, this work has been taken seriously by politicians, as Nordhaus’s Nobel prize recognises. To these policymakers, a prediction of future levels of GDP is far easier to understand than unfamiliar concepts like the viability of the ecosystem. They have been misled by comforting numbers that bear no relation to what climate change will, in fact, do to our economies.