# 1NC

## 1NC — Off

### 1NC — CP

#### The fifty states and relevant subfederal entities should recognize protection of competition as the purpose of antitrust law and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies.

#### The fifty states ought to sue the United States federal government for full federal enforcement to recognize protection of competition as the purpose of antitrust law and favor structural remedies, including blocking mergers and instituting breakups, over conduct remedies, on the grounds of sovereign preemption state standing based in Article III.

#### The CP gives states standing to force the fed to do the plan — active preemption and existing underenforcement in antitrust justifies the grounds for the suit

Nash 17. (Jonathan Remy Nash, Emory University School of Law. Sovereign Preemption State Standing. Northwestern University Law Review, Forthcoming Emory Legal Studies Research Paper No. 17-427. 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2906614)

In this Article, I advance a blueprint for what I term “sovereign preemption state standing” to sue the federal government. Sovereign preemption state standing is, I argue, consistent with the Court’s precedents and serves to clarify them. It rests upon an injury that is neither economic nor purely sovereign; rather, it is a form of quasi-sovereign—or parens patriae—injury.21 A state asserts a parens patriae injury on behalf of its citizenry. Here, that injury arises upon a combination of (i) the federal government actively preempting state law, and (ii) the executive branch under-enforcing that federal statutory law. To be more specific, sovereign preemption state standing arises when, at a minimum, the following conditions are met. First, the state must allege that the executive branch has under-enforced the federal law in a way that is inconsistent with a governing statute. Second, the state must be able to point to preemption of state law; in particular, either the preemption of state law must be obvious and clear from a federal statute, or the federal government must have previously sought, or be concurrently seeking, to preempt state law. In addition, there must be a nexus between area of preemption and the area in which the executive branch is allegedly under-enforcing federal law. Sovereign preemption state standing arises naturally out of the function of states in the federal system. The Constitution recognizes the continuing importance of states and preserves much of the states’ police power authority. The Constitution thus validates the ongoing role of states in protecting the health and well-being of their citizens.22 A state is unable to fulfill this role when the federal government preempts state law; still, the state’s citizens will be protected if the federal government puts in place a federal law to fill the void left by the preemption of state law. Indeed, the constitutional logic is that the federal government acts in the stead of the state governments to protect the nation’s citizenry. In effect, the state government and the federal government both have parens patriae status; either can validly protect the interest of the people. A state has no standing to challenge the mere fact that the federal government has opted to supersede the state as regulatory parens patriae on a particular issue.23 However, this logic breaks down when, notwithstanding the Congress’s decision to put in place a federal law, the executive branch under-enforces that law. Now, the state can argue that the federal government is not properly exercising the protective power that the state effectively delegated to the federal government under the Constitution. And the injury to its citizenry that results from that underenforcement is the state’s basis for sovereign preemption state standing.

#### The doctrine that the cp establishes strengthens overall state participation within federal regulatory schemes which strengthens both levels of governance and spills over.

Roesler 16. (Shannon Roesler, Professor of Law, Oklahoma City University School of Law. STATE STANDING TO CHALLENGE FEDERAL AUTHORITY IN THE MODERN ADMINISTRATIVE STATE. Washington Law Review, 2016. https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1588/91WLR0637.pdf?sequence=1&isAllowed=y)

We live in a world of shared governance, a world in which the supremacy of federal law depends on state cooperation in its implementation, and the efficacy of state regulation depends on federal support and action. The federal administrative state has expanded in an attempt to solve complex economic and social problems that traverse state and even national boundaries. But particularly in the health, safety, and environmental arenas, federal standards would mean very little in the absence of state cooperation. Without the assistance of state administrative agencies and mechanisms, the federal government would be unable to implement these protections in every state or would implement them in a way that fails to account for important local differences. In this “post-sovereignty” world, we need a doctrine of state standing that recognizes the interests of states as co-regulators under some federal laws. The governance approach to state standing recognizes this regulatory reality. It allows states to challenge federal laws and actions when the underlying federal law contemplates state assistance in its implementation. When states share in the day-to-day business of regulating by implementing federal policy, they have a concrete governance interest in litigating the boundaries of state-federal authority and in challenging federal actions that affect states as regulatory partners. Massachusetts had such an interest in challenging the EPA’s decision not to regulate GHG emissions under the Clean Air Act. And because the Affordable Care Act contemplates state implementation of market reforms and exchanges, Virginia had a governance interest in challenging the Act as an unconstitutional exercise of federal power. When federal law preempts state law, state standing should not turn on whether the state can allege a traditional injury-in-fact. Indeed, as Texas v. United States demonstrates, a state can almost always show that federal law has some effect on state laws or expenditures. But indirect injuries should not be enough. The governance approach to state standing would ensure that states have a direct interest in resolving questions of intergovernmental authority. It would also help clarify state standing doctrine, making it less susceptible to judicial manipulation and facilitating the resolution of other threshold questions.

#### That solves warming and stabilizes markets

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Advocating a new body of regulation with the explicit concession of likely error and risks of regulatory derailment may seem self-defeating. Nevertheless, effective regulatory design, like effective investment strategies, must be designed for success yet anticipate unfavorable developments and error risks.1 And in the United States, due to our constitutional structures and linked political norms, any major regulatory choice must include decisions about how to utilize the regulatory roles demarked by federalism. What roles should be allocated to or preserved for federal, state, and local actors, or perhaps a combination of them all? Climate change policy choices remain the subject of partisan and rancorous contestation, including disputes over the right federalism choice. By leavening idealized policy solutions with attention to political and legal discord and regulation-market linkages, this Article illuminates the effects and dynamics of federalism hedging, a largely overlooked value of federalism structures retaining concurrent and often interacting federal and state roles. Federalism hedging refers to the regulatory choice to retain overlapping, interacting, and often intertwined federal and state roles even in a setting where the apparently ideal regulatory regime would rely on exclusive federal regulation that would preempt state roles. This Article argues that both federalism discourse and climate change policy debates have failed to analyze adequately how choices about federal and state roles can serve to hedge and even reduce risks of regulatory reversal and implementation failure. This Article’s analysis of federalism hedging operates at three levels. First, it introduces federalism hedging as a theory, explaining the attributes and dynamics of federalism hedging and situating it within recent scholarly and policy debates about the values and functioning of federalism. Second, it then illuminates federalism hedging with analysis of the regulatory challenges posed by climate change and the history of climate and clean energy progress and contestation. And, third, drawing on this theoretical and historical analysis, the Article makes a normative and prescriptive claim that retaining latitude for state and federal overlap can provide an array of benefits and, especially, reduce risks of disruptive policy reversals that could, in turn, undercut linked markets and regulatory progress. Such a hedging role is of especial importance where a body of regulation provides a crucial underpinning of a market and that market is itself essential to regulatory success. Retaining latitude for both federal and state roles also can serve in a valuable precautionary role conducive both to innovation and pragmatic adjustment in regulatory settings characterized by rapid change in business models and technology.2 This Article, like much federalism discourse, is actually not about what is constitutionally required. Instead, the Article builds on an increasingly robust body of scholarship analyzing how federal and state roles recognized by the Constitution should be utilized to further particular regulatory policy goals or political ends.3 Although federalism scholars often mention the benefits of federalism “redundancy” in risk regulation and benefits of dynamic interjurisdictional learning, little of this pro-overlap and interaction federalism literature devotes attention to the regulation-business link, regulatory risks of error, implementation failures, and political reversal risks.4 Another strain of federalism scholarship documents and analyzes the logic and legality of state and local climate and clean energy initiatives undertaken without a broader national agreement. Before comprehensive federal climate legislative proposals went down to defeat in 2009 and 2010, they spurred an important but truncated debate over what roles should be retained by states if the nation enacted a climate-focused federal cap-and-trade bill.6 Prominent scholars and stakeholders argued that because climate regulation addresses a global ill and logically must embrace market-based regulatory tools—most likely cap-and-trade-based regulation or use of pollution taxes—regulation should be structured to draw on the largest markets possible in order to facilitate the business search for costeffective means to reduce emissions.7 They often championed preemption of state climate roles. Final (but unsuccessful) bills, however, rejected such calls.8 And a recent 2017 proposal by leading Republican conservatives advocated enactment of a carbon tax regime, but coupled that proposal with a call for the elimination of other similarly targeted federal or state laws.9 In the absence of a tailored federal climate law, states nonetheless have made climate and clean energy regulatory progress and, as litigants, prompted a series of federal regulatory actions to address climate risks under the Clean Air Act and federal energy laws. And those federal regulatory interventions, especially the Clean Power Plan (CPP) targeting existing power plants’ greenhouse gas (GHG) emissions, were shaped by state experiences, sought to harness state regulatory capacity and creativity, and preserved state authority to do more.10 The role of federalism overlap and interaction as a hedge, especially in the climate regulation arena, is a subject of more than just theoretical interest. As this Article goes to press, the new administration of President Donald Trump has overtly declared plans to revisit and roll back climate progress.11 The extent to which this new administration can do so is substantially shaped by federal, state and business climate and clean energy progress, and past statutory federalism choices. This Article agrees that the ideal answer to a global challenge like climate change would be regulation at the largest scale possible, with minimized regulatory overlap. Nonetheless, mandating such authority allocations would be the wrong answer. The effects and political economic dynamics of federalism hedging analyzed in this Article reveal why. The value of federalism hedging links to likely regulatory implementation failures, regulatory reversal risks, and risks of unsettling linked markets. Responses to regulation will inevitably be ongoing and dynamic; whatever regulatory instruments and design are chosen will shape and change the political and market terrain, and vice versa.12 All policy reforms are “at risk,” facing post-enactment threats and a dynamic environment.13 The challenges of climate change make such regulatory derailment risks especially likely to be persistent threats. Federal harnessing of state roles, or at least preservation of the possibility of state regulation alongside federal regulation,14 can be part of an effective and durable regulatory design due to three effects linked to federalism hedging: heightened stakeholder incentives to commit to the federal regime; policy diffusion dynamics; and gradual entrenchment of supportive coalitions through a process of path dependence dynamics that result in “increasing returns” and “costs of exit.”15 Relatedly, tested regulatory and market accomplishments create a body of experience and record that can provide a bulwark against ungrounded claims of regulatory hardship, change coalitional political dynamics, and provide a fact-based foundation for future regulation.16 For market actors supplying goods and services to meet a regulatory goal, a web of regulation resulting from multiple regulators, or at least potential regulators, is far more resilient and resistant to wholesale derailment than would be complete dependence on a single federal regulatory scheme. Retaining that state authority, even if just a regulatory hedging strategy, fosters overall stability, creates room for regulatory innovation, and thereby creates conditions conducive to private investment to meet regulatory goals. Legal durability is always important, especially where the regulatory infrastructure is a critical underpinning of linked investments and markets. This is especially true in the setting of climate regulation.17 Always underlying climate politics and linked markets is fear of all governments, citizens, and market actors that their jurisdiction will act, but others will not. Such inaction or regulatory reversals of others can disadvantage the climate-regulating jurisdiction, lay waste to investors in related businesses and markets, and leave GHG levels still on the rise.18 The climate and clean energy regulatory infrastructure is already built on laws and regulations benefitted by federalism hedging.19 Concerted federal efforts to reverse course on climate change—a constant in all climate regulation battles and an even more certain scenario under the Trump administration—will surely slow and might even halt federally led climate progress. The existence of federalism hedging strategies, however, will likely reduce the scale of such reversals and also set the stage for future progress.

#### Warming leads to extinction

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 — DA

#### FTC fraud prevention is funded now---unexpected demands trade off

Bilirakis et al. 21 (Gus Michael Bilirakis is an American lawyer and politician serving as the U.S. Representative for Florida's 12th congressional district since 2013; Hon. Noah Joshua Phillips is a Commissioner at the Federal Trade Commission; Hon. Lina Khan is the Chair of the Federal Trade Commission, “Transforming the FTC: Legislation to Modernize Consumer Protection,” *Committee on Energy and Commerce*, 6/28/21, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer>)

Gus Bilirakis (3:12:44): Thank you. Our committee has worked extensively in a bipartisan manner to protect consumers from fraud and scams. Mr. Carter's Combating Pandemic Scams Act was enacted at the beginning of the year thanks to all of our leadership here. Representive Blunt Rochester's Fraud and Scam Reduction Act, as well as Representative Kelly's Protecting Seniors from Emergency Scams Act both cleared our chamber with bipartisan support this year. My bill, HR 2672, the FTC Reports Act, would require the FTC to report on fraud against our seniors. Commissioner Philips, how important is the work the FTC staff does to protect Americans from scams? Noah Josuha Phillips (3:13:33): Congressman, thank you for your question. The work we do to protect American consumers against frauds and scams, is our bread and butter as an agency. There is no work that makes me feel better as a commissioner, when we watch our ability to find bad guys, or taking money from American consumers, dipping into their life savings, and get that money back to them. So the work that you have done on the committee to provide funding, to provide tools for us to go after scam artists, is critical. And I think that needs to continue with the agency. Gus Bilirakis (3:14:05): Thank you, and Chair Khan, again, as you pursue other initiatives, when staff and resources be shifted away from the fraud program, which is so essential in preventing bad actors from harming our constituents? That's the question, please. Lina Khan (3:14:22): Sorry, could you repeat the question - when should services be shifted... Gus Bilirakis (3:14:26): Yes, of course. As you pursue other initiatives, when staff and resources be shifted away from your fraud program, which is so essential in preventing bad actors from harming our constituents? Lina Khan (3:14:40): Well, of course, we're always limited by the appropriations bills when it comes to thinking through how we're delegating resources across the agency. In certain instances, I think there are exigent needs that can arise in certain aspects. Gus Bilirakis (3:14:54): But you don't anticipate moving money from the fraud program, is that correct? Lina Khan (3:15:00): Not especially, but I mean, I think overall, we are trying to look through the prism of managerial efficiency and trying to understand how we can best use our resources, especially given some of the exigent circumstances and so we'll be continuing to make those determinations. Gus Bilirakis (3:15:15): I suggest that you not because this is such a very important program. Commissioner Wilson, can you elaborate on why the FTC Reports Act would also prove beneficial to increasing much needed transparency and the flow of information within the commission?

#### Unplanned expanded enforcement drains finite resources from existing priorities

Dafny 21, Professor of Business Administration at the Harvard Business School and the John F. Kennedy School of Government, and former Deputy Director for Healthcare and Antitrust in the Bureau of Economics at the Federal Trade Commission. Professor Dafny’s research focuses on competition in health care markets, and the intersection of industry and public policy. (Leemore, “The Covid-19 Pandemic Should Not Delay Actions to Prevent Anticompetitive Consolidation in US Health Care Markets,” *Pro Market*, <https://promarket.org/2021/06/10/covid-pandemic-consolidation-pandemic-monopoly/>)

However, as Commissioner Rebecca Slaughter, the current acting FTC chair has noted, these efforts have “faced resistance, with two of these recent victories only coming after district court setbacks.” Blocking a horizontal merger, even when it appears to be an “open and shut” case to a layperson, requires extraordinary resources, including large investigation and litigation teams, as well as economic and other subject matter experts who must analyze the transaction, lay out the case for blocking the merger, and rebut arguments advanced by Defendants’ attorneys and experts. To pick a recent example, consider the proposed merger of two hospital systems in the Memphis area, which the FTC filed to block in November 2020. Based on the FTC’s complaint, the merger would have reduced the number of competing systems from four to three and created a system with over a 50 percent market share. In the face of litigation, the parties abandoned the deal—consistent with this being a straightforward case. Although the FTC prevailed without a trial, it took nearly a year from the merger announcement to the abandonment. Over that period, the FTC likely devoted thousands of staff hours to the investigation and lawsuit and expended substantial taxpayer resources on expert witnesses. The higher the payoff from the merger for the merging parties—and the payoff in the case of an increase in market power can be substantial—the greater the incentive for defendants to invest extraordinary resources to fight a merger challenge. Even if there is only a middling (and in some cases, small) chance of getting a merger through, it may well be in the parties’ interest to see if they can prevail, absorbing the agencies’ (i.e., DOJ and FTC’s) scarce resources in that attempt and preventing them from devoting those resources to investigate other transactions or anticompetitive practices. The substantial resources required to challenge transactions, paired with stagnating enforcement budgets, may explain why authorities have elected not to challenge some horizontal transactions they would likely have challenged in previous eras. Using data on a wide range of industries, antitrust scholar John Kwoka documents that enforcers rarely raise concerns about changes in market structure that used to draw scrutiny—that is, mergers that yield five or more market participants.

#### Fraud funds terror operations

Tierney 18, George & Mary Hylton Professor of International Relations; Director Global Research Institute (GRI) (Michael, “#TerroristFinancing: An Examination of Terrorism Financing via the Internet,” International Journal of Cyber Warfare and Terrorism, vol. 8, no. 1, 01/2018, pp. 1–11)

2. TERRORIST FINANCING AND THE INTERNET

As mentioned, terrorists’ use of the internet has become a major concern for security officials across the world in recent years. Like many other users, terrorists have found that the internet is an invaluable tool to share information quickly, in order to disseminate ideas and link up with likeminded individuals (Jacobson, 2010; Okolie-Osemene & Okoh, 2015). In this manner, terrorists use the internet for a variety of purposes, including recruitment, propaganda, and financing. As scholars have also noted, the internet is an attractive option for extremists due to the security and anonymity it provides (Jacobson, 2010). Yet while there have been a growing number of studies completed on the ways in which terrorist organizations use the internet to recruit and indoctrinate others, there has been relatively little focus on the methods by which terrorists finance themselves through online activities. Some researchers have attempted to fill gaps in this area by broadly studying internet aspects of terrorism financing. However, research on this particular aspect of terrorism financing still appears to be lacking, with little focus on new methods of terrorist financing via the internet or a marrying of strategies to combat online financing trends available to practitioners in the field.

For instance, Sean Paul Ashley (2012) assessed the mobile banking phenomenon, which is prevalent in regions such as the Middle East and Africa, and provides extremists with the ability to easily connect to the internet and remit funds around the world. The decentralization of this kind of banking, due to the fact that brick-and-mortar facilities are not needed to conduct transactions, has allowed terrorist financiersto more efficiently move funds while avoiding detection from authorities. Other researchers,such as MichaelJacobson (2010), have studied the waysin which terrorists engage in cyber-crime to raise and move funds. For example, Jacobson (2010) found that online credit card fraud was a fairly major source of terrorist financing. By stealing a victim’s private credit information, terrorists are able to co-opt needed funds and provide support to themselves or their counterparts. Yet as James Okolie-Osemene and Rosemary Ifeanyi Okoh (2015) note, the internet is mostly used to augment and assist activities which occur in the physical world. In this way, it would appear that the internet is far more useful as a means to move funds globally in support of terrorism, rather than simply as a method to raise funds.

#### Nuclear war---cash is key

Hayes 18, Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University (Dr. Peter J., “Non-State Terrorism and Inadvertent Nuclear War”, NAPSNet Special Reports, 1/18/2018, <https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/>)

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16]

Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders.

The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions:

1. Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact.
2. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains.
3. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended.

At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational.

Accordingly, the effect of nuclear terrorism involving a nuclear detonation or major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack).

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

### 1NC — T

#### ‘Scope’ is the extent of the area dealt with or relevant to the core laws

Oxford Languages ND, “scope,” shorturl.at/wCDY3

scope

the extent of the area or subject matter that something deals with or to which it is relevant.

"we widened the scope of our investigation"

#### It’s bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies application of antitrust for already covered activities by establishing a new mechanism for enforcement — it does not curtail an immunity or exemption to the core antitrust laws

#### Vote negative — eliminating exemptions and immunities is the most predictable limit on the topic, setting a baseline for prep while allowing for unique innovation on both sides and focusing debates on the balance between antitrust and regulation

### 1NC — CP

#### The United States federal government should substantially increase tax incentives and grants for technology research and development, immigration to the US, and STEM training programs; AND eliminate all restrictions on foreign trade.

#### The United States federal government should establish equitable tax and redistribution schemes, job-training programs, community investments, and relocate government agencies to economically depressed areas.

#### Plank one invigorates innovation.

Savchuk 19, journalist, MS in urbanization and development. Citing Nicholas A. Bloom, Professor of Economics, School of Humanities and Sciences @ Stanford. Senior Fellow, Stanford Institute for Economic Policy Research. (Katia, 10-7-2019, "The Five Best Policies to Promote Innovation — And One Policy to Avoid", *Stanford Graduate School of Business*, https://www.gsb.stanford.edu/insights/five-best-policies-promote-innovation-one-policy-avoid)

The Top Five Policies for Boosting Innovation

Outlined in a recent paper in the Journal of Economic Perspectives, here are five policies that Bloom and his colleagues say can effectively drive innovation:

1. Offer Tax Incentives for R&D

The research is clear: Government tax subsidies and grants are the most effective way to increase innovation as well as productivity. Studies show that reducing the price of R&D by 10% increases investment in innovation by 10% in the long run. The U.S. has one of the least generous tax credit policies among developed countries, only cutting the cost of R&D spending by around 5%. Countries like France, Portugal, and Chile are the most beneficent, slashing the cost of R&D spending by more than 30%.

2. Promote Free Trade

Existing evidence suggests that opening trade can spark innovation by increasing competition, allowing new ideas to spread faster and dividing the cost of innovation over a bigger market. For example, researchers who summarized the findings of more than 40 papers in 2018 concluded that freer trade generally increased innovation in South America, Asia, and Europe (results from North America are more mixed). This policy can bear fruit in the medium run and doesn’t cost much to implement, but can increase inequality.

3. Support Skilled Migration

Even if there’s more funding for innovation, you won’t see it unless you have more scientists to do the research. The most direct way to increase the supply of researchers is to allow more high-skilled immigrants into the country. One paper showed that increasing the population of immigrant college graduates in the U.S. by one percentage point increased patents per capita by up to 18%.

4. Train Workers in STEM Fields

Another way to increase the supply of researchers in the long term is to invest in training them domestically. One option is to promote programs that boost the number of people studying science, technology, engineering, and math (STEM). Another is to expose more would-be inventors from disadvantaged backgrounds to role models and mentoring.

5. Provide Direct Grants for R&D

Compared to tax incentives, government grants — often to university researchers — can target projects that are likely to have the most long-term benefits. Research shows that grants to academics in turn results in more patents filed by private firms. However, it’s tough to track the impact of grants, since it’s possible that private R&D funding would have stepped up in their absence.

#### Plank 2 solves better than antitrust.

Lambert 20, Wall Family Chair in Corporate Law and Governance @ the University of Missouri Law School. (Thomas A., 4-17-2020, “The Case Against Legislative Reform of U.S. Antitrust Doctrine”, Legal Studies Research Paper Series, Research Paper No. 2020-13, pg. 10-11, <https://ssrn.com/abstract=3598601>)

The non-buyer/seller harms emphasized by so-called Neo-Brandeisians42—job losses, community impairment, wealth inequality, harms to democracy—fall into the second and third categories: they are better addressed by bodies of law other than antitrust, or best left unremedied.43 Wealth inequality is better handled through tax and redistribution schemes; harms to democracy, by campaign finance rules and restrictions on lobbying (and, most fundamentally, by limiting discretionary government power so that it cannot be used to procure private advantages for politically connected firms—a key reason not to create a new agency to regulate digital platforms).44 Job losses and harms to communities from the failure of smaller, less efficient businesses may be somewhat mitigated by job-training programs, community investments, and the relocation of government agencies to economically depressed areas. At the end of the day, though, obsolescence is a consequence of economic development; there will always be some losses when new and better displaces old and less good. Using antitrust to protect economic laggards is sure to reduce welfare in the long run. In the end, then, none of the harms emphasized by critics of the consumer welfare standard justifies abandoning the standard in favor of an approach that would pursue multiple goals.

### 1NC — T

**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.

#### They violate by establishing a new standard, not prohibiting something directly — at best, they are effects T

#### 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

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

### 1NC — K

#### The aff is structured by the cybernetic episteme — expanding its control into all aspects of life through democratic governance — absent an epistemic boycott to cybernetic monopolization, cybernetic capitalism causes extinction.

Emmelhainz ’21, Visiting Scholar, Vermont College of Fine Arts (Irmgard, November 2021, “Authoritarianism and the Cybernetic Episteme, or the Progressive Disappearance of Everything on Earth”, *e-flux journal*, No. 122, <https://www.e-flux.com/journal/122/430488/authoritarianism-and-the-cybernetic-episteme-or-the-progressive-disappearance-of-everything-on-earth/>)

By means of the cybernetic episteme, Silicon Valley has shaped the world we all live in. As we are poisoned equally by microplastics and fake news, losing our grasp of a shared reality, the “Silicon Six”—as Sacha Baron Cohen called the titans of Silicon Valley in a 2019 speech—propagate algorithm-fueled fear, propaganda, lies, and hate in the name of profit. As Baron Cohen pointed out, the major online platforms largely avoid the kind of regulation and accountability that other media companies are subject to. “This is ideological imperialism,” he said. “Six unelected individuals in Silicon Valley impos[e] their vision on the rest of the world, unaccountable to any government, and acting as if they are above the law.” He called digital platforms the greatest propaganda machine in history.

Democratic institutions have failed to reign in the information chaos and the destruction of the public sphere. As Shoshana Zuboff argues, we inhabit a communications sphere that is no longer a public sphere. She describes this situation as an “epistemic coup” that has taken place in four stages: First, by way of companies gathering personal data about us and then claiming it as their own private property. Second, through data inequality, which means that companies know more than we do. Third, through the epistemic chaos created by algorithms. And fourth, through the institutionalization of this new episteme and the erosion of democratic governance.

Baron Cohen observes that people can take a stand against platforms by recognizing our power to boycott them. (One example is the mass defection from WhatsApp to Telegram when the former announced that would share its user data with Facebook.) But we also need to defend the existence of facts and a shared reality, understanding the world not as something we see but as something we inhabit—treating life not as something we have, but as something we live. Anti-platform strategies might be accused of Luddism, but they are not necessarily opposed to technology—only to certain uses of technology.

It is also crucial that we regard the cybernetic episteme as inextricable from a broader malaise: humanity’s relationship to life and the planet is a toxic one. The very technologies that supposedly enable us to read, think, flourish, and desire are destroying the world we inhabit.

People continue to yearn for commonality, mutuality, and something to share. But the culture we currently share is largely mediated by repressive, profit-driven digital platforms. This is why we need to flee from the invasion of images, to distinguish between image and reality, and to affirm the opacity of the world and the ambiguity of language. We need to resist platform monopoly through presence, embodiment, immediacy, and human memory. We need to find ways to create life as opposed to turning it into data, combine emotional and intellectual knowledge, and regard visceral gut feelings as a form of human consciousness. We need to learn to exist in symbiosis with others and with the environment, not dislocated, uprooted, and detached.

## 1NC — Solvency

### 1NC — AT: ProCo

#### Adopting a new standard triggers regulatory capture and zeroes compliance

Melamed 20, Professor of the Practice of Law, Stanford Law School. (A. Douglas, “ANTITRUST LAW AND ITS CRITICS”, 83 ANTITRUST L.J., pg. 15-16, <https://lisboncouncil.net/wp-content/uploads/2020/11/MELAMED-Antitrust-Law-and-Its-Critics.pdf>)

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighting inequality or political power, on the one hand, against economic welfare, on the other.86 There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary.

That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than one hundred years old. It is not an accident that populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

Second, if antitrust decisions are perceived as being arbitrary, they will be more easily subject to regulatory capture because there will not be seemingly principled bases to cabin antitrust decision making. The beneficiaries of a regime susceptible to capture are likely to be the powerful, not the powerless. Ironically, therefore, adding equality and dispersion of economic and political power to the objectives of the antitrust laws could prove detrimental to those very objectives.

The third and perhaps most important cost is rooted in the general application and decentralized enforcement of antitrust law. 87 Antitrust law applies to almost all businesses, and it can be enforced by at least 52 government entities and any entity that has been harmed by an antitrust violation. Antitrust law thus has a widespread effect on business conduct throughout the economy. Its principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law.

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

### 1NC — AT: New Cases

#### Antitrust cases are uniquely complex and time consuming. The plan clogs federal dockets.

Keith Holleran 20, JD from GMU School of Law, 2020, “Establishing an Independent Antitrust Court,” https://awards.concurrences.com/IMG/pdf/4.\_establishing\_an\_independent\_antitrust\_court.pdf?56466/614536766da09a9216d1e0809972eb9aa909eb4d

The Antitrust Court would be more efficient than generalist courts simply because the Antitrust Court is made up of experts in antitrust law. “Judges who regularly handle a single class of cases are expected to dispose of their work in less time than their counterparts on generalist courts who see that class of cases less frequently.”5 Antitrust Court judges are made up of experts in the field, and so they would require much less preliminary research to get brought up to speed on a given case. Generalist judges may not see many antitrust cases each year, and so they would have to research antitrust law and gain an understanding of what needs to be resolved and proven in every case. As antitrust cases often involve highly complex economic models and arguments, more and more is required of generalist judges to make an accurate decision. An ancillary gain in efficiency is realized from generalist courts no longer having to work through complicated antitrust cases, as they are now brought before a specialized court.6 Antitrust cases can take years to resolve, and these cases can clog up a generalist court’s docket. “It is now generally accepted that the regular federal courts, and especially the courts of appeals, are critically overloaded.”7 Removing all of these cases to a specialized court frees up generalist judges to resolve other cases quicker.8

#### Efficient court review underpins patent-led innovation---that stops nuclear war and a range of existential threats

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.” Intellectual Property in “Interesting Times” It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative). The Changes In Intellectual Property Law Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy. Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws. What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] genocidal maniacs and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.” Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States. Patents The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)). The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity. The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements. The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6. While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter). Copyrights The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection. Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged. For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections. Trademarks Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights. Trade Secrets As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws. The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations. There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts. Privacy Rights It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena. America’s Need For Strong Intellectual Property Protection The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations. Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison. All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee. Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country. It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved. In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements. Conclusion As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## 1NC — Innovation

### 1NC — AT: Innovation

#### They do not solve---tech companies get their innovations stolen by China via hacking.

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Could critical innovations proliferate through other (non-cyber) means? Cyber-theft is one of many avenues for innovations to proliferate. China’s technological transfer programs for AI innovations, for example, mainly employ legal practices.167 These practices include direct technology purchases, talent recruitment programs like the Thousand Talents Plan, and the direct enrollment of Chinese students in American universities.168 Many of these avenues are poorly understood, only recently attracting American policymakers’ scrutiny. As a result, it remains unclear how firm size may affect AI companies’ exposure to technology transfer through non-cyber means. Niche firms largely reliant on Pentagon contracts might be more willing to prioritize their relationship with the U.S. government over engagement with foreign actors, for example, while multinational giants might struggle to avoid certain markets. On the other hand, smaller companies may be less sophisticated and more easily compromised when it comes to vetting potential collaborators, investors or acquirers

#### No military applications for AI

Elsa Kania 18, Adjunct Fellow with the technology and national security program at CNAS, 4/19/18, “The Pursuit of AI Is More Than an Arms Race,” https://www.defenseone.com/ideas/2018/04/pursuit-ai-more-arms-race/147579/

However, the concept of an “arms race” is too simplistic a way to think of the coming AI revolution. To confront its challenges wisely requires reframing the current debates.

First and foremost, AI is not a weapon, nor is “artificial intelligence” a single technology but rather a catch-all concept alluding to a range of techniques with varied applications in enabling new capabilities. Just in the near term, the utility of AI in defense may include the introduction of machine learning to cyber security and operations, new techniques for cognitive electronic warfare, and the application of computer vision to analyze video and imagery (as in Project Maven), as well as enhanced logistics, predictive maintenance, and more.

Despite the active research and development underway, these technologies remain nascent and brittle enough that “fully autonomous” weapons (or even cars) are hardly imminent. Moreover, militaries – even those that care less about laws and ethics – may be unwilling to relinquish human control due to the risks.

#### Aff doesn’t end Chinese modernization or take away military equipment — hypersonics thump

#### No US-China war

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In recent years, a radical overcorrection appears to have taken place among many American scholars and policymakers, exemplified by Allison [1], who have expressed increasingly confident beliefs that China’s intentions are hostile to the US [5, 15, 19, 39, 58]. These beliefs are especially pronounced within the Trump administration, but have now also been expressed many foreign policymakers from previous administrations and more traditional experts on US-China relations.

This confident pessimism has two sources, neither of which is well-founded. The first is categorical assumptions about the behavior of rising states or authoritarian states in general. Many realist scholars assume that China’s intentions are hostile to US interests because the anarchic nature of the international system engenders inexorable zero-sum competition for power [40, 46], a logically-untenable claim that has been roundly refuted.12 Others assume that divergences in American and Chinese political values and regime types necessarily imply incompatible preferences for the international order at the systemic level [1, 17, 48, 52]. Yet as has been widely recognized, these particular variables are themselves indeterminate, and interact with many other domestic-level factors to determine China’s aggregate national preferences for the international order ([12, 41]:521; [60]:44). Indeed, China may very well (though not necessarily) prefer to maintain the status quo order from which it has so overwhelmingly benefitted ([7, 8]:xix; [26, 55, 56]).

Secondly, other observers have extrapolated from China’s increased “assertiveness” on regional territorial issues since 2009 to conclude that China’s intentions are broadly revisionist across all issue areas [5, 63]. The apparent rationale is that because China had previously exhibited cooperative behavior regarding the SCS and restraint toward Taiwan that its cooperation with the international economic order must similarly be misrepresenting its true goals [18, 43, 50]. As such, an increasingly common conclusion is that China’s initiation of new regional institutions such as the AIIB and BRI and its state-led industrial policies, large current-account surplus, sovereign lending, and expanding FDI are evidence of its preference for a less liberalized international economic order.13

This conclusion is unwarranted, however. Although the scholarly consensus now holds that China was previously misrepresenting its true goals on narrow regional territorial issues, China has yet to exhibit clearly revisionist behavior regarding the rules and norms of the liberal international order more generally, even as it has become more powerful [8, 47, 55, 57, 60, 62]. As Alastair Iain Johnston has convincingly argued, China’s “assertive turn” is almost entirely limited to the South China Sea, and does not extend to the broader international order: “one should be cautious about generalizing from these maritime disputes to Chinese foreign policy writ large...it is possible for a state to be newly assertive on some limited range of issues while leaving other major policies unchanged” ([31]:46). Furthermore, Christensen points out that even when China’s actions are noncooperative – e.g., by gaining advantageous financing from Chinese state-owned banks for foreign energy deals, stealing intellectual property, computer hacking, or “dumping” exports to gain market share – this does not constitute rewriting the existing rules of the international order. “It simply constitutes free-riding on existing rules, an entirely different kettle of fish” ([8]:57).

In short, in some issue areas – human rights policy and specific regional territorial issues in East Asia – the US and China clearly have real conflicts of interests. Yet this does not give us insights into the compatibility of US and Chinese interests on other issues, e.g., the global economic order and governing structure. On the latter issues, the goals of two countries might very well be more compatible. The likelihood of this depends on the credibility of China’s cooperative signals in these issue areas, which, in turn, depends in part on the degree of US hedging toward China.

Particularly in the economic realm, China has sustained and even increased its support for the rules and institutions that define the status quo order, continuing to champion economic liberalization even as American leadership has wavered under President Donald Trump. China’s institutional initiatives, such as the AIIB and BRI, as well as its increased influence in existing institutions, have so far served to augment the existing rules and norms of the U.S.-led order rather than challenge them. Furthermore, China has continued to pursue domestic economic reforms that would increase its cooperation regarding trade imbalances, intellectual property and cybersecurity [10, 11, 24, 49]. Again, this cooperation certainly does not imply that China’s long-term intentions are unambiguously benign on these issues – strong incentives to misrepresent have still obtained, particularly in the absence of US hedging – but in contrast to the territorial issues that are the subject of China’s “assertive turn”, China’s intentions on economic and institutional issues remain significantly uncertain.

Disturbingly, the Trump administration has overtly drawn on the flawed assumptions characterized above and expressed confident beliefs that China’s intentions are hostile. According to the 2017 US National Security Strategy, China is a “revisionist power” that “want[s] to shape a world antithetical to U.S. values and interests...seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor” and is “attempting to erode American security and prosperity” [64].14 Several of Trump’s most prominent foreign policy and economic advisers have written extensively on China’s hostility, cast China as the primary threat to US national security and economic wellbeing, and characterized war with China as inevitable and perhaps even desirable [39, 48, 51]. Correspondingly, the administration has begun to implement policies of economic containment toward China, levelling over 200 billion dollars of tariffs on Chinese imports (and counting), blocking Chinese FDI in the United States, and demanding that China increase imports of US goods to reduce the bilateral trade imbalance to specific thresholds.

Ironically, the Trump administration’s hedging strategy now lends considerable (though incomplete) credibility to China’s sustained economic and institutional cooperation. Yet that very hedging strategy is likely driven by unjustified and inflexible pessimism about China’s intentions, making it unlikely that the current leadership will draw appropriate lessons from China’s subsequent behavioral signals. To the extent that China continues to defend and advocate a rules-based liberal economic order in the face of Trump’s economic hedging, this constitutes a more credible signal of China’s benign intentions than did its previous cooperation under unconditional US accommodation.

Unfortunately, the Trump administration’s apparent confidence about China’s hostility, based on seriously flawed assumptions, does not portend that the current leadership is likely to positively update its beliefs should China continue its general cooperation within the existing international order. Nor does Trump’s narcissistic psychological profile or the track record of his administration, which has consistently twisted evidence to support preconceived beliefs and suppressed contrary opinions [44]. Thus, current US foreign policy turns the logic of hedging on its head: rather than hedging due to uncertainty, policymakers have assumed China’s hostility and adopted policies of containment in response. This implies that if the Thucydides trap produces preventive war between the US and a hypothetically benign China, it will not be due to rational uncertainty, but rather because American leaders fail to rationally update their beliefs in response to China’s cooperative signals and instead falsely assume China’s intentions to be hostile.

## 1NC — Inequality

### 1NC — AT: Inequality

#### Tons of alt causes — every plank to the advantage CP proves

#### Market consolidation is low now.

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There is no market power crisis justifying antitrust reform.

A second purported ground for revising the antitrust laws is that the U.S. is currently experiencing some sort of market power crisis. Those asserting that such a crisis exists point to evidence of increasing industrial concentration in the U.S., growing profit margins, reduced venture capital investment (as start-ups throw in the towel knowing that they will be killed off by entrenched incumbents), and a reduction in the share of surplus being paid to laborers (purportedly a reflection of firms’ monopsony power). The popular press has jumped on this crisis narrative, with The Economist leading the way in proclaiming that “America needs a giant dose of competition.”13 Examined closely, though, none of the trends cited points to a market power crisis that could be averted or eased by more aggressive antitrust intervention.

Increased Concentration? With respect to increased concentration, the purported evidence concerns growing concentration at the industry—not market—level. One widely cited study, conducted in 2016 by the White House Council of Economic Advisers (CEA), examined broad industry sectors reflected in two-digit codes of the North American Industry Classification System (NAICS).14 Finding that “the majority of industries [saw] increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012,” it concluded that this was “suggestive of a decline in competition.”15 A study by The Economist reached a similar conclusion. Dividing the American economy into the “900-odd sectors” recognized by four-digit NAICS codes, the study found that two-thirds of the sectors became more concentrated between 1997 and 2012, with the weighted average revenue share of the top four firms in each sector rising from 26% to 32%.16 Like the CEA study, The Economist’s investigation has been widely cited as evidence of a market power crisis in the U.S.

The problem is that these studies of broad industrial sectors say nothing about market concentration, much less about the state of competition in markets (which may increase along with concentration if larger firms are more efficient and thus more formidable competitors). Antitrust is interested, quite properly, not in industrial concentration but in competition within markets—“ranges of economic activity in which competitive processes determine price and quality.”17 The CEA study looked at concentration in such vast sectors of the economy as “retail trade,” “finance and insurance,” and “transportation and warehousing.” These giant sectors include all sorts of firms that do not compete (e.g., a shoe store in Sheboygan and a grocer in Grand Forks are both part of the retail trade sector, but they don’t constrain each other’s prices and are thus not in the same market). The fact that the fifty largest companies in all of U.S. retail collectively account for a larger portion of all retail sales today than the top fifty such companies did fifteen years ago tells us precisely zero about the state of market competition in any particular market; for the CEA to suggest otherwise was absurd.18 And the same goes for The Economist’s study. Four-digit NAICS sectors are giant swaths like “other food manufacturing” (NAICS 3119), which lumps together “roasted nuts and peanut butter manufacturing” (NAICS 311911), “coffee and tea manufacturing” (NAICS 311920), and “spice and extract manufacturing” (NAICS 311942). Knowing that the four largest companies in all of “other food manufacturing” now earn a larger portion of that giant sector’s revenues than the four top companies did fifteen years ago simply says nothing about market concentration.

#### BUT Market concentration can’t explain inequality or wage stagnation, and antitrust won’t solve.

Bivens et al. 18, \*PhD, director of research at the Economic Policy Institute; \*\*PhD, MA, distinguished fellow at EPI; \*\*\*PhD, MSc, EPI’s vice president. (Josh, Lawrence Mishel, and John Schmitt, 4-25-2018, "It’s not just monopoly and monopsony: How market power has affected American wages", *Economic Policy Institute*, https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/)

This paper highlights some empirical findings from the new literature on the effect of labor and product market concentration on wages. We address three questions about market concentration that have not always been placed front and center in this literature. The first question is, “Does concentration adversely affect wages at a point in time?” The second question is, “Has concentration grown over time?” The third question is, “Can growing concentration by itself explain a significant portion of the change in wage trends in recent decades?” We find there is evidence to answer “yes” to the first and second questions but not the third. To be clear, the failure to answer affirmatively to the third question is not a criticism of these studies. The studies are not claiming that rising concentration alone can explain wage stagnation or inequality. Yet too many readers have taken these studies’ findings to this conclusion.

Finally, this paper makes two broader points about market power. First, market concentration is not the only source of power—particularly employer power—in markets. Second, even unchanged employer power (like that conferred by market concentration) can play a role in growing wage suppression and inequality if it is accompanied by a collapse of workers’ market power. The new literature on market concentration tells us a lot about employer power, but further exploration of what has happened to workers’ market power remains a key research agenda.

This paper highlights the need to tackle sluggish wage growth and rising inequality with a broad menu of policy interventions that go beyond those provided by competitive models to focus on employer and worker power, and even beyond the antitrust

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agenda suggested by focusing exclusively on market concentration.

Following are our key conclusions:

Labor market concentration is negatively correlated with wages, but the scope of its downward pressure on wages is limited.

New research shows that labor market concentration is negatively correlated with wages. However, the effect of labor market concentration is comparatively modest when scaled against what we consider the most significant wage trend in recent decades: the growing gap between typical (median) workers’ pay and productivity.

The new literature on market concentration has not yet provided concrete empirical estimates of a key labor market trend of recent decades—rising compensation inequality. This should be a priority for this research agenda in the future.

The new concentration literature does allow us to estimate the effect of market concentration on the share of overall income claimed by labor compensation. These estimates suggest that concentration has not risen enough, nor is its effect on labor’s share of income strong enough, to account by itself for an economically important share of the divergence between economywide productivity and the typical worker’s pay in recent decades.

The new research on labor market concentration implies that this concentration reduced wage growth by roughly 0.03 percent annually between 1979 and 2014, a decline that would explain about 3.5 percent of the total divergence between the median worker’s pay and economywide productivity over the same period.

One important study shows that the “average” labor market is “highly concentrated.” But differences between measures of concentration of the average labor market and the labor market experienced by the average worker have important implications for how to assess the impact of labor market concentration on long-term wage trends. In other words, many labor markets suffer from high degrees of concentration, but most people work in labor markets with only low-to-moderate degrees of concentration.

Nonetheless, labor market concentration is a particular challenge for rural areas and small cities and towns. This is an important finding for those looking to provide economic help to residents of those areas.

#### Can’t access Kupchan — says making internationalism popular is a pre-requisite to coop and that Biden has to do popular foreign policy actions — Afghanistan thumps & proves “America First” isn’t fixable.

#### Aff can’t fix gridlock in the Senate — republicans don’t become democratic post aff.

#### 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

MARKED

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.

# 2NC

## T — Exemptions

#### Independently---a ‘substantial increase’ must be change in kind, not merely magnitude.

Jeffrey S. Ross 18, Judge, California Superior Court, San Francisco County, “People v. Lawson,” 2018 Cal. App. Unpub. LEXIS 8132, Lexis

To prove the aggravated kidnapping allegation, there must be nonconsensual movement of the victim that is not merely incidental to the commission of the underlying crime, and the movement must substantially increase the risk of harm over and above that necessarily present in the underlying crime itself. (Martinez, supra, 20 Cal.4th at pp. 232-233.) The requirements of substantial movement and substantial increase in risk are separate, but interrelated, and are determined by consideration of the totality of the circumstances in a qualitative rather than quantitative evaluation. (People v. Dominguez (2006) 39 Cal.4th 1141, 1152, 47 Cal. Rptr. 3d 575, 140 P.3d 866 (Dominguez).)

#### I’ll insert this list:

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

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#### There’s DA uniqueness

McGinnis 14 (Anne, “Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform,” University of Michigan Journal of Law Reform, 47.2)

Most of the statutory exemptions enacted over the last one hundred years are still in place today, despite widespread changes in economic theory, market structures, and antitrust law in general. When initially enacted, many statutory exemptions were seen as special-interest legislation harmful to competition, competitors, and society. While others were beneficial when first put into law, even many of those have grown irrelevant over time. Some have even become as harmful as those enacted with the intent of benefitting special interests.

#### 3 — precision — it’s the most precise vision of the topic — the resolution has the first half modifies by “expand the scope” meaning that the only way to increase prohibitions is by expanding the scope AND it reflects the core distinction of the topic

Barak Orbach 14, Professor of Law, The University of Arizona College of Law, “The Implied Antitrust Immunity,” 7/1/14, https://awa2015.concurrences.com/IMG/pdf/ssrn-id2447718.pdf

Introduction

An important question antitrust courts have always been grappling with, is whether a federal regulatory scheme regulating a business activity impliedly precludes the application of antitrust law.2 [FOOTNOTE 2 BEGINS] 2 See, e.g., Donald F. Turner, The Scope of Antitrust and Other Economic Regulatory Policies, 82 HARV. L. REV. 1207, 1207 (1969) (“A pervasive and overriding issue of domestic economic regulatory policy is when and to what extent we should rely on free competitive markets and antitrust, and when and to what extent we should resort instead to regulation.”) [FOOTNOTE 2 ENDS] The argument, first introduced shortly after the enactment of the Sherman Act,3 is that the mere existence of a special regulatory scheme impliedly precludes the application of antitrust law. The persistent use of the argument contributed to the rise of the “implied antitrust immunity” doctrine, which in the past was also known as the “implied repeal doctrine” and today is also known as the “implied preclusion doctrine.”4

During its first seven decades, the implied immunity doctrine was largely an application of the presumption against implied repeals, which treats lawmaking as a rationalizable process and attempts to reconcile inconsistencies between statutes. 5 In the early 1960s, with no meaningful changes in its framing, the antitrust immunity departed from canon of statutory construction replacing the deference to legislative choices with a commitment to competition policy. In Philadelphia National Bank (“PNB”), Justice William Brennan’s clerk, Richard Posner, 6 gave new life to the immunity using the traditional wording of the presumption but stressing that the existence of “broad [regulatory] powers to enforce of the competitive standard” is the key criterion courts should consider when they evaluate “plain repugnancy.”7

During the five decades that have followed PNB, the implied immunity has considerably evolved, transforming from a presumption against implied repeals of antitrust law into a flexible evaluative framework whose underlying premises tilt its outcomes toward preclusion of antitrust law. Offering immunity from antitrust laws to regulated industries, the implied immunity is exceptionally important. Its interpretation influences the scope of antitrust law, giving courts the power to strike the balance between antitrust and other national economic policies. Notwithstanding, the doctrine, its transformation, and applications by courts are poorly understood. 8 This Article seeks to clarify the functions of the implied immunity, its structure, premises, and flaws.

#### The set of prohibited conduct is not coextensive with the set of conduct ‘within the scope’---here’s a picture!

Ida E. Wendt 13, Lecturer of European Law in the Department of International and European Law at Maastricht University, the Netherlands, “Article 101(1) TFEU and Its Field of Application With Regard to Professional Self-Regulation,” EU Competition Law and Liberal Professions: An Uneasy Relationship?, vol. 2, Brill, 01/01/2013, pp. 183–317 DOI.org (Crossref), doi:10.1163/9789004214514

Comparing the cases Gøttrup-Klim v DLG and Wouters seems to reveal a number of similarities, at least at fist sight. First of all, both cases concern provisions adopted by an association of undertakings that prohibit their members to adopt a certain conduct. Second, in dogmatic terms both cases exclude the disputed restrictive rules from the scope of Article 101(1) TFEU rather than trying to justify or exempt their restrictions under the third paragraph of Article 101 TFEU. A third similarity is the adoption of a larger perspective beyond the specific negative impact of the self- regulatory measures at stake. In both cases certain beneficial aspects were considered that the associations in question pursued.

However, while in Gøttrup-Klim v DLG the Court minutely examined all relevant factors to give a full appreciation of the competitive benefits and the associated harms of the measure at stake to eventually come to a positive conclusion, the application of the concept of ancillary restraints in Wouters revealed negative net effects on competition. It is noteworthy that the 1048 Wouters proviso in para. 109 reinforces the finding that the absolute prohibition of multi-disciplinary partnerships between lawyers and accountants is clearly restrictive of competition. This means that, different from Gøttrup-Klim v DLG, the Court in Wouters did not disqualify the rules of the association of undertakings from being restrictive of competition. Thus, based on the respective facts in Gøttrup-Klim v DLG and Wouters the Court came to opposite results in assessing the substantive concept of restriction of competition in Article 101(1) TFEU. The conclusion to be drawn at this point therefore is that with the salvation of the challenged NOvA regulation the Court in Wouters went beyond the dogmatics of the Gøttrup-Klim v DLG decision and earlier case law: the disputed NOvA provisions were not the least restrictive means to serve a legitimate commercial aim and thus did clearly not meet the first and third condition of the DLG-test on ancillary restraints.

The following section will turn to critically scrutinise which broader perspective the Court exactly adopted with the Wouters proviso, and in particular which criteria the Court applied to come to the final finding that the NOvA regulation did not infringe Article 101(1) TFEU.

4.2.2. Beyond ancillary restraints: limiting the reach of the prohibition of Article 101(1) TFEU

So far it has become clear that by salvaging the NOvA rules the Court in Wouters was bound to step outside the system of Article 101 TFEU, and in particular outside the concept of restriction of competition and the interpretation thereof, if it did not intend to leave it to the Commission to ascertain whether the disputed regulation qualified for an exemption under the third paragraph of Article 101 TFEU. However, by referring to 1049 Gøttrup-Klim v DLG the Court in Wouters presented its findings in paragraphs 97-110 as if they stayed within the boundaries of the ancillary restraints test. On face value it appears that the patterns of the two decisions indeed resemble each other, namely insofar as they employ a similar language:

DLG: ... it would not seem that restrictions laid down in the statutes [...] go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers1050;

Wouters: ...it does not appear that the effects restrictive of competition [...] resulting [...] from a regulation [...] go beyond what is necessary in order to ensure the proper practice of the legal profession.1051

However, while both decisions respectively refer to the ‘proper functioning’ and the ‘proper practice’, these two references are different in character. To begin with, the proper functioning of the purchase cooperative in Gøttrup-Klim v DLG had been defined in commercial terms (namely to maintain its contractual power) – as one can actually expect within the frame of Article 101(1) TFEU. More particularly, the proper functioning in DLG refers to that of the association in question as the author of the restrictive rules. Conversely, in Wouters the proper practice refers to the activity of the members of the association in question (namely by referring to the “proper practice of the legal profession”1052). Re- applying this logic to the case of Gøttrup-Klim v DLG would read as the ‘proper practice of the agricultural profession or sector’. Clearly, this was not the point of reference of the Court in Gøttrup-Klim v DLG.

The resulting shift in reference – i.e. from the ‘proper functioning’ of the author of restrictive self-regulatory rules in Gøttrup-Klim v DLG to the ‘proper functioning’ of the regulated activity in Wouters – can be explained by the different characters of the two associations at hand. The DLG was considered to exercise an economic activity itself, whereas the NOvA did not qualify as an undertaking for lack of an economic activity independent of that of its members. As a consequence, the DLG had a commercial 1053 relationship towards its members. By accepting the ancillarity of the 1054 DLG statutes the Court actually provided for a ‘right of (commercial) self- protection’ of the DLG against its dissident members. Conversely, while 1055 the NOvA very well interfered with the economic activity of others – as was DLG – it did not regulate for its own economic activity as DLG had been doing. Since the ‘proper functioning’ of the NOvA itself could 1056 thus not be decisive in commercial terms, it could not be the linchpin for the Wouters proviso. The focus thus naturally turned to the regulated activity as the subject of the competition law scrutiny. However, as becomes apparent from the Court’s reasoning preceding the Wouters proviso, the reference to ‘properness’ did not concern the proper economic practice of the legal profession, as that would have resulted in accepting the ancillary restraints defence as suggested by the government of Luxembourg. Therefore, the Wouters proviso could not but exceed the 1057 limits of the purely commercial purpose that the ancillary restraints doctrine sets.1058

The fundamentally different character of the Wouters proviso can be revealed by analysing the exact connection that the Court established between the two cases. To start with, it needs to be pointed out that the Wouters proviso did not actually refer to paragraph 40 of Gøttrup-Klim v DLG as reproduced above, but to paragraph 35 of that judgment. While there is no substantive difference between the two passages, they differ in that paragraph 35 carries an ‘addendum’ that is crucial in tracing the logic of the Wouters proviso: “So, in order to escape the prohibition laid down in Article [101(1) TFEU], the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers” (emphasis added). By referencing in particular the opening of paragraph 35 of Gøttrup-Klim v DLG the Wouters proviso diverts the attention from the concept of restriction of competition toward the agreement or decision escaping the prohibition of Article 101(1) TFEU. In Gøttrup-Klim v DLG these two ideas stand for the same, since a measure not restricting competition is not within the substantive scope of Article 101(1) TFEU and thus necessarily ‘escapes’ the prohibition laid down therein. The NOvA regulation, however, clearly came within the substantive scope of Article 101(1) TFEU, as the Court has underlined in Wouters.1059

Consequently, the Court’s reference to paragraph 35 of Gøttrup-Klim v DLG deludes into thinking that the concept of ancillary restraints would (also) offer a plain escape route from the prohibition laid down in Article 101(1) TFEU “despite the effects restrictive of competition”.1060 This reference thus leads to believe that the Wouters proviso would be an application of the concept of ancillary restraints – which, however, constitutes in turn a finetuned interpretation of the substantive element of Article 101(1) TFEU of restriction of competition. This misguidance of 1061 the Wouters proviso is provoked by taking paragraph 35 of Gøttrup-Klim v DLG out of its context. The ensuing result is twofold: first of all, Gøttrup- Klim v DLG is presented to formulate a more sweeping rule than it actually does, namely to limit the reach of the prohibition of Article 101(1) TFEU, rather than to refine the concept of restriction of competition. Secondly, 1062 safeguarding a clear competition restrictive measure that is proved not to qualify as an ancillary restraint, and which is not tested under Article 101(3) TFEU or Article 106(2) TFEU, constitutes a contra legem interpretation of Article 101(1) TFEU since that article states that all agreements, decisions and concerted practices shall be prohibited as incompatible with the internal market.

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Description automatically generated

In order to grasp the precise twist that the Wouters proviso applies to the scope of Article 101(1) TFEU it shall be further contrasted with the concept of ancillary restraints. The result of that exercise will allow to assess whether the Wouters proviso, by limiting the reach of the prohibition of Article 101(1) TFEU, establishes a sector specific exception or actually leads to a more principled exception from the article’s scope.

A shift in paradigm: ‘proper’ commercialisation of professional services

As set out earlier particular types of restrictions may not be prohibited under Article 101(1) TFEU if, in accordance with the first criterion of the ancillary restraints doctrine, they are necessary for the commercialisation of a particular type of product or service. This criterion was not met in Wouters as the commercialisation of legal services does not necessitate the unqualified prohibition of multi-disciplinary partnerships. The Court nonetheless recognised that limiting that commercialisation can be justified. Hence, squaring the prominent formulation of the Wouters proviso with the first criterion of the ancillary restraints doctrine reveals that the Wouters proviso cannot but mean to stipulate that it is the ‘proper’ commercialisation of legal service that necessitated the disputed type of restriction. To build a legal reasoning on some thought of ‘proper commercialisation’ almost has a moralising overtone. At this juncture it becomes clear that the Wouters proviso accepts as legitimate a main operation that pursues an aim other than to increase commercial net effects across the market. The concrete consideration of the Court in this respect will be scrutinised shortly below. Suffice it to state for now that the stance of the Court represents a deflection of the economic objective of Article 101(1) TFEU toward non-commercial considerations. A concept of properness thus determines a standard that is not anchored in the actual wording or objective of Article 101(1) TFEU and hence marks more than a simple shift in reference point.

#### Scope is jurisdictional---it’s totally independent from whether a substantive evaluation will end up prohibiting the conduct.

Ida E. Wendt 13, Lecturer of European Law in the Department of International and European Law at Maastricht University, the Netherlands, “Article 101(1) TFEU and Its Field of Application With Regard to Professional Self-Regulation,” EU Competition Law and Liberal Professions: An Uneasy Relationship?, vol. 2, Brill, 01/01/2013, pp. 183–317 DOI.org (Crossref), doi:10.1163/9789004214514

This is the reason why the scope of Article 101(1) TFEU is drafted to include associations of undertakings. Its aim is to effectively cover conduct that may have similar effects on competition like, but does not originate from, direct collusion between a multitude of undertakings. Put in the words of AG Léger in Wouters, Article 101(1) TFEU:

[S]eeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article [101(1) TFEU] covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.641

As with undertakings, no specific definition of ‘association’ exists in the Treaty. “As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-a-vis other economic operators, government bodies and the public in general.” This statement first of all 642 reflects that the concept of association is an accessory one. This means that without economically active members (i.e. undertakings) a collective body will not qualify as association of undertakings for the purpose of competition law. In symmetry with the functional approach that the Union Courts and the Commission apply to the concept of ‘undertaking’, the concept of ‘association’ equally is a relative one. A body may thus qualify as an association of undertakings when carrying out some of its functions, but not when performing others. Secondly, an association is usually 643 determined by some organisational structures, which in practical terms are necessary to materialise the more legal requirement flowing from the case law of vertical influence on the behaviour of the association’s members.644 This means that an association is an entity legally separate from its members. However, it does not have to have a legal personality, or even any formal constitution. Still, some rules on the decision making within 645 the association, and in particular on the appointment to the governing body, are usually to be found either in statutes or the constitution of an association – or even in statutory provisions in case a professional association is established by State legislation.646

Broadly speaking the classification as an association of undertakings in the sense of competition law depends on the objectives, tasks, rules and powers that determine its potential to influence and/ or control the behaviour of its members. The objectives of an association, e.g. a trade association, normally take some form of economic or commercial purpose. It is not necessary, however, that they be explicitly defined as pursuing the economic interests of the association’s members or that the association itself has an economic motive. Even a non-profit-making collective body can qualify as association of undertakings for the purpose of Article 101(1) TFEU.647 This is a logical consequence from the fact that an association usually does not exercise an economic activity – if it was, it would qualify as an undertaking, i.e. as an addressee of competition law in any event. Again a broad interpretation of the concept of association is justified by the fact that at this juncture we are still concerned with the jurisdictional scope of Article 101(1) TFEU, the width of which does not prejudge the result of the substantive competition law assessment that will be conducted at a later stage. Moreover, and as will be explained in greater detail below in section A.1.2., it is salient that an association is in the position to influence the conduct of its members by assuming the task and/ or 648 powers to adopt measures that help to eliminate uncertainties inherent in the competitive situation, e.g. by disseminating information amongst the members, in particular about prices, or by defining standards of business conduct. The dissemination of such information or standards will significantly facilitate the business planning of the fellow members to an association. It is such vertical coordination of economic behaviour that 649 Article 101(1) TFEU aims to prohibit.

## CP — State Standing

#### Independelty Kareiva says ocean acidification---extinction.

Merchant 15, Senior Editor, Motherboard at VICE Media, Inc. Citing Dr. Rachel Wood, a professor of carbonate geoscience at the University of Edinburgh. (Brian, VICE, April 9, 2015, http://motherboard.vice.com/read/the-last-time-our-oceans-got-this-acidic-it-drove-earths-greatest-extinction)

The biggest extinction event in planetary history was driven by the rapid acidification of our oceans, a new study concludes. So much carbon was released into the atmosphere, and the oceans absorbed so much of it so quickly, that marine life simply died off, from the bottom of the food chain up. That doesn’t bode well for the present, given the disturbingly similar rate that our seas are acidifying right now. Parts of the Pacific, for instance, are already so acidic that sea snails’ shells begin dissolving as soon as they’re born. The biggest die-off in history, the Permian Extinction event, aka the Great Dying, extinguished over 90 percent of the planet's species—and 96 percent of marine species. A lot of theories have been put forward about why and how, exactly, the vast majority of Earth life went belly up 252 million years ago, but the new study, published in Science, offers some compelling evidence acidification was a key driver. A team led by University of Edinburgh researchers collected rocks in the United Arab Emirates that were on the seafloor hundreds of millions of years ago, and used the boron isotopes found within to model the changing levels of acidification in our prehistoric oceans. Through this “combined geochemical, geological, and modeling approach,” the scientists say, they were able to accurately model the series of “perturbations” that unfolded in the era. They now believe that a series of gigantic volcanic eruptions in the Siberian Trap spewed a great fountain of carbon into the atmosphere over a period of tens of thousands of years. This was the first phase of the extinction event, in which terrestrial life began to die out. The study explains that the second phase of the event happened much more quickly. “During the second extinction pulse, however, a rapid and large injection of carbon caused an abrupt acidification event that drove the preferential loss of heavily calcified marine biota," the authors write. So does this study mean we should be especially worried about the phenomenon taking hold today? "Yes," said Dr. Rachel Wood, a professor of carbonate geoscience at the University of Edinburgh and one of the paper's authors. "We are concerned about modern ocean acidification," she told me in an email. "Although the amount of carbon added to the atmosphere that triggered the mass extinction was probably greater than today's fossil fuel reserves, the rate at which the carbon was released was at a rate similar to modern emissions." In other words, the Siberian Traps probably spewed out more carbon in total, but we're spewing out just as fast. And that's overwhelming the planetary equilibrium. "This fast rate of release was a critical factor driving ocean acidification," Wood said. Why? "The rate of release is critical because the oceans absorb a lot of the carbon dioxide (CO2) from the atmosphere, around 30 percent of the carbon dioxide released by humans," Wood said. "To achieve chemical equilibrium, some of this CO2 reacts with the water to form carbonic acid. Some of these molecules react with a water molecule to give a bicarbonate ion and a hydronium ion, thus increasing ocean 'acidity' (H+ ion concentration)." Marine animals whose skeletons are comprised of calcium carbonate—and that’s a lot of them (think snails, coral), which form a crucial part of the food chain—dissolved or couldn’t form in the first place. And that is what’s happening today. "Between 1751 and 1994, surface ocean pH is estimated to have decreased from approximately 8.25 to 8.14, representing an increase of almost 30 percent in H+ ion concentration in the world's oceans," Wood said. That's a major uptick in ocean acidity in a relatively short amount of time, and it's happening because humans have burned fossil fuels like coal, oil, and gas with reckless abandon since the Industrial Revolution. That's fueling climate change, of course, as well as its less-discussed, but potentially equally cataclysmic sibling, ocean acidification. "Scientists have long suspected that an ocean acidification event occurred during the greatest mass extinction of all time, but direct evidence has been lacking until now,” study coordinator Dr. Matthew Clarkson said in a statement. “This is a worrying finding, considering that we can already see an increase in ocean acidity today that is the result of human carbon emissions." Much of marine life is already in grave danger from acidification. It's contributing to the bleaching of coral reefs around the world, and, as mentioned before, it's killing sea snails in the Pacific. If it worsens, acidification could threaten the whole of the marine biosphere, and, obviously, the land-dwelling creatures that depend on it too. In 2013, marine scientists released a "State of the Oceans" report that found that the rate of current acidification was “unprecedented.” They noted that the seas were acidifying faster than any point in the last 300 million years. That study didn’t take into account the new data, of course, but that’s the timeline we’re dealing with: The last time the oceans were so acidic was in the midst of the greatest extinction in the history of the world.

#### The perm is the aff trying to fix the enforcement problems of the SQUO — this removes the ground of the suit

Watson, 91 — Corey C. Watson, former clerk for the Ninth Circuit Court of Appeals, magna cum laude graduate of Northwestern University School of Law, and a former associate editor of Northwestern's Law Review, 1991 (“Mootness and the Constitution,” *Northwestern University Law Review*, (86 Nw. U.L. Rev. 143), Fall, Available Online to Subscribing Institutions via Lexis-Nexis)

A case becomes "moot" when "its factual or legal context changes in such a way that a justiciable question no longer is before the court." n32 [\*147] Defining mootness as the absence of a justiciable issue, however, merely raises the question of what is meant by the term "justiciability." n33 The Supreme Court has distinguished a justiciable controversy "from one that is academic or moot." n34 Accordingly, a justiciable controversy is one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." n35 The controversy must be "real and substantial[,] . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." n36 The rule that a court will not decide a moot case is recognized in virtually every American jurisdiction. n37 With the concepts of mootness and justiciability so loosely formulated, some scholars have attempted to understand mootness jurisprudence by cataloguing the various circumstances which render a case moot. n38 A case may become moot because the alleged wrong passes and cannot be expected to recur; n39 because a defendant pays money owed [\*148] and no longer wishes to appeal; n40 because a criminal defendant dies while appealing his case; n41 because the law under which the suit was brought has since changed; n42 or because a party is no longer affected by the challenged statute. n43

#### That’s specifically true in the context of states standing

Hessick 18  
F. Andrew Hessick, Law Prof-UNC, and William P. Marshall, Kenan Prof of Law-UNC, State Standing to Constrain the President, Chapman L. Rev. 21(1), 2018

Courts can hear cases only when parties have requisite standing. This means that presidential actions may be able to escape judicial review because of standing limitations. For example, if the lower courts had not granted standing to Texas to challenge President Obama's Dreamers initiative, which declared a policy of not enforcing immigration laws against a large class of immigrants, then it is likely no party would have been able to maintain that suit. 35Link to the text of the note To establish standing to challenge a policy, an individual must show he suffered an injury in fact because of that policy. 36Link to the text of the note The Dreamers policy of not enforcing the law does not obviously injure anyone; instead, it confers a benefit on the immigrants covered by it. Giving the states standing to sue, therefore, may be the only way through which a president's actions can be subject to judicial scrutiny. The next sections accordingly examine the current law governing state standing and discuss whether the scope of state standing should be adjusted so as to provide an additional check on the expansion of presidential power. State Standing to Sue the Executive Under Current Law State suits against the president and other federal executive officials seeking to force compliance with the Constitution and federal law invariably raise questions of Article: III standing.37 Standing is one of the various doctrines that implement the "cases" and "controversies" provision in Article: III.38

[Footnote 37]

Although the most heavily litigated, standing is not the only obstacle states face in suits against federal actors. For example, states must also demonstrate their claim is ripe and not moot. Although the United States and its officials also enjoy sovereign immunity in suits by states, Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983), section 702 of the Administrative Procedure Act waives that immunity for suits seeking non-monetary damages against an "officer or employee" of the United States. 5 U.S.C. § 702. Accordingly, so long as a suit does not seek damages, sovereign immunity should not be an obstacle to state suits against federal officials.

[End Footnote]

#### Underenforcement now + the 1AC cards prove underenforcement now cuz plan interp key

AAI 20 American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society ( 4-14-2020, “THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S.” <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf> )

Where are we now? Antitrust enforcement is at a crossroads. The U.S. economy struggles with the cumulative effects of decades of under-enforcement and a step-down in current enforcement levels under the Trump administration. Despite its anti-corporate concentration rhetoric on the campaign trail, key metrics of cartel and merger enforcement have declined since the Trump administration took over.6 And in 2017 and 2018, the DOJ did not open one monopolization investigation, the longest span of inattention to dominant firms in the last 50 years.7 The compound effect of these problems is to imperil the very power of the antitrust laws. For example, the role of merger control is to prevent harmful mergers, but lax enforcement of hundreds of transactions over time has resulted in “creeping” concentration in many markets, resulting in tight oligopolies and dominant firms. Merger enforcement is now effectively constrained to preventing only the most patently anticompetitive mergers and acquisitions, and competition problems must instead be addressed through enforcement against collusive and exclusionary conduct. But these areas of law face their own limitations, including the difficulty of policing tacit agreements, which the courts do not recognize as illegal, and high standards for showing monopolization. The result is that the enforcement balance among the three areas of antitrust law—mergers, agreements, and monopolies—has been fundamentally and perhaps irrevocably disturbed.

## Solvency

## Adv — Innovation

## Adv — Inequality

# 1NR

## DA — FTC Tradeoff

#### **Enforcement against multiple companies magnifies the link.**

Sutner 20, News Director @ TechTarget. (Shaun, 12-15-2020, "Efforts to break up big tech expected to continue under Biden", *SearchCIO*, <https://searchcio.techtarget.com/news/252493702/Efforts-to-break-up-big-tech-expected-to-continue-under-Biden>)

Biden pushed on antitrust

Antitrust activists, though, are optimistic about the prospects of a Biden administration clamping down on big tech -- an outcome they argue is long overdue, with decades of light enforcement of antitrust laws. They are pushing Biden toward aggressive antitrust policy. Thirty-three antitrust, consumer and progressive groups in a letter on Nov. 30 urged Biden to reject the influence of big tech vendors and to exclude big tech executives, lobbyists, lawyers and consultants from his administration. Prominent among the signatories was Public Citizen, the liberal consumer advocacy group that has called for Biden to triple the FTC's annual funding, from $400 million to $1.2 billion. "At the front end we want these investigations to be pressed. There are supposed to be investigations of Amazon and Apple and we believe there are cases to be brought there," said Alex Harman, competition policy advocate at Public Citizen and former chief legal counsel to Sen. Mazie Hirono (D-Hawaii). "It's a lot to bring big antitrust cases against multiple companies, and that requires resources," Harman said. "As a lawyer, I don't want to say 'Biden does this,' but we want results that structurally change these companies. We don't want quick resolutions and quick settlements."

#### FTC has sufficient resources now to fight fraud. But they are stretched to capacity.

Soto et al. 21, American attorney and Democratic politician from Kissimmee, Florida, who is the U.S. Representative for Florida's 9th district; Lina Khan is Chair at the FTC; Noah Joshua Phillips is Commissioner at the FTC; Rohit Chopra is Commissioner at the FTC; Christine S. Wilson is Commissioner at the FTC, (Darren, “Transforming the FTC: Legislation to Modernize Consumer Protection,” Committee on Energy and Commerce, 6/28/21, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer>)

Noah Joshua Phillips (5:06:17): Thank you, Congressman, I'd just start with the fact that when I began, our budget was about 309 million, I think, something like that, and the latest congressional budget justification has us at 389. So there's been a substantial increase in the ask, including some funding from Congress. So I think it's important to track how those resources are used. But I do think we can do more with more. That's, that's certainly a true thing. But I think it's important to take care in how we spend what we have.

Darren Soto (5:06:46): Thank you. Commissioner Chopra.

Rohit Chopra (5:06:48): Sir, I think - I know every agency says that they need more resources. But just looking at the data, we are stretched completely to capacity and the rubber band is snapping. And if we need to effectively enforce the law, we need the resources. There are so many laws that Congress has recently passed, whether it's relates to opioids or so many other topics, that the FTC has not brought a single law enforcement action on. That's not just resources. That's also Commissioner accountability. But resources will certainly help.

Darren Soto (5:07:25): Commissioner Slaughter.

Christine Williams (5:07:30): Commissioner Slaughter had to leave, but Commissioner Wilson is here. And I would say that our hard working staff have been even harder working during the last 18 months. They are teleworking but they are working incredibly hard to stay on top of the increase in mergers as well as the increase in COVID scams. And I agree with Commissioner Phillips, it's important to understand how we are spending additional appropriations. But I also know that there are many different areas of the economy where Congress has expressed interest in our being very active and aggressive. And it is difficult to do that unless we have the appropriate resources to do that.

#### The FTC is tentatively committed to fighting fraud now. But it’s under the radar.

Kaufman 12-21-2021, JD (Daniel, “What Is a Rule-A-Palooza – Another Public Federal Trade Commission Meeting,” JD Supra, <https://www.jdsupra.com/legalnews/what-is-a-rule-a-palooza-another-public-1946261/>)

Commissioner Slaughter discussed scammers who impersonated her when she was acting chair in an effort to steal COVID-19 relief funds from consumers. Commissioner Phillips noted that he has been concerned that the agency was turning away from fraud enforcement and also noted the recent decline in complaints being issued from the agency. And Commissioner Wilson made it clear that although this rule is worthy of being initiated, the broad “rule-a-palooza” described in the Statement of Regulatory Priorities is hugely problematic. And she asked folks to check out her dissent, linked above. Chair Khan noted that government and business impersonation schemes have “skyrocketed during the pandemic” and were targeting seniors, communities of color and small businesses. And I would be remiss if I didn’t have at least a few words to say about the public comment portion of the show, and of course the continued rigorous oversight of time limits by the FTC’s awesome head of public affairs. (And I know that sounds absolutely sarcastic, but I swear it isn’t intended as such – she is the best.) A smaller-than-usual number of participants addressed issues including impersonation fraud and the FTC’s recently launched supply chain study. And for my closing thoughts, I will reiterate Commissioner Phillips’ point. I too have been concerned that, up until now, the new FTC leadership has been pretty quiet about the agency’s fraud work, causing many to wonder whether the agency would decrease its traditional fraud focus. It remains to be seen, but I certainly hope agency leadership realizes how important it is for the agency to continue to be a leader in tackling fraud. But let’s set expectations about this rulemaking: despite the controversial streamlining of FTC rulemaking, there is a long, long road ahead for this rulemaking. And if you are interested in the rulemaking, you can find background information and questions that will help frame the issues here. And trust me – your comments in rulemakings are reviewed closely by FTC staff.

#### Under the radar priorities are most likely to get cut during resource triage

McCabe 18, covers technology policy from The Times' Washington bureau, formerly of Axios (David, “Mergers are spiking, but antitrust cop funding isn't,” Axios, <https://www.axios.com/antitrust-doj-ftc-funding-2f69ed8c-b486-4a08-ab57-d3535ae43b52.html>)

The number of corporate mergers has jumped in recent years, but funding has stagnated for the federal agencies that are supposed to make sure the deals won’t harm consumers. Why it matters: A wave of mega-mergers touching many facets of daily life, from T-Mobile’s merger with Sprint to CVS’s purchase of Aetna, will test the Justice Department's and Federal Trade Commission’s ability to examine smaller or more novel cases, antitrust experts say. What they’re saying: “You have finite resources in terms of people power, so if you are spending all of your time litigating big mergers … there might be some investigations where decisions might have to be made about which investigations you can pursue,” said Caroline Holland, who was a senior staffer in DOJ’s Antitrust Division under President Obama and is now a Mozilla fellow. What's happening: More mergers are underway now than at any point since the recession. The total number of transactions reported to the federal government in fiscal year 2017, and not including cases given expedited approval or where the agencies couldn't legally pursue an investigation, is 82% higher than the number reported in 2010 and 55% higher than the number reported in 2012. Funding for antitrust officials who weigh the deals hasn’t kept pace. The funding for the Department of Justice’s antitrust division has fallen 10% since 2010, when adjusted for inflation. That's in line with the broader picture: not adjusting for inflation, the Department's overall budget increased just slightly in 2016 and 2017. Funding for the FTC has fallen 5% since 2010 (adjusted for inflation). An FTC spokesperson declined to comment on funding levels and Antitrust Division officials didn't provide a comment. Driving the news: Merger and acquisition activity is up 36% in the United States compared to the same time last year, according to Thomson Reuters data from April. Several deals under government review have gotten national attention, including Sinclair’s purchase of Tribune's TV stations or T-Mobile’s deal with Sprint, which stands to reduce the number of national wireless providers from four to three. Meanwhile, the Justice Department is awaiting the ruling on its lengthy legal effort to block AT&T’s proposed $85 billion purchase of Time Warner. Yes, but: It’s not the attention-grabbing mega-mergers that advocates worry will get less of a close look thanks to a shortage of funds. Instead, some say budget limitations are likely to matter when officials are deciding which smaller or "borderline" deals to investigate further. “Sometimes there’s nothing there,” said Holland of the agency's early investigations. “Other times, it might be, ‘This is kind of a close call, and we’ve got three or four close calls and we need to pick one of them.’" "It could mean settlements get accepted that otherwise wouldn’t, or deals that should be challenged aren’t," said Michael Kades of the Washington Center for Equitable Growth, an antitrust-enforcement-friendly think tank that has done extensive research on the topic, in an email

#### It’s all interconnected

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.

#### Each new structural remedy requires decades of enforcement and litigation

Crandall 1, Senior Fellow in Economic Studies at the Brookings Institution and a Scholar at the AEI-Brookings Joint Center for Regulatory Studies. The author is indebted to Hal Singer, Bruce M. Owen, J. Gregory Sidak, and Clifford Winston for comments and suggestions. Research assistance was provided by Jeffrey West, Ana Kreacic, and Kristin Jaeger“The Failure of Structural Remedies in Sherman Act Monopolization Cases,” https://www.brookings.edu/wp-content/uploads/2016/06/03\_monopoly\_crandall.pdf

The on-going costs of enforcing antitrust decrees can be very large. If an industry is changing rapidly, structural remedies may be difficult to enforce. For instance, it may be difficult to determine the demarcation point between various stages of production that have been separated through vertical divestiture. When television exhibition replaced theatrical exhibition of feature films, for example, would the Paramount defendants be allowed to own television stations, but not theaters? Could the divested Bell operating companies provide Internet service through local Internet Service Providers (ISPs) if the latter sent data packets across LATA boundaries? What if the Bell-owned ISP connected with another entity within its own LATA, who, in turn, sent the data packets to the Internet backbone? Most of the antitrust decrees in the leading cases analyzed below continued in effect for many years, even decades. In many cases, these decrees required the continual supervision by the lower court and often led to appeals to the higher courts. The AT&T decree, in particular, was a structural decree that involved scores of hearings before the District Court and created a backlog of unresolved disputes that had become very large when the decree was finally vacated by 1996 legislation. Approximately 35-40 separate waiver requests were filed per year in the first 8 years of the decree, and by 1993 the average age of pending waiver requests had grown to approximately four years.17 This caseload was due in no small part to the changing nature of the telecommunications industry

#### AND Separations require granular case by case analysis—their author

Khan ’19 [Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Separations of Platforms and Commerce,” *Columbia Law Review* 119(4), p. 973-1098 ; date accessed 9/23/21]

These overall numbers, however, offer limited insight into whether— and in what way—dominant platforms are affecting venture capital funding. Even sector-specific figures compiled by the industry database are based on industry classifications that are too generalized for a precise analysis of this question. Establishing high-level causality between platform conduct and investment decisions would prove extremely challenging; there are a significant number of variables at play, and demonstrating but-for causality is tough. Achieving clarity on this question would require granular case-by-case analysis.198

#### It’s inherent in separation—their author

Khan ’19 [Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Separations of Platforms and Commerce,” *Columbia Law Review* 119(4), p. 973-1098 ; date accessed 9/23/21]

This Part examines whether integration by dominant platforms gives rise to the sort of harm previously addressed through separations, offers a rough sketch of what a separations framework for digital intermediaries might look like, and identifies the likely challenges and unresolved questions. Ultimately, any separations proposal will require a case-by-case analysis of the relevant market that the platform dominates, the types of network effects and entry barriers that suggest the platform’s market power may be durable, and the potential costs of implementing a separation. Several questions that this Part only briefly engages—such as how to define what constitutes a platform, how to assess the contours of the platform, and how to scope structural separations—invite deeper study.

#### It requires intensive study—their author

Khan ’19 [Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Separations of Platforms and Commerce,” *Columbia Law Review* 119(4), p. 973-1098 ; date accessed 9/23/21]

Getting the policy right will require careful case-by-case analysis and further study to assess the relevant tradeoffs. Closer study, moreover, may reveal that the set of contexts that warrant separations is relatively limited. Arriving at the proper set of interventions, however, requires first knowing the full set of available tools.

#### Changing to “protection of competition” requires tons of resources and iterations to make the standards practicable [KU is blue]

1AC Wu, 18 –Columbia University law professor

[Tim, former senior enforcement counsel at the New York Office of the Attorney General, former senior advisor to the Federal Trade Commission, served on the National Economic Council in the Obama and Biden administrations, “After Consumer Welfare, Now What? The ‘Protection of Competition’ Standard in Practice,” Columbia Public Law Research Paper No. 14-608, April 2018, <https://scholarship.law.columbia.edu/faculty_scholarship/2291>, accessed 5-31-21]

D. Preservation of Competition

Some have begun to argue that the “preservation of competition” should be re-recognized as the “end” of antitrust. Even some members of the judiciary have so stated. Without much fanfare, Justice Stephen Breyer, in condemning so-called “pay for delay” settlements in the pharmaceutical industry, did so based on the “potential for genuine adverse effects on competition.”31 Richard Posner writes that “The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency.”32

As a legal matter, the “protection of competition” standard has the **advantage of much greater support from** congressional intent and **earlier precedent**. It is a challenging, even absurd exercise, to pick a modern economic standard out of the language of the Sherman, Clayton, or Anti-Merger Acts or their legislative histories. The idea that Congress was concerned with “allocative efficiency” in 1890 or even 1914 or 1950 is an economic version of anthropomorphism.33 In contrast, it is no great stretch to say that Congress was interested in the preservation of competition. The Congressional Record does not contain the words “allocative efficiency,” “consumer welfare” or “wealth transfer” but it does repeatedly discuss the choice between competition and monopoly. Here, as just one typical example, is Representative Dick Thompson in 1914: “the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition.”34

These considerations suggest a return to the “protection of competition” as the recognized goal of American antitrust law. It is a **return**, for, as Barak Orbach makes clear, protection of competition was, **from the 1890s through 1970s**, the **accepted** and restated **goal of** the **antitrust laws**.35 The point was repeated over the decades: In 1904 the Supreme Court said in N. Sec. Co. v. United States that the Sherman Act “has prescribed the rule of free competition among those engaged in ... commerce.”36 In the 50s, it stated in Standard Oil Co. v. FTC, “The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, ‘Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.’”37 And in 1978, the Court observed that “Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country.”38 In short, **to use the “protection of competition” standard is not to break new ground but to return to previous practice**.

C. Protection of the Competition in Practice

This leads us, finally, to our question: **is “**protection of competition**”** or “protection of the competitive process” **too indeterminate** a standard? I think the answer is “**no**,” **because it draws on tests already in use in** antitrust law and practice. Nonetheless, I think that its development will require much further work and practice to arrive at practicable standards. Indeed, this short writing surely does not represent the author’s final thoughts on the matter. What I describe here is a beginning of what I think is an important and indeed essential project for the future of the law.

#### 2. Morale— The plan’s perceived as a fundamental critique of FTC’s legacy---that devastates morale

Kovacic 20, Global Competition Professor of Law and Policy, et al (William, with Allison Jones, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” *The Antitrust Bulletin*, 65.2)

(ii) Respecting and Learning from Past Achievements. In the United States, there is an unfortunate habit of making the case for major reforms by depicting the existing policy making institutions as utterly incompetent, slothful, or corrupt.61 Reform advocates sometimes appear to believe that any recognition that existing institutions sometimes have done good work undermines the case for fundamental reform. There is a perceived imperative to portray the responsible bodies and their leaders as hopelessly inadequate. Electoral campaigns can sharpen this tendency by leading the opposition party to claim that the incumbent administration’s program was an unrelieved failure. In a striking number of instances, this pattern has emerged in discussions of antitrust policy.62 In current discussions about the future of the U.S. antitrust regime, advocates of fundamental reform sometimes portray the federal antitrust enforcement agencies as decrepit -- perhaps to underscore the need for basic change.63 The implication is that, because the antitrust system has failed so miserably, there are few, if any, positive lessons to be derived from experience since the retrenchment of U.S. policy began in the late 1970s, and certainly none since 2000. This style of argument has several potential costs. One danger is that it overlooks genuine accomplishments and, in doing so, ignores experience that suggests how to build successful programs in the future. We offer three examples that deserve close study in building future cases that seek to expand the reach of the antitrust system. The first is the development of the FTC’s pharmaceutical and non-pharmaceutical health care program from the mid-1970s forward. The Commission identified health care as a major priority and devised a strategy that used the full range of the agency’s policy tools – cases, rules, reports, and advocacy – to change doctrine and alter business behavior.64 The affected business enterprises were (and are) economically powerful and politically influential, and they mounted powerful campaigns in the courts and in the Congress to blunt the Commission’s initiatives. The difficulty of the FTC’s program is perhaps most apparent in the case of health care services. The agency had to win cases before courts that displayed skepticism about whether competition had a useful role to play in the delivery of health care, or in any of what are known as the learned professions.65 The FTC also had to outmaneuver an industry that was bent on gaining legislative relief from antitrust scrutiny. Allied with other professional groups, the leading U.S. medical societies came within an inch in the late 1970s and early 1980s of persuading Congress to withdraw the FTC’s jurisdiction to apply the antitrust law to the professions.66 A second example is the FTC’s effort over the past two decades to restore the effectiveness of the “quick look” as an analytical tool in the wake of the Supreme Court’s decision in Federal Trade Commission v. California Dental Association (CDA).67 By 2001, it had become apparent to the FTC’s senior leadership team that CDA had raised doubts about the application of the quick look method of analysis to truncate the assessment of behavior that, while not previously condemned as illegal per se, strongly resembled conduct that antitrust jurisprudence had forbidden categorically.68 The agency responded with a strategy focused on the development of cases that would enable the Commission to use its administrative adjudication authority to persuade courts to reject the broader negative implications of CDA and restore the vitality of the quick look. This initiative ultimately generated court of appeals decisions that upheld the Commission’s effort to treat certain behavior as “inherently suspect” without proving that the defendant possessed market power and to require the defendant to offer cognizable, plausible justifications.69 A third example is the FTC’s successful litigation of three cases before the Supreme Court over the past decade.70 Not since the 1960s has the Commission litigated and won three consecutive antitrust cases before the Supreme Court. Each matter involved difficult issues and featured strong opposition from the defendants and amici. Had the FTC been a “timid” institution, one cannot imagine that it wouild have mounted or sustained these litigation challenges. The programs that accounted for these results were not accidental. Each program began with a careful examination of the existing framework of doctrine and policy to identify desired areas of extension. This stock-taking guided the identification of potential candidates for cases and the application of other policymaking tools.71 Each program built incrementally upon the bipartisan contributions of agency leadership and the sustained commitment of staff across several presidential administrations headed by Democrats and Republicans. If one assumes (as a number of reform proponents assert) that the FTC was a useless body in the modern era, there would be little purpose in studying these examples, or anything else it did, as there would be nothing useful to learn. The paint-it-black interpretation of modern antitrust history makes the costly error of tossing aside experience that might inform the successful implementation of new reforms. A second notable harm from the catastrophe narrative, most relevant to the discussion of human capital, is its demoralizing effect on the agency’s existing managers and staff. To see one’s previous work portrayed as substandard, or worse, tends not to inspire superior effort. It breeds cynicism and distrust where managers and staff understand that the critique badly distorts what they have done. Proponents of basic change must realize that the success of their program to expand antitrust intervention will require major contributions from existing staff and managers.

#### 3. Backlash— Big wins against big players cause FTC wing-clipping

Hyman 14, Workman Chair in Law and Professor of Medicine, University of Illinois, and former special Counsel at the Federal Trade Commission (David A., and William E. Kovacic, Hyman is H. Ross & Helen; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Can’t Anyone Here Play This Game - Judging the FTC’s Critics The FTC at 100: Centennial Commemorations and Proposals for Progress: Essays,” George Washington Law Review, 83.6)

The ABA Commission set out three basic guidelines for the FTC's future antitrust work:

(1) Forsake trivia in favor of economically significant matters;123

(2) Emphasize cases involving complex, unsettled questions of competition economics and law, and leave per se cases to the DOJ;124 and

(3) Replace voluntary commitments with binding, compulsory orders. 12 5

Each of these changes certainly sounds sensible, particularly when taken one at a time. After all, who could be against the forsaking of trivia? But, each change involved a shift from a safer law enforcement strategy to a riskier one. The pursuit of economically significant matters galvanizes tougher opposition in litigation and motivates firms to seek out legislative assistance in backing down the agency. Focusing on complex and unsettled areas of the law involves greater litigation risk (because the cases are on the edges of existing doctrine) and exposes the agency more broadly to claims that it is engaged in unprecedented enforcement or sheer adventurism. The pursuit of tougher remedies arouses a stronger defense by respondents and, again, increases efforts to enlist Congress to discipline the FTC. Although the ABA Commission noted the importance of political support and a vigorous chairman who would "resist pressures from Congress, the Executive Branch, or the business community," 1 26 it paid almost no attention to the predictable consequences of having the FTC occupy the risk-heavy end of the spectrum of all possible enforcement matters. The political science literature before 1969 had emphasized the political dangers inherent in the Commission's expansive norms-creation mandate and its broad information-gathering and reporting powers.1 27 For example, Pendleton Herring's study in the mid-1930s about the political hazards facing economic regulatory bod-ies said the agency's mandate placed it in "a precarious position" from the start: The parties coming within [the FTC's] jurisdiction were often very powerful. The more important the business, the wider its ramifications, and the more numerous its allies and subsidiaries, the closer it came within the commission's responsibility. To review the firms with which this agency has had official contacts, especially in its early years, is to go down the roster of big business in this country. Making political enemies was soon found to be an incident in the routine of administration. The discharging of official duties meant interfering with business and often "big business."128 Had it read and absorbed the teaching of the available political science literature, the ABA panel would have had to confront deeper, harder questions about the causes of the FTC's performance. The panel missed (or underestimated) the big issue of politics. Like many blue ribbon studies of government performance, the ABA Report was long on demands for bold action and short on practical suggestions about how to cope with the crushing political backlash that boldness can breed.129 B. The Posner Dissent Posner argued that the FTC would not be able to deliver on the ABA Commission's ambitious agenda because the FTC's leaders and staff lacked the necessary incentives to do so. 130 In his view, FTC Commissioners deliberately avoided confrontation with powerful eco- nomic interests that could frustrate reappointment or deny the board member a suitable landing place in the private sector upon leaving the agency.131 Similarly, FTC staff saw little upside (and considerable downside) to being overly aggressive in enforcing the law.1a2 Posner's assessment was certainly plausible. Government service disproportionately attracts people who plan to stay, and keeping your head down is an excellent way of doing that. "Don't make waves" becomes the default strategy of the lifers, and those who are tempera-mentally unsuited to that approach either self-select out, or are ac- tively encouraged to depart. 33 But matters are not so simple. Regulators that create or adminis- ter a program that threatens major commercial interests can leave government and monetize their expertise by guiding firms through the regulatory shoals.1 34 The prosecution of big cases attracts media at- tention and raises the prominence of the officials who set them in mo- tion. This publicity often translates into attractive offers for post- government employment. Posner also overlooked the emergence of attractive career paths for aggressive enforcement officials outside the private sector. A reputation for toughness would prove to be an asset, not a barrier, for those aspiring to join university faculties, think tanks, or advocacy groups that wanted to add high visibility officials to their ranks. III. SOME LESSONS AND A FEW MODEST SUGGESTIONS People like morality tales. The conventional morality tale in- spired by the ABA Report goes like this: In 1969, the FTC had a long history of existence, but almost nothing else to recommend it.1" The ABA Report accurately diagnosed the problems and laid out a clear agenda for the FTC to redeem itself.136 The FTC followed the recom- mendations in the ABA Report, and the agency was saved. All hail the ABA Commission, and the wisdom of those who served onit.13 Of course, life is more complicated. Unambiguous morality tales are more common in children's books than in real life. 38 A close reading of the record indicates that the pre-1969 FTC was not as aw-ful, and the ABA Report was not as good, as the conventional wisdom would indicate.1 39 We consider the lessons that should be drawn and offer four "modest suggestions that may make a small difference" the next time we encounter a similar situation.140 A. Be Careful What You Demand (Or Wish For) The ABA Commission wanted the FTC to be a fierce and aggressive enforcer/regulator, and it generated a detailed list of all the things the agency had to do to justify its continued existence.141 The FTC responded aggressively to the challenge-but in so doing, it became significantly overextended. In other work, we consider a number of factors that appear to be associated with good agency performance.14 2 One of the most important factors is whether the agency has the capacity and capability to perform the tasks that it has been given (or for which it has assumed responsibility).143 An agency that is overextended will find itself engaged in a constant process of regulatory triage-meaning it is unlikely to do a good job on any of the tasks within its portfolio of responsibilities. It is one thing to launch a single bet-the-agency case and entirely another to launch a half-dozen of those cases and an equal number of significant rulemaking projects simultaneously-let alone staff each case and rulemaking project so as to maximize the likelihood of good outcomes across the entire portfolio.144 The ABA Commission set a high bar for the FTC to clear if it was to remain in business-and the FTC responded with the enforcement equivalent of building and launching an armada of 1,000 ships.145 Little thought was given by the ABA Commission (or by top FTC management) as to whether the agency was up to the task of waging the functional equivalent of multiple land wars in Asia. 146 In particular, the ABA Commission gave no attention to the time it would take the agency to build the highly skilled teams of professionals it would need to perform the ambitious agenda it had recommended. There should have been an express caution that building this capability would take time. Instead, the ABA Report's "one last chance" admonitionl47 led the FTC to take on a daunting agenda before it had the ability to deliver. This consequence arguably is one of the ABA Commission's most unfortunate legacies. The remarkable thing is that the FTC managed to do as well as it did-notwithstanding the Herculean list of labors handed to it by the ABA Commission. B. Leadership Incentives Matter Posner did not think the FTC leadership would ever be able to rouse itself from its stupor.14 8 He also could not envision a set of in- centives that would motivate the FTC to become an activist presence on the regulatory scene. 149 As detailed above, Posner's assessment on both of these issues was wrong.150 But, it does not follow that the FTC's leadership (or the leader- ship of any other agency) is subject to an optimal set of incentives. Agency leadership always faces a choice between consumption and investment-and the stakes are systematically skewed toward con- sumption (in the form of launching new high-profile cases) by the short duration of any given leader's tenure.'51 As one of us noted in another article, the case-centric approach to evaluating agency per- formance-which is what the ABA Commission effectively embraced and encouraged-has a critical vice: It accords no credit to long-term capital investments. It gives decisive weight to the initiation of new cases. This incentive system can warp the judgment of incumbent political appoin- tees who typically serve terms of only a few years. The per- ceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the si- rens of credit-claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed. It is a common aphorism in Washington that agency leaders should begin by picking the low-hanging fruit.... What is missing in the lexicon of Washington poli- cymaking is an exhortation to plant the trees that, in future years, yield the fruit.1 52 [FOOTNOTE 152 BEGINS] 152 Kovacic,supra note 144, at 922; see also Kovacic, supra note 151, at 189 ("[A] short-term perspective may incline the manager to launch headline-grabbing initiatives with inadequate regard for the matter's underlying merits or the ultimate cost to the agency, in resources and reputation, in litigating the case. If the case goes badly, the manager responsible for the take-off rarely is held to account for the crash landing. He can hope the passage of time will dim memories of his involvement, he can blame intervening agents for their poor execution of his good idea, or he can shrug his shoulders and say he was making the best of the fundamentally bad situation that policymakers encounter in the nation's capital."); Timothy J. Muris, Principlesf or a Successful Competition Agency, 72 U. CHi. L. REV. 165, 166 (2005) ("An agency head garners great attention by beginning 'bold' initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors."). [FOOTNOTE 152 ENDS] Thus, if anything, the ABA Commission's "do something" recommendations encouraged (and hyper-charged) precisely the wrong incentives. C. Don't Forget About Politics Perhaps the largest failing of the ABA Commission was its failure to anticipate the political risks associated with its recommendations. Academics and do-gooders will enthusiastically lecture all and sundry about how the government exists to promote the general public interest-but decades of research on political economy make it clear that there is not much of a constituency for that mission.153 Indeed, an agency that seeks to promote the general public interest is an agency without any constituency.1 54 Thus, the ABA Commission wound up and sent into battle an agency without any real constituency or political backing, to wage war against a large and politically powerful collection of firms in every sector of the economy. There is no question that the FTC was unlucky, in that many of its most enthusiastic supporters were being voted out of office at the same time the FTC was picking fights with everyone and their brother.155 But, luck aside, if you were trying to create a "coalition of the willing" determined to clip the wings of the FTC, you would be hard-pressed to pick a better strategy than the one selected by the ABA Commission.15 6

#### Only says it’s POSSIBLE--- NOT that the institutional energy exists in the squo. The aff overhauls competition law overnight, which is the OPPOSITE of what their author advocates

1AC Manduca, 19 -- University of Michigan sociology professor

[Robert, “Antitrust Enforcement as Federal Policy to Reduce Regional Economic Disparities,” 2019, <https://journals.sagepub.com/doi/full/10.1177/0002716219868141>, accessed 6-26-21]

Should a more assertive antitrust regime become established, it is quite possible that it will induce beneficial feedback effects that could entrench and expand it relatively quickly. It is important to note that many of these feedback effects would stem from the changes to the marketplace and political arena that result from breaking up firms that are currently consolidated vertically or horizontally into their component pieces. This dynamic suggests that proponents of the new enforcement regime would be wise to push for the full breakup of consolidated companies rather than simply imposing fines or attempting to regulate them through consent decrees. A powerful firm that has just been hit with a major fine is likely to redouble its efforts at political influence; a firm that is split in two will likely find that its successor companies have both less total power and conflicting goals.

**\*\*\*THEIR EV ENDS\*\*\***

Strategic Considerations in Establishing a Reinvigorated Antitrust Regime

Despite the many features that make antitrust enforcement a promising candidate for establishment, it is important that advocates pursue the issue carefully and strategically. Here I briefly discuss some strategic considerations related to the initial establishment of a reinvigorated antitrust regime. These recommendations include embracing the political nature of antitrust enforcement, thinking carefully about the sequencing of enforcement actions, and taking advantage of federalism to force progress at the state level if federal regulators continue with a lax approach. Embrace the political nature of antitrust Antitrust policy is fundamentally a political issue. It centers on questions about resource distribution and power that are at the core of any political system. This means that any attempts to remove it from public debate and treat it as a purely technical question are likely to fail: entrenched interests will continue to correctly see it is as vitally important to their interests, and without a countermobilization bureaucrats will almost certainly succumb to their lobbying. Rather than searching for an illusory econometric magic bullet, supporters of stronger antitrust enforcement should fully embrace its political nature. This means building an antitrust movement that mobilizes a large number of people, uses high-visibility platforms to describe the problems of consolidation—and even the specific harms caused by specific companies—and pressures public figures, both elected and unelected, to take clear stances in favor of competition. Antitrust is an issue with great power to energize everyday consumers and voters, and that power should be utilized. A corollary to the political nature of antitrust is that, as with other political issues, fighting for greater enforcement and campaigning against predatory companies may result in political progress even in instances where the immediate objective is defeated. Just as an initial electoral loss can lay the groundwork for future victories, so each attempt to fight a merger or break up a monopoly moves the national conversation forward, generates awareness of the harms of consolidation, and makes further merger attempts appear more costly to businesses. Careful sequencing to build momentum Because a new antitrust enforcement regime is likely to face substantial pushback from entrenched interests, the initial targets for enforcement actions should be carefully chosen for political as well as legal viability. Enforcers should aim to set precedent and build momentum by choosing targets for enforcement that are in politically precarious positions and that offer the possibility of dividing corporate lobbies.