## 1

#### The scope of antitrust law is exclusively bounded by exemptions and immunities

ABA 7 (American Bar Association, ABA Section of Antitrust Law, Monograph 24, “Chapter 1 Introduction,” *Federal Statutory Exemptions from Antitrust Law*, American Bar Association, 2007, ISBN: 978-1-59031-864-5, pp.4-7)

A. Background: The Broad Scope of Antitrust, and an Introduction to Statutory Exemptions

Because this monograph concerns statutory constraints on the reach of antitrust law, a word is in order about the broad scope of antitrust principles.

Sherman Act sections 1 and 2 apply to “trade or commerce among the several States, or with foreign nations,”11 but the act leaves that phrase undefined. The Clayton and Federal Trade Commission Acts both define the “commerce” to which they apply,12 but give it only a jurisdictional meaning similar to that under the Commerce Clause of the federal Constitution.13 The courts have thus been left to decide just how broadly antitrust applies. Despite some uncertainty in the first half of the twentieth century,14 and with one lingering exception,15

**[FOOTNOTE 15]**

15. Namely, neither the Court nor Congress has ever overruled the Court’s sui generis 1922 rule that professional baseball is not “commerce.” See Fed. Club. 259 U.S. at 209.

**[/FOOTNOTE 15]**

modem courts define this scope very broadly. The inclusive modem definition is perhaps the natural culmination of the Supreme Court’s long-held belief that “Congress intended to strike as broadly as it could in Section 1 of the Sherman Act,”16 a view it developed because “[l]anguage more comprehensive” than that in Section 1 “is difficult to conceive.”17

This view probably also reflects the broad definition given to the terms “trade” and “commerce” for various purposes at common law, as some courts have explicitly held that antitrust was meant to incorporate those ideas." Thus, the courts have held generally that any exchange of money for a good or service, between any persons, is in ‘trade or commerce,”19 and the Supreme Court itself has described “commerce” to include any “exchange of...a service for money.’00 Indeed only in very limited, and sometimes exotic, circumstances have modem courts found conduct to be outside the scope of antitrust.21

**[FOOTNOTE 21]**

21. See. e.g., Dedication & Everlasting Love to Animals v. Humane Soc’y of the U.S., 50 F.3d 710 (9th Cir. 1995) (holding that solicitation of gratuitous charitable donations is not trade or commerce).

**[/FOOTNOTE 21]**

Therefore, in the absence of an explicit statutory exemption or a judicially created immunity, and so long as it is in the interstate or foreign commerce of the United States, the giving of essentially anything in return for money or barter is subject to federal antitrust.

Understanding the scope of modem antitrust also requires recognition of contemporary developments that affect enforcement of antitrust and its substantive reach. The United States is one of the few of more than 100 nations with competition laws that permit private antitrust suits.22 U.S. antitrust has permitted those suits dating from the initial adoption of the Sherman Act in 1890,23 and they comprise by far the largest component of antitrust enforcement.24 However, recent caselaw developments may increase barriers to the private lawsuits on which U.S. enforcement heavily depends. During the past thirty years or so, the federal courts have gradually raised doctrinal barriers to private enforcement of federal antitrust law, particularly through the rule of antitrust injury and the developing doctrine of antitrust standing.25 Partly as a result of these developments, private enforcement has declined.26

#### ‘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 just clarifies the application of antitrust to already covered practices – it does NOT curtail an exemption or immunity

#### Vote NEG – eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity

## 2

#### The United States federal government should establish interpretive rules and policy statements prohibiting anti-competitive business practices by the private sector that artificially centralize public blockchain infrastructure under Section 5 of the Federal Trade Commission Act, and enforce the prohibitions accordingly.

#### Interpretive rules and policy statements avoid rollback AND solve the case.

Pierce 21 (Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University School of Law; “Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?;” 2021, GW Law School Public Law and Legal Theory Paper No. 2021-42, <https://ssrn.com/abstract=3933921>, TM) [language modified, denoted by brackets]

The FTC does not need to use the notice and comment process to accomplish that worthy goal, however. It can issue an interpretive rule in which it announces and explains why it interprets section five of the FTC Act to ban the inclusion of non-compete clauses in contracts to employ low paid employees. It can couple that interpretive rule with a general statement of policy in which it announces its intention to take aggressive action against any employer who acts in a manner that is inconsistent with its interpretation of the Act. It can follow those two actions with a couple of well-chosen, [high profile] ~~visibility~~ enforcement actions against firms that act in ways that are inconsistent with its interpretation of the Act.

That approach to the problem would be as effective as issuance of a legislative rule, and it would have major advantages over issuance of a legislative rule. There is no doubt that the FTC has the power to issue interpretive rules and policy statements to implement section five of the FTC Act. It has issued scores of interpretive rules and policy statements for many decades. The FTC can issue interpretive rules and policy statements in days, in contrast to the years required to complete a notice and comment rulemaking. There is also no doubt about the FTC’s authority to use adjudication to implement section five. It has exercised that power for over a century. The enforcement actions would be easy to win, given the powerful empirical evidence that non-compete clauses cause significant harm to the performance of both labor markets and product markets and that non-compete clauses in the contracts of low paid employees have no plausible offsetting benefits. In a matter of months, the FTC could use the combination of an interpretive rule, a policy statement, and a couple of high visibility enforcement actions to ban non-compete clauses in the contracts of low paid workers.

By contrast, the notice and comment proceeding required to issue a legislative rule would take years to complete. Once the FTC issued such a rule, it would be subjected to judicial review to determine whether the FTC has the power to issue legislative rules to implement section five of the FTC Act. Since the FTC has never previously attempted to exercise that power, there is a good chance that the issue would go all of the way to the Supreme Court. That could delay the effect of the rule for many years. If the FTC lost in that test of its authority, it would have wasted many years of hard work and a great deal of its scarce enforcement resources engaging in an exercise in futility.

## 3

#### The United States federal government should create a domestic competition network over anti-competitive business practices by the private sector that artificially centralize public blockchain infrastructure.

#### Solves case – builds consensus

Kovacic 13 (William E. Kovacic, Commissioner, U.S. Federal Trade Commission, and Professor, George Washington University Law School, “Distinguished Essay: Good Agency Practice and the Implementation of Competition Law” European Yearbook of International Economic Law 2013. European Yearbook of International Economic Law, vol 4, <https://link.springer.com/chapter/10.1007/978-3-642-33917-2_1>) MULCH

If the answer to all of these queries is to leave the status quo in place, then it is incumbent upon the public agencies with competition or consumer protection duties to spend more effort than they do today to achieve a greater convergence of approaches and to see how collaboration can permit them to achieve results that exceed the grasp of single agencies acting alone. One place to start is to create a domestic competition network and a domestic consumer protection network to engage the public authorities in the kind of discussions and cooperation that U.S. agencies pursue with their foreign counterparts.17 There is no forum in which the U.S. public institutions assemble regularly to discuss what they do and consider, as a group, how the complex framework of federal, state, and local commands might operate more effectively. At best, the U.S. public authorities perform these network building functions in piecemeal fashion at bar association conferences and other professional gatherings. There also are bilateral discussions involving some public bodies.18 These measures are useful, but they are not good substitutes for the establishment of a more comprehensive framework of interagency regulatory cooperation. The U.S. competition agencies spend more time seeking to develop effective mechanisms for cooperation with foreign authorities than they devote to the integration of policymaking across federal and state agencies domestically.

Good examples of how to achieve greater levels of cooperation exist abroad. In the middle of the previous decade, the European Union (EU) created the European Competition Network (ECN) to coordinate the work of the national competition authorities of the EU member states and the European Commission’s Competition Directorate (DG COMP). The ECN meets regularly to discuss matters of common concern and to promote information sharing and other forms of cooperation. The network has achieved considerable success in avoiding conflicts that might have arisen from the EU’s decision to devolve greater levels of responsibility to the member states as part of a modernization of the EU’s competition policy framework.

As suggested above, government agencies in the United States would do well to emulate the European experience and create domestic networks for competition policy and consumer protection, respectively. A domestic competition network could begin with a memorandum of understanding adopted by the public agencies with competition policy duties, including the two federal antitrust agencies, sectoral regulators such as the Federal Communications Commission (FCC) and the antitrust units of the state attorneys general. The agreement might commit the participants to participate in regular discussions about matters such as the coordination of inquiries involving the same transaction or conduct, the development of common analytical standards, information sharing about specific cases, staff exchanges, and the identification of superior investigative techniques. Cooperation could progress toward the pursuit of joint research projects and the preparation of a common strategy to address various commercial phenomena. The network would be a platform for replicating activities that have become core elements of the ECN, such as interagency sharing of practical know-how and sector-specific experience, the development of common training exercises, and benchmarking of procedures across agencies.

## 4

#### Next off is Error Costs

#### Independent FTC action means fewer of them. Plan and perm can’t solve - they permit *private causes of action* and *boost error rates* via court reviews OR non-FTC investigations.

Crane ‘10

Daniel A. Crane - Professor of Law, University of Michigan. “Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel” - The CPI Antitrust Journal (Competition Policy International) – February, 2010, (2) - #E&F - https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles

The FTC Act gives the Commission a seemingly simple mandate: Detect and prohibit “unfair methods of competition . . . and unfair or deceptive [trade] practices.”4 The Commission’s powers under Section 5 are at least co-extensive with the substantive reach of the Sherman Act—in other words, that anything that is illegal under the Sherman Act is also illegal under the FTC Act.5 But the Supreme Court has also held that the FTC may go further than the Sherman Act and “stop in their incipiency acts and practices which, *when full blown*, would violate those Acts.”6 Thus, “the standard of unfairness under the FTC Act . . . encompass[es] not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons.”7

There are compelling reasons to allow the FTC an independent norm-creation role in antitrust.8 Over the past several decades, the courts have sharply constricted antitrust liability norms under the Sherman Act largely out of a reaction to the dangers and abuses of private antitrust litigation, which outnumbers public antitrust enforcement (at both the FTC and Department of Justice) by a 10-1 ratio.9 Among these real or perceived dangers and abuses are the chilling effects of automatic treble damages and one-way fee-shifting, the damagescompounding effects of easy class certification, strategically-minded competitor plaintiffs, discovery run amok, and generalist judges and unsophisticated juries who create inconsistent and incoherent industrial policy.10 Reacting to these perceived infirmities in the institutional structure of private antitrust litigation, the federal courts (led by the Supreme Court) have contracted the Sherman Act’s substantive liability norms. While such contraction may be justified to mitigate the systemic risks of private litigation, to the extent that the government sues under the same statute a perhaps unintended side effect has been to stymie public litigation.

The Justice Department has no means of avoiding this difficulty—it can only enforce the Sherman and Clayton Acts. The FTC, however, need not tie itself to the Sherman Act. Indeed, it has no power to enforce the Sherman Act, but only the FTC and Clayton Acts. If it so chooses, it may declare that it is enforcing the Sherman Act as incorporated into the FTC Act through judicial decision, but then it appropriates all of the baggage of private litigation as expressed in contracted liability norms.

#### Exclusive FTC means *they investigate* AND address t*hrough non-judicial Administrative proceedings*. Avoids risks from *private causes of action*.

Rosch ‘10

Remarks of J. Thomas Rosch - Commissioner, Federal Trade Commission before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA - March 23, 2010 - #E&F – modified for language that may offend - https://www.ftc.gov/sites/default/files/documents/public\_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

More broadly, however, I want to suggest that Section 5 may supply an optimal vehicle for challenging conduct that weakens innovation. The common law that has grown up around Section 2 over the last several decades is deeply ingrained in price theory; that static framework, however good it may be for evaluating short-run harm and quantifiable conduct such as price and output restraints, does not easily lend itself to looking at (considering) whether a party’s conduct has or will dampen innovation or prevent product improvement. Compounding matters is the fact that the difficult line drawing and weighing involved in comparing the likelihood of innovation against the likelihood of quantifiable anticompetitive harm is not something that generalist judges and lay juries are well suited for. Indeed, even the metric for measuring innovation itself remains elusive.

If the Commission proceeds under Section 5, these concerns largely fall away. Judging harm to competition against a consumer choice standard not only follows from Section 5’s text and the FTC’s unique institutional architecture, but provides a readymade vehicle for evaluating anticompetitive harm from a dynamic perspective. Moreover, by proceeding under Section 5 and suing in our Part 3 administrative process, the FTC (and only the FTC) can have the first crack at the hard line drawing and balancing that must occur when one weighs price competition against other forms of more dynamic competition. Arguably by leaving this critical task to the FTC and its prosecutorial discretion in the first instance, Section 5 allows the Commission to minimize the threat of false positives and shake down lawsuits that have animated many of the Supreme Court’s more recent decisions. For all of these reasons, I would not be surprised if the Commission decided to pursue claims based on dynamic concerns under Section 5 in the coming years, provided we can provide clear guidance to parties about when their conduct will trigger Section 5 review.

#### Exclusive FTC key – avoids false positives *AND* false negatives.

Salop ‘13

Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center - “Guiding Section 5: Comments on the Commissioners” -Scholarship @ Georgetown Law - #E&F - https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2284&context=facpub

Commissioner Wright apparently is most concerned with over-deterrence from the FTC’s administrative process, where the FTC acts as prosecutor and judge and is not subject to the constraints from an independent court deciding motions to dismiss and summary judgment.25 However, there also are forces tipping in the other direction. First, the FTC is an expert body with significant economics resources available, resources that presumably can be used to avoid false negatives *and* overdeterrence.26 Second, the Commission’s bipartisan nature and the use of majority rule also have provided significant constraints over most of its history. Finally, if this is the main concern, his remedy proposal instead might be that the FTC be forced to all litigate its complaints in District Court.27

#### Error rates are *the worst of both worlds* – false positives and false negatives crush econ AND kill compliance with the Aff.

* Resolves all Aff offense vs. the CP related to “underdeterrence” bc…
* …under-deterring doesn’t map onto a world with error rates in the investigation and enforcement stages. Those errors can invite “false positive” non-compliance for the Aff.

Baker ‘15

Jonathan B. Baker - Professor of Law, American University Washington College of Law. “TAKING THE ERROR OUT OF “ERROR COST” ANALYSIS: WHAT’S WRONG WITH ANTITRUST’S RIGHT” - 80 Antitrust Law Journal No. 1 (2015) - #E&F – continues to footnotes #18 and #19 – no text removed. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2333736

The error cost perspective evaluates antitrust rules—whether considered individually or as a whole—based on whether they minimize total social costs. The relevant costs include costs of “false positives” (finding violations when the conduct did not harm competition), costs of “false negatives” (not finding violations when the conduct harmed competition), and transaction costs associated with use of legal process.17 False positives and false negatives are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review:18 False positives and false negatives may chill beneficial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply. False positives and false negatives do not neatly map to overdeterrence and underdeterrence, respectively, however, because the deterrence consequences of legal errors depend in part on the way that those errors affect the marginal costs and benefits of conduct undertaken in the shadow of the law19.

FN18 - From an economic perspective, antitrust rules benefit society primarily by deterring harmful conduct. See generally Jonathan B. Baker, The Case for Antitrust Enforcement, J. ECON. PERSP., Autumn 2003, at 27; cf. Louis Kaplow, Burden of Proof, 121 YALE L.J. 738 (2012) (highlighting a tradeoff between the benefits of deterrence and costs of chilling beneficial conduct that arises when the burden of proof in adjudication is set to maximize social welfare). Accordingly, the evaluation of error costs must ~~look to~~ (consider) the consequences of the decision or legal rule for conduct by other firms, not simply to the incidence of the decision on the parties to the case. For example, restricting analysis to the parties before the court would yield the misimpression that draconian punishments for parking in front of a fire hydrant will eliminate error costs. The prospect of such punishments would lead to 100% compliance with the no-parking rule, so there would be no court cases, no possibility for a court erroneously to convict or acquit a defendant, and no litigation expenditures. Yet such punishments would also chill parking in front of a hydrant when its social benefits (e.g., allowing a doctor to arrive in time to save a life) would outweigh its social costs. Such punishments would also discourage socially beneficial parking near hydrants (by drivers who fear that an aggressive parking enforcer would wrongly conclude that the hydrant is blocked and that a court would uphold the ticket). Restricting analysis to the parties before the court would yield the same misimpression with respect to an enforcement policy taken to the opposite extreme: A complete absence of enforcement of the rule prohibiting parking in front of hydrants would also lead to no court cases, and so would generate no judicial errors and no transaction costs of litigation. Yet such a rule would not deter parking in front of hydrants when the social cost (the cost of impeding fire department access in the event of a fire discounted by the probability that a need for access would arise) would exceed the social benefit.

FN19 See generally Warren F. Schwartz, Legal Error, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 1029 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). For example, a rule change that increases the frequency or cost (penalty) of false positives may increase deterrence, but it could also do the reverse. The latter may occur if more false positives mean that firms no longer obtain enough benefit from staying within the line separating legal and illegal behavior to justify being careful. For this reason, uncertainty about a rule or its application can reduce compliance. See generally Hendrik Lando, Does Wrongful Conviction Lower Deterrence?, 35 J. LEGAL STUD. 327, 329–30 (2006) (providing a simple technical example); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1483–84 (1999) (greater accuracy in judicial determinations increases the returns to compliance with legal rules); Steven C. Salop, Merger Settlements and Enforcement Policy for Optimal Deterrence and Maximum Welfare, 81 FORDHAM L. REV. 2647, 2668–69 & 2669 n.60 (2013) (a firm’s incentive to comply with a rule may fall identically when the probability of either type of error increases).

## 5

#### Momentum for Manchin BBB now but its close

Everett & WU 3/02 John Burgess Everett is the co-congressional bureau chief for POLITICO, Nicholas Wu is a congressional reporter at POLITICO. “Dems agonize over Manchin's wish list: Taxes, prescription drugs, climate cash.” 03/02/2022. <https://www.politico.com/news/2022/03/02/joe-manchin-democrat-bill-taxes-00013246> {DK}

Joe Manchin is once again setting the agenda for **Dem**ocrat**s** and says he’s willing to make a deal. They’re **listening — cautiously**. Hours after President Joe Biden laid out what he hoped to salvage from Democrats’ defunct “Build Back Better” social spending plan, Joe Manchin quickly assembled a counteroffer. It might amount to deja vu for Democrats, many of whom still feel burned from last year’s debacle, yet many in the party are willing to entertain any shot they have to unify while they still have control of Congress. “Here’s the thing. I’ve always been open to talking to people okay? But they just don’t want to hear,” Manchin said in a Wednesday interview. The West Virginia centrist laid out a basic party-line package that could win his vote in the interview, to lower the deficit and enact some new programs — provided they are permanently funded. It may be Democrats’ best and last chance to get at least some of their major domestic priorities done before the midterm election, even as some leading liberals acknowledged any potential deal would not come close to the $1.7 trillion package Manchin spurned in December. Manchin said that if Democrats want to cut a deal on a party-line bill using the budget process to circumvent a Republican filibuster, they need to start with prescription drug savings and tax reform. He envisions whatever revenue they can wring out of that as split evenly between reducing the federal deficit and inflation, on the one hand, and enacting new climate and social programs, on the other — “to the point where it’s sustainable.” “If you do that, the revenue producing [measures] would be taxes and drugs. The spending is going to be climate,” Manchin said. “And the social issues, we basically have to deal with those” with any money that’s left, he added. As far as whether he thinks his party finally understands his parameters for joining the talks, he said that Democrats “know where I am. They just basically think that I’m going to change.” Negotiating with Manchin isn’t exactly Democrats’ favorite topic after nearly a year of back and forth. Asked about whether he can envision a passable deal, Sen. Mark Warner (D-Va.) responded: “I was hoping you would were going to, like, ask me to expound about Ukraine.” “I’ve got a lot of respect for him. And hope springs eternal,” Warner said. The two are often aligned in centrist deal-making groups. Manchin, who also chairs the Senate Energy Committee, said that the climate portion of any theoretical bill will look different now that Russia is invading Ukraine. He’s calling for the U.S. to ban oil imports from Russia and ramp up domestic energy production, including fossil fuels. He would support big clean energy investments in a potential deal, he said, but wants domestic oil, gas and coal production to still be a big part of the mix. “You want to be able to defend your people, have reliable, dependable and affordable power? You have to use ‘all of the above,’” Manchin said, defending his support for clean energy investments. “They say ‘Manchin doesn’t care … he’s killing the environment.’ I’m not killing anything.” Though he prefers everything in Congress to be bipartisan, Manchin said he has “come to that conclusion” that changing the tax code to make the rich and corporations pay their fair share can only be done with Democratic votes. To enact Manchin’s vision, Democrats would also have to bargain with Sen. Kyrsten Sinema (D-Ariz.) who last year steered the party toward surtaxes and corporate minimum taxes — and away from raising individual and corporate tax rates. Sinema said Wednesday that the tax package negotiated last year, which shied away from raising those rates, would more than pay for what Manchin is talking about. “Any new, narrow proposal — including deficit reduction — already has enough tax reform options to pay for it. These reforms are supported by the White House, target tax avoidance, and ensure corporations pay taxes, while not increasing costs on small businesses or everyday Americans already hurting from inflation,” said Hannah Hurley, a spokesperson for Sinema. Progressives might take a while to warm to it. Asked about Manchin’s hopes of diverting new revenues to deficit reduction and inflation, Sen. Bernie Sanders (I-Vt.) griped: “I don’t care what he wants. We’re talking about what the American people want. He doesn’t like it, he can vote against it, that’s his business.” And Rep. Barbara Lee (D-Calif.) scoffed, saying it would not satisfy many of the House’s frustrated liberals. She seemed more interested in still trying to change Manchin’s mind on the expanded child tax credit and other domestic programs than in accepting his blueprint. “I would hope he would reconsider, and realize how many people are being left behind,” Lee said. “We’ve got to keep going and try to get everything that we can get.” Despite some lawmakers’ aggravation with Manchin, other **progressives** were willing to entertain just about whatever they could get through with only 50 Senate Democrats and a slim House majority. After all, the midterms are now eight months away; recreating the momentum to put a big bill on the floor may take months. Sen. Elizabeth Warren (D-Mass.) put it this way: “There’s so much that we all agree on, that we ought to be able to get a deal.” And Rep. Katie Porter (D-Calif.), the deputy chair of the Progressive Caucus, said she’s “open” to Manchin’s energy proposal provided “it’s paired with a real meaningful commitment, and actual movement.” Biden’s State of the Union address called for congressional action on some of the individual portions of the wide-ranging social spending measure that the House passed last year, including drug pricing, child care, tax hikes on the wealthy and climate change. The momentum that Democrats had mustered for their trillion-dollar-plus proposal has mostly evaporated, and some lawmakers are increasingly open to slimmed-down legislation or even standalone bills to address their policy priorities.

**The plan trades-off**

**Cartensen 21** [Peter C. Carstensen, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en]

14. Similarly, **despite bipartisan murmurs** about competitive issues, the potential in a **closely divided** Congress that **any** major initiatives will survive is **limited at best**. In part the challenge here is how the Biden administration will **rank its commitments**. If it were to make reform of competition law a major and primary commitment, it would have to **trade off other goals**, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to **give up** stricter competition rules in order to achieve **other legislative priorities**. 15. **A**nother key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not **entirely encouraging**. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating **agriculture** who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a **pessimistic prognostication** for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a **willingness** to take **major enforcement risks**, to **invest significant political capital** in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The **early signs** are that the new administration will be **no more committed** to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Extinction from climate

Åberg et al 21 (Anna Åberg, research analyst in the Environment and Society Programme of Chatham House, formerly served as desk officer at the Swedish Ministry for Foreign Affairs, MSc Development Studies, London School of Economics and Political Science, BSc Business and Economics, and Politics and Economics, Lund University; Antony Froggatt, deputy director and senior research fellow in the Environment and Society Programme of Chatham House; and Rebecca Peters, Queen Elizabeth II Academy Fellow in the Environment and Society Programme of Chatham House, doctoral candidate at the University of Oxford with the UK Foreign, Commonwealth and Development Office REACH Water Security programme, MSc Development Economics, MSc Water Science and Policy, Marshall Scholar; “Raising climate ambition at COP26,” Chatham House (the Royal Institute of International Affairs, London) Research Paper, October 2021, https://www.chathamhouse.org/sites/default/files/2021-10/2021-10-05-raising-climate-ambition-at-cop26-aberg-et-al-pdf.pdf)

We really are out of time. We must act now to prevent further irreversible damage. COP26 this November must mark that turning point.14 UN Secretary-General António Guterres, 16 September 2021 The 26th Session of the Conference of the Parties (COP26) to the UNFCCC is to be hosted by the UK, in partnership with Italy. After a year-long delay, the conference is now scheduled to take place in Glasgow, Scotland, between 31 October and 12 November 2021.15 Organizing an in-person event during a pandemic presents a substantial challenge. The UK government is providing vaccines to accredited delegations, but doses only started to be delivered at the beginning of September 2021 and restrictions, such as quarantine requirements,16 pose further obstacles to participation.17 An alliance of 1,500 civil society organizations are among those calling for a second postponement of the COP, citing concerns about a lack of plans to enable safe and inclusive participation of delegates from, not least, the Global South.18 The UK government is, however, adamant that it will proceed with the conference as planned.19 The pandemic has changed understandings of global risks, the interconnected nature of economies and the role of governments in preparing for and responding to existential threats. This may provide impetus for accelerated climate action. The postponement of COP26 itself has been of considerable significance. Over the past year, the global politics of climate change have shifted, with the election of President Joe Biden and the announcement of China’s climate neutrality target being particularly important. Moreover, the economic recovery packages that are being rolled out to counter the economic consequences of the pandemic present an opportunity to accelerate the green transition.20 To date, however, the members of the G20 have prioritized investments in fossil fuels above those in clean energy,21 and only 10 per cent of the global expenditure is estimated to have been allocated to projects with a net positive effect on the environment.22 COP26 is the most important climate summit since COP21 in Paris, and it differs from earlier COPs in several ways: it is the first test of the ambition-raising ratchet mechanism and marks a shift from negotiation to implementation. An ambitious outcome at COP26 requires substantial action to be taken before the summit – and outside the remits of the UNFCCC process – as well as at the actual conference. Human activity has already caused the global average temperature to rise by around 1.1°C above pre-industrial levels, and every additional increase in warming raises the risks for people, communities and ecosystems. To avoid the most catastrophic climate change impacts, it is essential world leaders make every effort to limit warming to 1.5°C. Working group I of the Sixth Assessment Report of the IPCC shows it is still possible to keep warming to this critical threshold, but that unprecedented action must be taken now.23 As John Kerry, special presidential envoy for climate, stated, ‘[t]his test is now as acute and as existential as any previous one’.24 COP26 has a critical role in getting the world on track for a 1.5°C pathway, and in supporting those most affected by climate change impacts. It also constitutes a key test for the credibility of the Paris Agreement and the UNFCCC process overall. But what can and should the Glasgow summit achieve more specifically? The objective of this paper is to discuss what a positive outcome at COP26 would entail, with the dual aims of encouraging increased ambition and contributing to an informed public debate. The main argument put forth is that substantial progress must be made in three main areas, namely on increasing the ambition of NDCs; enhancing support to and addressing concerns of climate-vulnerable developing countries; and advancing the Paris Rulebook to help operationalize the Paris Agreement. COP26 is undoubtedly hugely significant and national government pledges in the run-up to Glasgow will contribute to shaping the level of future GHG emissions. However, the event is not only critical in terms of reaching an ambitious outcome on climate, it is also an important opportunity to judge the level of confidence in the international process and the UNFCCC. 02 Increasing the ambition of the NDCs A key element of COP26 will be the level of ambition of the revised NDCs put forward by governments to the UNFCCC and the extent to which these keep the 1.5°C global warming target agreed in Paris within reach. According to the United Nations Environment Programme (UNEP), greenhouse gases (GHGs) in 2019 totalled 52.4 gigatonnes of CO₂ equivalent (GtCO₂e)25 of which the majority was CO₂ (38 Gt), then methane (9.8 Gt), nitrous oxide (2.8 Gt) and F-gases (1.7 Gt).26 The same year, GHG emissions were approximately 59 per cent higher than in 1990 and 44 per cent higher than in 2000.The six largest emitters – together accounting for 62 per cent of the global total – were China (26.7 per cent), the US (13 per cent), the EU (8 per cent), India (7 per cent), Russia (5 per cent) and Japan (3 per cent) (see Figure 1).27 **[FIGURE 1 OMITTED]** According to UNEP, the implementation of the first round of NDCs would result in an average global temperature increase of 3°C above pre-industrial levels by the end of the century, with further warming taking place thereafter. If these NDC’s were fully implemented, emission levels are expected to be in the range of 56 GtCO2e (with unconditional NDCs) to 53 GtCO₂e (with conditional NDCs) by 2030.28 To align with a 2°C pathway, the ambition of the second round of NDCs would need to triple relative to the original targets, leading to emissions levels of around 41 GtCO₂e in 2030. Alignment with the 1.5°C target would require a fivefold increase in ambition, leading to emission levels around 25 CO₂e in 2030 (see Figure 2).29 **[FIGURE 2 OMITTED]** The Paris Agreement states that parties shall communicate an NDC every five years,30 and that each submission shall constitute a progression in terms of ambition.31 Parties conveyed their first round of targets prior to COP21, and were due to submit new or updated plans in 2020.32 COP26, originally scheduled for November 2020, would then take stock of the collective level of ambition of these plans vis-à-vis the temperature targets of the Paris Agreement. The postponement of the COP by one year has in practice (albeit not formally) extended the deadline for submitting NDCs to ‘ahead of COP26’. Where do we stand? The delay of COP26 has given countries more time to put forward NDCs and longer-term decarbonization targets. This effort gained significant traction when China pledged to achieve carbon neutrality by 2060 and peak its emissions before 2030, during the general debate of the 75th Session of the UN General Assembly (UNGA) in September 2020.33 Then, in November 2020, the UK submitted its NDC, pledging a 68 per cent reduction in emissions by 2030 (based on 1990 levels)34 and later added a 2035 target of 78 per cent.35 The EU has, moreover, put forward a 55 per cent reduction target relative to 1990 levels,36 with some countries within the bloc going even further, including Germany, which agreed on a 65 per cent reduction target.37 The election of President Biden has fundamentally changed the US’s position on climate change, leading to, among other things, the country re-joining the Paris Agreement.38 At a specially convened Leaders Summit on Climate – hosted by the US – the Biden administration presented an NDC with an emission reduction target of 50–52 per cent39 (based on 2005 levels, which is equivalent to 40–43 per cent below 1990 levels40). During the summit, countries including Canada, Japan and others pledged more ambitious NDC targets.41 While there is more pressure on governments to act on climate change, due to its increasingly devastating impacts, there are also more opportunities for carbon mitigation through available alternative technologies and systems, as well as falling renewable energy costs (see Box 2). Table 1 details the NDC targets put forward by G20 countries prior to COP21 in Paris and the extent to which these have since been revised. The updated NDCs have been assessed by the independent body, Climate Action Tracker, which has analysed to what extent the NDCs align with the 1.5°C pathway. The analysis also looks at domestic policies and actions, which are important as they provide an indication of whether governments are following through on their promises. **[TABLE 1 OMITTED]** As of September 2021, 85 countries and the EU27 had submitted new or updated NDCs, covering around half of global GHG emissions. Some parties, like China and Japan, have proposed new targets but not yet submitted them formally while around 70 parties – including G20 countries like India, Saudi Arabia and Turkey – have neither proposed nor communicated a revised NDC target. Several parties have, moreover, submitted new NDCs without increasing ambition. These include Australia, Brazil, Indonesia, Mexico, New Zealand, Russia, Singapore, Switzerland and Vietnam.42 In some of these cases, adjustments in baselines mean that ambition has de facto decreased (Brazil and Mexico).43 Analysis published by Climate Action Tracker in September 2021 shows that the NDC updates only narrow the gap to 1.5°C by, at best, 15 per cent (4 GtCO₂e). This leaves a large gap of 20–23 GtCO₂e.44 Similar analysis from the UN underscores the need for further NDC enhancements.45 If all current NDCs are implemented, total GHG emissions (not including emissions associated with land use) in 2030 are projected to be 16.3 per cent higher than in 2010, and 5 per cent higher than in 2019. The emissions of the parties that have submitted new or updated NDCs are, however, expected to fall by around 12 per cent by the end of the decade, compared to 2010 levels. The UN report also highlights the importance of providing support to developing countries, as many of these have submitted NDCs that are – at least in part – conditional on the receipt of additional financial resources, capacity-building support, and technology transfer, among other things. If such support is forthcoming, global emissions could peak before 2030, with emission levels at the end of this decade being 1.4 per cent lower than in 2019. However, even the full implementation of both the unconditional and conditional elements of the NDCs would lead to an overshoot of the targets of the Paris Agreement – as alignment with 1.5°C and 2°C require cuts of 45 per cent and 25 per cent, respectively, by 2030 (relative to 2010 levels).46 A large number of countries are also making more long-term net zero emissions or carbon neutrality pledges. As of September 2021, just over 130 countries had made such commitments, but not all of them have formally presented them to the UNFCCC.47 Examples include large economies like China, Japan, Brazil, the US, South Africa, South Korea, and the EU, as well as climate-vulnerable developing countries like the Marshall Islands, Barbados, Kiribati and Bangladesh.48 Climate Action Tracker estimates that if these long-term targets – and the NDCs – are fully implemented, global warming could be limited to 2°C.49 Most of the net zero pledges are, however, formulated in vague terms that are not consistent with good practice. The long-term targets are, moreover, only credible if they are backed up by ambitious and robust 2030 NDCs,50 given that substantial cuts in emissions must occur this decade. An additional concern that has been raised when it comes to net zero pledges is that they may encourage reliance on negative emissions technologies, such as bioenergy with carbon capture and storage (BECCS), which have still to be tested at scale to assess land requirement, efficiency and economic viability.51 **[BOX 1 OMITTED]** The challenge of closing the gap Bridging the gap between current NDCs and targets that would keep warming to 1.5°C is a defining challenge for governments ahead of COP26. As mentioned, UNEP estimates that the ambition of 2030 targets would need to be enhanced fivefold vis-à-vis pledges made in 2015 to align with a 1.5°C pathway.53 Several large emitters – including the US and the EU – have now submitted their new or updated NDCs. According to Climate Action Tracker, the UK’s target is considered to be compatible with a 1.5°C pathway, while those of the US, EU, Japan and Canada are classified as ‘almost sufficient’.54 It is critical that all countries that have not yet submitted a new or updated NDC do so, and that these pledges are aligned with 1.5°C. It is equally important that countries that have submitted unambitious NDCs revisit their targets. The Paris Agreement states that parties may revise existing NDCs at any time, if the purpose is to enhance ambition.55 The G20 countries have a particularly important role to play. In July 2021, the Italian G20 presidency hosted the first ever G20 Climate and Energy Ministerial meeting. In the final communique the countries in the G20 stated that they ‘intend to update or communicate ambitious NDCs by COP26’.56 The importance of action from all members of the G20 is clear, as they collectively account for 80 per cent of global emissions and as UN Secretary-General António Guterres said, ‘there is no pathway to this [1.5°C] goal without the leadership of the G20’.57 With only a few weeks to go it is, however, unlikely that the 20–23 GtCO₂e gap in targets will be closed by COP26. At the UK-hosted COP26 ministerial in July, a number of ministers stressed that parties would need to respond to any gap remaining by the Glasgow conference. Some suggested that such a response could include a ‘clear political commitment’ to keep 1.5°C within reach, a recognition of the gap, and a plan to bridge it. More specific proposals of actions that could be taken, as part of the response, to keep the 1.5°C pathway alive were also discussed. Suggestions included, but were not limited to, encouraging countries whose NDCs are not consistent with 1.5°C to bring their 2030 targets in line before 2025 (when the third round of NDCs are due); calling for parties to submit concrete long-term strategies for reaching net zero; and/or sending clear signals to markets through actions like phasing out unabated coal, carbon pricing, fossil fuel subsidy reform, nature-based solutions, and decarbonizing transport.58 Achieving a positive COP26 outcome The ultimate benchmark for a high ambition outcome at COP26 is whether the new or updated NDCs are ambitious enough to align with a 1.5°C pathway. For many communities and ecosystems, the threat of different climate impacts between 1.5°C and 2°C – not to mention 3°C, 4°C or 5°C – is existential. Each increment of warming is anticipated to drive increasingly devastating and costly impacts, including extreme heatwaves, rising sea levels, biodiversity loss, reductions in crop yields, and widespread ecosystems damage including to coral reefs and fisheries.59 Keeping the goal of 1.5°C within reach will require substantial action this decade. Long-term targets to achieve net zero emissions or carbon neutrality have the potential to be powerful drivers of decarbonization but need to be supported by ambitious NDCs as well as concrete policies and sufficient investment. Should we reach COP26 without sufficient ambition on NDCs, parties would need to present a plan for how ambition will be raised in the early 2020s. This could include a COP decision or a political statement underscoring the need to keep warming to 1.5°C and inviting parties to revisit their NDCs earlier than the Paris timetable dictates (for instance in 2023 instead of 2025).60 To support more ambitious action, countries should look to expand international collaboration and accelerate decarbonization in key sectors. At COP26, parties can help boost the credibility of their pledges by showcasing policies, measures and sector initiatives that will accelerate decarbonization, including on the phase out of unabated coal and the increased use of electric vehicles (see Box 3). **[BOX 2 OMITTED] [FIGURE 3 OMITTED]** In the run-up to COP26, the UK government is mobilizing its counterparts and non-state actors to drive accelerated action on phasing out the use of unabated coal,65 accelerating the deployment of electric vehicles,66 protecting and restoring nature (nature-based solutions67), and aligning financial flows with the goals of the Paris Agreement.68 The role of the private sector is crucial in the transition to net zero economies and is recognized within the framework of the UNFCCC, as they can deliver funding, innovation and technology deployment at a pace and scale beyond that of most governments (see Box 1). It is hoped that some of these initiatives will lead to plurilateral agreements at or ahead of COP26, which could enhance the credibility of mitigation pledges and help keep the 1.5°C target within reach. Being able to showcase a package consisting of ambitious NDCs, plurilateral deals, and national policies at COP26 could generate positive momentum and create a sense of inevitability around the transition to net zero societies. **[BOX 3 OMITTED]** 03 Support to climate-vulnerable developing countries Increased action on climate finance, adaptation, and loss and damage is critical for supporting climate-vulnerable developing countries, strengthening trust and raising ambition on mitigation. The year 2020 was one of the warmest on record.80 As COVID-19 ravaged the world, extreme weather events continued to cause severe devastation. In Bangladesh, torrential rains submerged a quarter of the country,81 resulting in hundreds of deaths, mass displacement and damage to more than a million homes.82 Record-breaking floods in Sudan83 and Uganda84 also displaced hundreds of thousands, while super cyclone Amphan raged across South Asia.85 Extreme weather events were also a defining feature of the summer of 2021. An unprecedented heatwave may have killed almost 500 people in British Columbia,86 as well as a billion marine animals along the Canadian coastline.87 In the Chinese province of Henan people drowned in the subway after a year’s worth of rain fell in just three days.88 Germany and Belgium also experienced death and destruction as a result of severe flooding,89 while villages in Greece burned.90 The impacts of climate change are striking even harder than many anticipated,91 and as temperatures continue to rise extreme weather events are increasing in both frequency and intensity. Limiting global warming to 1.5°C is key to avoiding the most catastrophic events, but substantial measures must also be undertaken to adapt to climate change impacts and build resilience. As the summer of 2021 shows, no country is spared. It is, however, those who have emitted the least that are most at risk,92 and in many countries that are disproportionately affected by climate change – such as the least developed countries (LDCs)93 – financial constraints impede their ability to invest in adaptation, build resilience and deal with loss and damage.94 COVID-19 has aggravated this challenge: while industrialized countries have implemented unprecedented stimulus measures to support their economies – and vaccinated large parts of their populations – many developing countries remain in the midst of a health and economic catastrophe. Scaled up action on climate finance, adaptation and loss and damage are – in addition to increased ambition on mitigation – key priorities for climate-vulnerable nations ahead of COP26. Raised ambition and concrete delivery in these areas are critical for supporting those at the frontline of climate change, key to building trust, and could encourage some parties to raise the ambition of their NDC pledges. The implementation of many NDCs is, in addition, at least partly conditional upon receiving increased levels of finance, as well as other types of support.95 Honouring the $100 billion goal In 2009, developed countries committed to mobilizing $100 billion per year by 2020 for climate mitigation and adaptation in developing countries.96 This pledge was subsequently formalized in the Cancun Agreements in 201097 and reaffirmed in the Paris Agreement in 2015. The resources provided were to be ‘new and additional’98 and come from a variety of public and private sources.99 The $100 billion goal is a core element of the bargain underpinning the Paris Agreement.100 While achieving the mitigation and adaptation goals of the agreement will require trillions of dollars in investment – of which most will need to come from the private sector – the delivery of the $100 billion is critical to building trust between developed and developing countries,101 and is important for raising ambition on mitigation.102 The OECD estimates that $79.6 billion was mobilized in 2019, which is the most recent year for which official figures are available.103 In 2018, the figure was $78.9 billion, and in 2017 it was $71.2 billion.104 Though the verified figures for 2020 will not be available until 2022, it is clear the target was missed.105 Developed countries have, moreover, not yet been able to show that the pledge will be honoured in 2021, nor demonstrate conclusively how it will be met in the 2022–24 period.106 The pledge by developed nations to mobilize $100 billion to developing nations by 2020 is a commitment made in the UNFCCC process more than a decade ago. It’s time to deliver. How can we expect nations to make more ambitious climate commitments for tomorrow if today’s have not yet been met?107 Patricia Espinosa, 23 July 2021 How the goal is achieved matters. Only around one-fifth of bilateral climate finance is allocated to the LDCs,108 and locally led projects receive low priority.109 There are also concerns related to overreporting and lack of additionality. Oxfam estimates, for instance, that 80 per cent of public climate finance provided over the 2017–18 period took the form of loans or other non-grant instruments, and that the actual grant equivalent only accounted for around half of the total amount of finance reported.110 Furthermore, the Center for Global Development has found that almost half of the climate finance reported between 2009 and 2019 cannot be considered ‘new and additional’.111 There is, finally, an urgent need to close the adaptation finance gap (see next section),112 and facilitate access to finance.113 It is widely recognized that honouring the $100 billion goal is a prerequisite for success at COP26.114 The hitherto failure of developed countries to provide clarity on the issue is creating mistrust between countries,115 with the director of the International Centre for Climate Change and Development (who is also an adviser to the climate-vulnerable countries) conveying that, ‘if the money is not delivered before November, then there is little point in climate-vulnerable nations showing up in Glasgow to do business with governments that break their promises’.116 The chair of the LDC Group has also made it clear that, ‘[t]here will be no COP26 deal without a finance deal’. 117 The G7 countries play a critical role in mobilizing the $100 billion,118 and there was a hope that G7 leaders would increase their bilateral commitments substantially – and provide clarity on the $100 billion119 – when they convened in Cornwall in June 2021. Some new pledges were made. Canada, for instance, committed to doubling its climate finance through to 2025 (to CAD $5.3 billion), and Germany pledged to increase its annual commitments from €4 billion to €6 billion by 2025 at the latest.120 The G7 members collectively also committed to ‘each increase and improve’ their public climate finance contributions, and announced they would develop a new international initiative – ‘Build Back Better for the World’121 – the details of which have yet to be fleshed out. However, many developing country officials – and many observers worldwide – expressed disappointment with the summit outcome, with the climate minister of Pakistan describing the G7 commitments as ‘peanuts’.122 Several announcements on climate finance were also made during the 76th Session of the UNGA in September 2021. Most importantly, President Joe Biden pledged to double US climate finance (again) from the previously committed $5.7 billion to $11.4 billion per year by 2024. Actual delivery is, however, contingent on congressional approval.123 The EU – which already contributes around $25 billion in climate finance per year – also stepped up, announcing an additional €4 billion until 2027,124 while Italian Prime Minister Mario Draghi conveyed that Italy would shortly be announcing a new climate finance commitment.125 Though the US pledge in particular has been described as a critical step forward that ‘puts the $100 billion within reach’,126 more will need to be done.127 $100 billion is a bare minimum. But the agreement has not been kept. A clear plan to fulfil this pledge is not just about the economics of climate change; it is about establishing trust in the multilateral system.128 António Guterres, 9 July 2021

## ADV 1

#### Blockchain does NOT inhibit enforcement now

Weinstein 21 (Samuel N. Weinstein, Associate Professor of Law, Benjamin N. Cardozo School of Law, “Blockchain Neutrality,” Georgia Law Review, vol.55, Winter 2021, 55 Ga. L. Rev. 499, https://www.georgialawreview.org/article/21202.pdf)

In doing so, the Article draws a distinction between antitrust and competition policy. The former term is used here to refer to enforcement of federal and state antitrust statutes, particularly the Sherman and Clayton Acts.25 This Article treats the latter term as a broader concept encompassing not only decisions about antitrust enforcement priorities, but a wider set of choices made by Congress, the executive branch, sector regulators, and state and local governments that establish the terms on which competition takes place in various markets.26 It argues that concerns among some scholars and practitioners that blockchain threatens effective antitrust enforcement are premature.27

**[FOOTNOTE 27]**

27 See, e.g., Schrepel, supra note 24, at 335 (“In the face of blockchain, current antitrust law may well be eliminated.”).

**[/FOOTNOTE 27]**

Despite the technology’s disruptive nature, the substantive antitrust challenges blockchain poses are not novel and can be addressed using current law and enforcement strategies. Indeed, the transparency blockchain offers may simplify discovery and prosecution of antitrust violations. Rather than locating and sifting through hundreds of thousands of documents to prove a price-fixing conspiracy, enforcers may find the relevant evidence permanently recorded on a cartel’s blockchain. The ability of blockchain users to mask their identities by employing pseudonyms may raise some technical enforcement challenges, but pseudonymity does not guarantee anonymity.28 Violators typically can be identified, and remedies can attach.29

#### Squo solves application of antitrust to blockchain – they have absolutely no evidence that courts will apply the Copperweld precedent to grant “single entity” immunity – it’s just Schrepel’s speculation – actual observed behavior of US antitrust authorities counter-indicates – OR, blockchains will just incorporate as a regulatory arbitrage strategy, which thumps

--antitrust can and has been applied to individuals outside of the “firm” construct

--courts and enforcers have been observed to not care about the formal legal definition of the firm and instead just care about the anticompetitive effects of behaviors

Massarotto 20 (Giovanna Massarotto, Adjunct Professor at the University of Iowa, Research Associate at UCL CBT, “Can Antitrust Trust Blockchain?” last revised 12-21-2020, forthcoming in *Algorithmic Antitrust*, ed. Aurelien Portuese, Springer, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3622979)

4.2. What Kind of Entity is Blockchain?

Before exploring possible antitrust concerns, it is worth investigating blockchain’s identity in order to verify if this entity can be directly liable for antitrust violations. Antitrust presumes that there is a defined entity or a set of entities that aim to market power, which in case of monopolization, conduct or agreements in restraint of trade, can be investigated. Otherwise, as Professors Catalini and Tucker observed, it is basically impossible to prosecute antitrust conduct in the context of blockchain. (Catalini, C. & Tucker, 2018; Lianos, 2018)

Should blockchain be considered as a firm, or a network that enables people and companies to interact or something different? The decentralized nature of blockchain can, as we have seen, help antitrust agencies in preserving competition in today’s centralized platforms. On the other hand, the inherent decentralization of blockchain brings new challenges for antitrust enforcers in terms of defining blockchain’s identity.

Similar to the nineteenth century, where society created corporations to separate people from entities devoted to business, a decade ago it introduced a new decentralized entity/infrastructure to operate. Differently from traditional corporations, in decentralized blockchains, people participate and interact with the blockchain network through a digital identity.

Digital identity can be identified as “the digital data corpus being built by users and digital systems” (Fehér, K., 2019) that enable people and any other entity to access computers and interact with computer networks. Blockchain is a decentralized computer network and in public blockchain, such as bitcoin blockchain, people’s digital identity is characterized by pseudonyms to protect privacy. The same creator of bitcoin is still known under the pseudonym of Satoshi Nakamoto, no one was able to reveal his real identity.

Satoshi Nakamoto is likely to be only one of the several pseudonyms that the founder of bitcoin uses to interact on the Internet. There is often the wrong assumption that we have only a digital identity that follows us everywhere; but this is basically not true. Every day, we create, for example, a number of email and social media accounts. Digital identity is different from our passport or social security number, and it is naïve to think that we should have only one digital identity (Ou, 2017). Similar to corporations that were created as a separate entity from its owners, digital identity is something separate (although related) to its creator.

In other words, blockchain creates a network made up by blockchain participants who interact with each other by using digital identities. Blockchain is basically the platform that enables people to interact to do much of their regular work more efficiently bypassing intermediaries. Similar to a buyer group, as we have seen, participants in the blockchain group/network are basically users that leverage their force of acting together to get goods and services that are usually provided through intermediaries.

Thus, what kind of entity is blockchain? A deeper inquiry is necessary, but as any group such as associations, consortiums or networks, blockchain does not appear immune from antitrust scrutiny. By considering the US and EU competition law, which are the main antitrust jurisdictions, we can observe that antitrust law is giving an increasing importance to the economic effects of practices in the affected markets, rather than formalistic legal definitions of entities relevant for antitrust legislation. The US antitrust law clearly emphasizes this point as under Section 7 of the Sherman Act, antitrust law is applicable to potentially any “person,” including “corporations and associations existing under or authorized by the laws” (Section 7 of the Sherman Act). In Europe, Article 101 and 102 of the TFEU applies to undertakings and associations, which exercise an economic activity (Lianos, 2018). Therefore, blockchain can easily fall into both the US and EU antitrust jurisdictions.

As outlined above, a set of rules set into a protocol governs the blockchain network. But, a group of people wrote the protocol and is leading the blockchain growth. The fact that these people are using digital identities does not make them less liable.

#### Schrepel’s “granularity” approach does NOT solve ANY of their legal certainty or confrontation warrants – only worsens problems applying antitrust

Katopodi ’21 [Eleni; 2021; LL.M PhD Candidate (University of Augsburg) and Research Associate, Technical University of Munich; EU and Comparative Law Issues and Challenges Series (Eclic 5) – Special Issue; “Blockchain Market: Regulatory Concerns Arising from the ‘Diem’ Example in the Field of Free Competition1,” https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18821/10289]

In order for the reader to answer this question, they have to go through the analysis of another essential term: the notion of ‘firm’ adapted to the requirements of the blockchain technology in competition law. In the traditional doctrine, the enterprise is the smallest economic unit, in which free competition law can be applied. The fact that the introduction of the blockchain complicates the boundaries of the company and makes its traditional definition redundant has given rise to a number of theoretical views with a view to redefining it.24 Initiating from the classic Ronald Coase’s theory of transaction costs as the most contributing factor to the more modern ‘theory of granularity’ introduced by Schrepel one thing is to be guaranteed; the issue still remains unsolved.

According to this latest theory, there is a narrow ‘nucleus’ among users of the same blockchain, which can define and control the entire structure of it, therefore bear the sole liability. This control is identified on the basis of various quantitative criteria, such as the technical capacity, the capacity to interfere with the blockchain economic value or the capacity to influence the blockchain norms. 25 However, even Schrepel’s well-structured theory presents gaps to the extent that the concept of undertaking as an entity engaged in economic activity within a structured market is unfortunately lost. Users of blockchain can be natural persons with no involvement into the business market. The narrow ‘nucleus’ may consist of the sum of those people that cannot constitute in any case legal entities.

Of course, the adoption of the ‘theory of granularity’ challenges the interpreter who will give in to it to face significant evidentiary difficulties immediately afterwards. These mainly focus on the proof that a blockchain user actually belongs to the ‘nucleus of a blockchain’ on the basis of the above criteria. Could in the decentralized ecosystem of the blockchain, however, still be expected a centralized classical dominant undertaking, which controls the market in one of the traditional and prescribed ways? According to the author, something like that would not be possible for typical permissionless blockchain. If this were accepted, it would probably jeopardize the whole antitrust legal system and result in the impunity of the responsible ones for stopping the prohibited conduct. Therefore, to the question of whether there can be a monopoly without a monopolist, the answer inevitably ends up being positive. This is partially confirmed through the wording of the MiCa Regulation (see below). Naturally, there is an exception and this theoretical structure can easily be applied in permissionless blockchains that are organized in a different way; especially within those ecosystems only few people have the right to write the code and actually run the blockchain. In similar situations, this is deemed applicable. Nonetheless, such ecosystems are far from being the rule.

Secondly, even taken for granted that the answer to the previous question would be positive, it is a real fact that blockchain and non-blockchain institutions are in a thorough competition with one another. In this framework, every time a definition is going to take place the market will be defined rather broad, excluding per se the possibility of diagnosing dominance of one actor. For example, that is the case if one considers the market for online payments, in which companies, such as PayPal or VISA payments, are also major players. Blockchain reduces significantly the transaction fees, yet it does not itself constitute a separate market. Only under the scenario that one could argue that there is a separate market for infrastructure, there might be an argument for the inclusion of blockchain technology in it. Namely, to the extent that mining cryptocurrencies and verifying transactions are also subject to fees, just like the normal payments, the existence of a broader market cannot be doubted. However, even then, this theory overlooks the various functions of blockchain and focuses only one; the use as a payment system.

#### Their “leadership on digital trade” link says Biden should try to negotiate a digital trade agreement, which the plan does NOT do NOR result in – AND, even if Biden were trying to do that now, it’s NOT about antitrust, rather regulation

#### Soft power doesn’t solve war – Ukraine and previous Russian examples prove

#### China soft power fails

Nye, 15 (7/10, Prof-Harvard, "The Limits of Chinese Soft Power," http://www.todayszaman.com/op-ed\_the-limits-of-chinese-soft-power\_393404.html)

In 2007, then-President Hu Jintao told the Communist Party that the country needed to increase its soft power; President Xi Jinping repeated the same message last year. They know that, for a country like China, whose growing economic and military power risks scaring its neighbors into forming counter-balancing coalitions, a smart strategy must include efforts to appear less frightening. But their soft-power ambitions still face major obstacles. To be sure, China's efforts have had some impact. As China enrolls countries as members of its Asian Infrastructure Investment Bank and doles out billions of dollars of aid during state visits abroad, some observers worry that, when it comes to soft power, China could actually be taking the lead over countries like the United States. The American sinologist David Shambaugh, for example, estimates that the country spends roughly $10 billion a year in "external propaganda." By comparison, the US spent only $666 million on public diplomacy last year. Yet **the billions of dollars China is spending on its charm offensive have had only a limited return.** Polls in North America, Europe, India, and Japan show that opinions about China's influence are predominantly negative. The country is viewed more positively in Latin America and Africa, where it has no territorial disputes and human-rights concerns are not always high on the public agenda. But even in many countries in those regions, Chinese practices like importing labor for infrastructure projects are unpopular. Combining hard and soft power into a smart strategy, it turns out, is not easy. A country derives its soft power primarily from three resources: its culture (in places that find it appealing), its political values (when it lives up to them at home and abroad), and its foreign policies (when they are seen as legitimate and having moral authority). China has emphasized its cultural and economic strengths, but it has paid less attention to the political aspects that can undermine its efforts. Two major factors limit China's soft power, as measured by recent international polls. The first is nationalism. The Communist Party has based its legitimacy not only on a high rate of economic growth, but also on appeals to nationalism. Doing so has reduced the universal appeal of Xi's "Chinese Dream," while encouraging policies in the South China Sea and elsewhere that antagonize its neighbors. With, for example, China bullying the Philippines over possession of disputed islands in the South China Sea, the Confucius Institute that China established in Manila to teach Chinese culture can win only so much goodwill. (China has opened some 500 such institutes in more than 100 countries.) The consequences of the country's foreign policy can be seen in last year's anti-Chinese riots in Vietnam following the positioning of a Chinese oil drilling rig in waters claimed by both countries. The other limit is China reluctance to take full advantage of an uncensored civil society. As noted by the Economist, the Chinese Communist Party has not bought into the idea that soft power springs largely from individuals, the private sector, and civil society. Instead, it has clung to the view that the government is the main source of soft power, promoting ancient cultural icons that it thinks might have global appeal, often using the tools of propaganda. In today's media landscape, information is abundant. What is scarce is attention, which depends on credibility — and government propaganda is rarely credible. For all of China's efforts to position the Xinhua news agency and China Central Television as competitors of CNN and the BBC, the international audience for brittle propaganda is vanishingly small. The US, by contrast, derives much of its soft power not from the government, but from civil society — everything from universities and foundations to Hollywood and pop culture. China does not yet have global cultural industries on the scale of Hollywood or universities capable of rivaling America's. Even more important, it lacks the many non-governmental organizations that generate much of America's soft power. In addition to generating good will and promoting the country's image abroad, non-governmental sources of soft power can sometimes compensate for the government's unpopular policies — like the US invasion of Iraq — through their critical and uncensored reaction. China, by contrast, **has watched its government policies undermine its soft-power successes.** Indeed, the domestic crackdown on human-rights activists undercut the soft-power gains of the 2008 Beijing Olympics. And the benefits of the 2009 Shanghai Expo were rapidly undermined by the jailing of Nobel Peace Prize laureate Liu Xiaobo and the television screens around the world broadcasting scenes of an empty chair at the Oslo ceremonies. Marketing experts call this "stepping on your own message." China's aid programs are often successful and constructive. Its economy is strong, and its traditional culture is widely admired. But if the country is to realize its enormous soft-power potential, it will have to rethink its policies at home and abroad, limiting its claims upon its neighbors and learning to accept criticism in order to unleash the full talents of its civil society. As long as China **fans the flames of nationalism and holds tight the reins of party control, its soft power will always remain limited.**

## ADV 2

#### None of their ev on this advantage is specific to antitrust NOR anticompetitive practices – it’s only about blockchains which were decentralized OR private by design

#### Anti-competitive blockchain practices require consensus which is unlikely

Pike and Capobianco ’20 [Chris; Gabriele; 2020; Partner and Managing Director (Head of Digital Markets) at Fideres, an economics firm that focuses on antitrust litigation exclusively from the complainant-side and an associate at the Centre for Competition Policy at the University of East Anglia; Junior Competition Expert at the Competition Division; OECD Blockchain Policy Series; “Antitrust and the trust machine,” https://www.oecd.org/daf/competition/antitrust-and-the-trust-machine-2020.pdf]

Permission-less blockchains both compete in, and are in effect, governed by markets. They have no formal governing body. Rather they exist as decentralised organisations, their governance controlled in effect by the validators that vote on whether to adopt the protocols that are proposed by developers and which then define the decision-making of the blockchain, rather than alternative protocols that would create a fork in the chain. These validators are therefore responsible for the service that the blockchain offers to the market.

However, these validators are numerous and their identities are pseudonymous. This means that, as a practical matter, it is extremely difficult to change the behaviour of the blockchain, since forcing the adoption of a protocol requires a degree of consensus amongst the validators of the chain. In effect, permission-less blockchains might therefore be seen as a huge employer-owned mutual (e.g. John Lewis), that can propose motions and vote on the firm’s detailed decision-making, while being unable to delegate decision-making to a board, nor even to recognise one another.4

Now, although we liken this governance framework to a market, the validators would appear unlikely to be considered to be independent contractors (as for example is claimed in the case of ride-sharing platforms), since they follow strict protocols in the gig-work they do for the blockchain. If they are workers or employees they would not face the risk of being accused of colluding with one another, however, this is being tested in the United American Corp. v. Bitmain, Inc. complaint.5

In a sense, they might be seen as a gig-working co-operative who collectively determine the blockchain’s offer to users (like Partners in a law firm), while individually having to follow the collectively determined protocols (like drivers on a ride-sharing platform). Like an oversized board, they may try to agree on the price that should be set. However, as noted, the prospects of countless pseudonymous validators successfully agreeing either to boycott validation of low-margin blocks, or to adopt new ‘price-raising’ protocols, appears far-fetched. Permission-less blockchains may therefore be seen as platforms which might potentially hold latent significant market power, but which are incapable of exercising that power.

As such, competition agencies would be well-advised not to spend time worrying about decentralised permission-less blockchains. Indeed, this form of blockchain offers a number of reasons for competition advocates to be cheerful (see Pike & Carovano, 2020).6 However, a caveat to this is that if – and it is a big if – if, somehow, a decentralised permission-less blockchain were to engage in anticompetitive behaviour, then big questions on practical enforcement arise.7

Firstly, how would you punish an entity with no assets, no bank account, no office, and such a large and pseudonymous board? Secondly, how would you stop the anticompetitive behaviour that was identified? Who would you instruct to change their behaviour. These would be extremely challenging questions. However, for now at least, they appear to be theoretical and not practical problems.

#### No catastrophic AI impacts---their ev is flawed scholarship

Edward Moore Geist 15, MacArthur Nuclear Security Fellow at Stanford University's Center for International Security and Cooperation, 8/9/15, “Is artificial intelligence really an existential threat to humanity?,” <http://thebulletin.org/artificial-intelligence-really-existential-threat-humanity8577>

Superintelligence: Paths, Dangers, Strategies is an astonishing book with an alarming thesis: Intelligent machines are “quite possibly the most important and most daunting challenge humanity has ever faced.” In it, Oxford University philosopher Nick Bostrom, who has built his reputation on the study of “existential risk,” argues forcefully that artificial intelligence might be the most apocalyptic technology of all. With intellectual powers beyond human comprehension, he prognosticates, self-improving artificial intelligences could effortlessly enslave or destroy Homo sapiens if they so wished. While he expresses skepticism that such machines can be controlled, Bostrom claims that if we program the right “human-friendly” values into them, they will continue to uphold these virtues, no matter how powerful the machines become.

These views have found an eager audience. In August 2014, PayPal cofounder and electric car magnate Elon Musk tweeted “Worth reading Superintelligence by Bostrom. We need to be super careful with AI. Potentially more dangerous than nukes.” Bill Gates declared, “I agree with Elon Musk and some others on this and don’t understand why some people are not concerned.” More ominously, legendary astrophysicist Stephen Hawking concurred: “I think the development of full artificial intelligence could spell the end of the human race.” Proving his concern went beyond mere rhetoric, Musk donated $10 million to the Future of Life Institute “to support research aimed at keeping AI beneficial for humanity.”

Superintelligence is propounding a solution that will not work to a problem that probably does not exist, but Bostrom and Musk are right that now is the time to take the ethical and policy implications of artificial intelligence seriously. The extraordinary claim that machines can become so intelligent as to gain demonic powers requires extraordinary evidence, particularly since artificial intelligence (AI) researchers have struggled to create machines that show much evidence of intelligence at all. While these investigators’ ultimate goals have varied since the emergence of the discipline in the mid-1950s, the fundamental aim of AI has always been to create machines that demonstrate intelligent behavior, whether to better understand human cognition or to solve practical problems. Some AI researchers even tried to create the self-improving reasoning machines Bostrom fears. Through decades of bitter experience, however, they learned not only that creating intelligence is more difficult than they initially expected, but also that it grows increasingly harder the smarter one tries to become. Bostrom’s concept of “superintelligence,” which he defines as “any intellect that greatly exceeds the cognitive performance of humans in virtually all domains of interest,” builds upon similar discredited assumptions about the nature of thought that the pioneers of AI held decades ago. A summary of Bostrom’s arguments, contextualized in the history of artificial intelligence, demonstrates how this is so.

In the 1950s, the founders of the field of artificial intelligence assumed that the discovery of a few fundamental insights would make machines smarter than people within a few decades. By the 1980s, however, they discovered fundamental limitations that show that there will always be diminishing returns to additional processing power and data. Although these technical hurdles pose no barrier to the creation of human-level AI, they will likely forestall the sudden emergence of an unstoppable “superintelligence.”

The risks of self-improving intelligent machines are grossly exaggerated and ought not serve as a distraction from the existential risks we already face, especially given that the limited AI technology we already have is poised to make threats like those posed by nuclear weapons even more pressing than they currently are. Disturbingly, little or no technical progress beyond that demonstrated by self-driving cars is necessary for artificial intelligence to have potentially devastating, cascading economic, strategic, and political effects. While policymakers ought not lose sleep over the technically implausible menace of “superintelligence,” they have every reason to be worried about emerging AI applications such as the Defense Advanced Research Projects Agency’s submarine-hunting drones, which threaten to upend longstanding geostrategic assumptions in the near future. Unfortunately, Superintelligence offers little insight into how to confront these pressing challenges.

# 2NC

## Section 5

#### Guidance uniquely avoids rollback---it’s not judicially reviewable because it’s not legally binding---guidance is neither ripe nor final.

Kessler 21 (Jeremy Kessler, Professor of Law at Columbia University; Charles Sabel, Maurice T. Moore Professor of Law at Columbia University; “The Uncertain Future of Administrative Law;” 08-01-21, Daedalus, Vol. 150, Issue 3, pp. 188-207, <https://doi.org/10.1162/daed_a_01867>, TM)

Yet government-by-guidance has provoked significant legal controversy, for at least three related reasons.18 First, as notice-and-comment rulemaking became accepted as the paradigmatic mode of administrative rulemaking, the less procedurally onerous issuance of guidance began to strike some scholars, litigants, and judges as a potential cheat. As Justice Elena Kagan put it during an oral argument in 2015, this is the recurrent concern that “agencies more and more are using interpretive rules and are using guidance documents to make law and that … it is essentially an end run around the notice and comment provisions.”19 A second, related fear is that because the provisionality of guidance documents makes them difficult to challenge in court, agencies can use guidance to evade not only the pre-issuance notice-and-comment process but also post-issuance judicial review as well.20 A final concern relates to the proliferation of doctrinal deference to agencies' interpretation of their statutory mandates and prior regulations. Critics warn that such deference perversely shelters agency interpretations announced in guidance documents from judicial scrutiny, even though they do not reflect the deliberation and evidence-gathering required by the notice-and-comment process or by formal agency adjudication.21

Underlying these technical legal objections are deeper normative concerns about the relationship of regulation as “current thinking” to conventional forms of legal authority–legislative, executive, and judicial–that help to explain why guidance continues to bedevil American courts and legal commentators. Guidance, unlike notice-and-comment rules, cannot be seen as analogous to and directly descended from legislation as a natural outgrowth of the constitutional order. But neither does guidance have the finality that marks the culmination of lawful executive or judicial action. Unlike prosecutorial indictments and administrative enforcement actions, it does not purport to represent the executive branch's determination that a particular private party has violated the law; unlike administrative orders and judicial decisions, it is not an assessment of the guilt or liability of an accused party. Guidance is always ripening into a conclusive decision, but it is never ripe; for this reason, unlike administrative rules and orders, it is not reviewable by the courts as a matter of course.

#### Even if it gets challenged, agencies will win on ripeness and finality grounds.

Raso ’10 CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

5. Judicial Challenge

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use guidance documents more frequently relative to legislative rules. Guidance documents are advantageous because they are less likely to be challenged. Even if challenged, agencies have a reasonable probability of winning on ripeness or finality grounds.

#### Their cards are about deference for determining ‘unfair methods of competition,’ an interpretation of the counterplan could be an ‘unfair trade act,’ which is also under Section 5 of the FTCA.

Bush 16 (Darren Bush, Professor of Law, University of Houston Law Center; “Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency;” Fall 2016, Willamette Law Review, Vol. 33, Issue 1, Accessed through HeinOnline, TM)

B. FTC Receives Little Deference in Court

The FTC receives almost no deference with respect to cases it brings under the "unfair methods of competition" prong of the Federal Trade Commission Act. In contrast, the FTC usually receives Chevron deference 57 when it acts under the "unfair or deceptive trade acts or practices" prong of section 5 of the FTC Act. Theories abound as to why this is so.

The most obvious theory is that the dual enforcement scheme clouds the ability of the courts to offer the FTC any deference. Unlike with the FTC's "unfair methods of competition" actions, the courts do not face a non-agency duplicate that appears in the bulk of cases before the courts regarding "unfair or deceptive trade acts or practices."5 The FTC and DOJ both enforce the Clayton Act, and while the Sherman Act is exclusively within the confines of the DOJ, the FTC cases, to the courts, are parallel actions. 59 With an "ugly stepsister" in the midst, it is difficult for the FTC to make a claim of deference successfully. 60

#### First, expand the scope---regulations don’t.

Lane 92 --- Mills Lane, Judge on the Second District Court of Nevada, “STATE, GAMING COMM'N V. GNLV CORP”, https://www.casemine.com/judgement/us/5914875dadd7b049344e3895

Moreover, an administrative agency is not required to promulgate a regulation where regulatory action is taken to enforce or implement the necessary requirements of an existing statute. K-Mart Corp. v. SIIS, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985). "An administrative construction that is within the language of the statute will not readily be disturbed by the courts." Dep't of Human Res. v. UHS of The Colony, Inc., 103 Nev. 208, 211, 735 P.2d 319, 321 (1987). The Commission did not engage in ad hoc rule-making because the Commission did not expand the scope of the statute, but merely enforced the requirements of NRS 463.3715(2) in accordance with the plain dictates of the statute.

#### Contextual evidence proves---guidance documents interpreting Section 5 don’t expand the scope---merely alter enforcement.

Federal Register: Rules and Regulations - ‘9 (Federal Trade Commission - *16 Code of Federal Regulations*- 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; *Final Rule* - “Rules and Regulations” - Federal Register - Vol. 74, No. 198 - Thursday, October 15, 2009 - #E&F - https://www.ftc.gov/sites/default/files/documents/federal\_register\_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf)

b. Examples 7-9 – New Media Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.91 Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission’s prior commitment to address word of mouth marketing issues on a case-by-case basis.92 Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.93 Two commenters said that industry self-regulation is sufficient.94

The Commission’s inclusion of examples using these new media is not inconsistent with the staff’s 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ‘‘buzz marketing’’ were appropriate.95 All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides do not expand the scope of liability under Section 5; they simply provide guidance as to how the Commission intends to apply governing law to various facts. In other words, the Commission *could* challenge the dissemination of deceptive representations made via these media regardless of whether the Guides contain these examples; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.96

#### Second, ‘increase prohibitions by… law’---regulations don’t.

John Roberts 15, Chief Justice, US Supreme Court, “Department of Homeland Security, Petitioner v. Robert J. MacLean,” 135 S.Ct. 913, WestLaw

The Government argues that this whistleblower statute does not protect MacLean because his disclosure regarding the canceled missions was “specifically prohibited by law” in two ways. First, the Government argues that the disclosure was specifically prohibited by the TSA's regulations on sensitive security information: 49 CFR §§ 1520.5(a)-(b), 1520.7(j) (2003). Second, the Government argues that the disclosure was specifically prohibited by 49 U.S.C. § 114(r)(1), which authorized the TSA to promulgate those regulations. We address each argument in turn.

\*390 A

1

\*391 In 2003, the TSA's regulations prohibited the disclosure of “ [s]pecific details of aviation security measures ... [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.” 49 CFR § 1520.7(j). MacLean does not dispute before this Court that the TSA's regulations prohibited his disclosure regarding the canceled missions. Thus, the question here is whether a disclosure that is specifically prohibited by regulation is also “ specifically prohibited by law ” under Section 2302(b)(8)(A). (Emphasis added.)

The answer is no. Throughout Section 2302, Congress repeatedly used the phrase “law, rule, or regulation.” For example, Section 2302(b)(1)(E) prohibits a federal agency from discriminating against an employee “on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation.” For another example, Section 2302(b)(6) prohibits an agency from “grant[ing] any preference or advantage not authorized by law, rule, or regulation.” And for a third example, Section 2302(b)(9)(A) prohibits an agency from retaliating against an employee for “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.”

1In contrast, Congress did not use the phrase “law, rule, or regulation” in the statutory language at issue here; it used the word “law” standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). Thus, Congress's choice to say “specifically prohibited by law” rather than “specifically prohibited by law, rule, or regulation” suggests that Congress meant to exclude rules and regulations.

\*392 The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here for two reasons. First, Congress used “law” and “law, rule, or regulation” in close proximity—indeed, in the same sentence. § 2302(b)(8)(A) (protecting the disclosure of “any violation of any law, rule, or regulation ... if such disclosure is not specifically prohibited by law”). Second, Congress used the broader phrase “law, rule, or regulation” repeatedly—nine times in Section 2302 alone. See §§ 2302(a)(2)(D)(i), (b)(1)(E), (b)(6), (b)(8)(A) (i), (b)(8)(B)(i), (b)(9)(A), (b)(12), (b)(13), (d)(5). Those two aspects of the whistleblower statute make Congress's choice to use the narrower word “law” seem quite deliberate.

\*\*920 We drew the same inference in Department of Treasury, IRS v. FLRA, 494 U.S. 922, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990). There, the Government argued that the word “laws” in one section of the Civil Service Reform Act of 1978 meant the same thing as the phrase “law, rule, or regulation” in another section of the Act. Id., at 931, 110 S.Ct. 1623. We rejected that argument as “simply contrary to any reasonable interpretation of the text.” Id., at 932, 110 S.Ct. 1623. Indeed, we held that a statute that referred to “laws” in one section and “law, rule, or regulation” in another “cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.” Ibid. That inference is even more compelling here, because the statute refers to “law” and “law, rule, or regulation” in the same sentence, rather than several sections apart.

Another part of the statutory text points the same way. After creating an exception for disclosures “specifically prohibited by law,” Section 2302(b)(8)(A) goes on to create a second exception for information “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” This exception is limited to action taken directly by the President. That suggests that the word “law” in the only other exception is limited to actions by Congress—after all, it would be unusual \*393 for the first exception to include action taken by executive agencies, when the second exception requires action by the President himself.

In addition, a broad interpretation of the word “law” could defeat the purpose of the whistleblower statute. If “law” included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that “specifically prohibited” whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word “law.”

2

2The Government admits that some regulations fall outside the word “law” as used in Section 2302(b)(8)(A). But, the Government says, that does not mean that all regulations are excluded. The Government suggests two interpretations that would distinguish “law” from “law, rule, or regulation,” but would still allow the word “law” to subsume the TSA's regulations on sensitive security information.

First, the Government argues that the word “law” includes all regulations that have the “force and effect of law” (i.e., legislative regulations), while excluding those that do not (e.g., interpretive rules). Brief for Petitioner 19–22. The Government bases this argument on our decision in Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). There, we held that legislative regulations generally fall within the meaning of the word “law,” and that it would take a “clear showing of contrary legislative intent” before we concluded otherwise. Id., at 295–296, 99 S.Ct. 1705. Thus, because the TSA's regulations have the force and effect of law, the Government says that they should qualify as “law” under the statute.

The Government's description of Chrysler is accurate enough. But Congress's use of the word “law,” in close connection with the phrase “law, rule, or regulation,” provides \*394 the necessary “clear showing” that “law” does not include regulations. Indeed, using “law” and “law, rule, or regulation” in the same sentence would be a very obscure way of drawing the Government's nuanced distinction between different \*\*921 types of regulations. Had Congress wanted to draw that distinction, there were far easier and clearer ways to do so. For example, at the time Congress passed Section 2302(b)(8)(A), another federal statute defined the words “regulatory order” to include a “rule or regulation, if it has the force and effect of law.” 7 U.S.C. § 450c(a) (1976 ed.). Likewise, another federal statute defined the words “State law” to include “all laws, decisions, rules, regulations, or other State action having the effect of law.” 29 U.S.C. § 1144(c)(1) (1976 ed.). As those examples show, Congress knew how to distinguish between regulations that had the force and effect of law and those that did not, but chose not to do so in Section 2302(b)(8)(A).

Second, the Government argues that the word “law” includes at least those regulations that were “promulgated pursuant to an express congressional directive.” Brief for Petitioner 21. Outside of this case, however, the Government was unable to find a single example of the word “law” being used in that way. Not a single dictionary definition, not a single statute, not a single case. The Government's interpretation happens to fit this case precisely, but it needs more than that to recommend it.

Although the Government argues here that the word “law” includes rules and regulations, it definitively rejected that argument in the Court of Appeals. For example, the Government's brief accepted that the word “law” meant “legislative enactment,” and said that the “only dispute” was whether 49 U.S.C. § 114(r)(1) “serve[d] as that legislative enactment.” Brief for Respondent in No. 11–3231 (CA Fed.), pp. 46–47. Then, at oral argument, a judge asked the Government's attorney the following question: “I thought I understood your brief to concede that [the word “law”] can't \*395 be a rule or regulation, it means statute. Am I wrong?” The Government's attorney responded: “You're not wrong your honor. I'll be as clear as I can. ‘Specifically prohibited by law’ here means statute.” Oral Arg. Audio in No. 11–3231, at 22:42–23:03; see also id., at 29:57–30:03 (“Now, as we've been discussing here, we're not saying here that [the word “law”] needs to encompass regulations. We're saying statute.”). Those concessions reinforce our conclusion that the Government's proposed interpretations are unpersuasive.

In sum, when Congress used the phrase “specifically prohibited by law” instead of “specifically prohibited by law, rule, or regulation,” it meant to exclude rules and regulations. We therefore hold that the TSA's regulations do not qualify as “law” for purposes of Section 2302(b)(8)(A).

B

3We next consider whether MacLean's disclosure regarding the canceled missions was “specifically prohibited” by 49 U.S.C. § 114(r)(1) itself. As relevant here, that statute provides that the TSA “shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that \*396 disclosing the information would ... be detrimental to the security of transportation.” § 114(r)(1)(C).

This statute does not prohibit anything. On the contrary, it authorizes something—it authorizes the Under Secretary to “prescribe regulations.” Thus, by its terms Section 114(r)(1) did not prohibit the disclosure at issue here.

The Government responds that Section 114(r)(1) did prohibit MacLean's disclosure by imposing a “legislative mandate” on the TSA to promulgate regulations to that effect. See Brief for Petitioner 28, 33; see also post, at 2–3 (SOTOMAYOR, J., dissenting). \*\*922 But the Government pushes the statute too far. Section 114(r)(1) says that the TSA shall prohibit disclosures only “if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation.” § 114(r)(1)(C) (emphasis added). That language affords substantial discretion to the TSA in deciding whether to prohibit any particular disclosure.

The dissent tries to downplay the scope of that discretion, viewing it as the almost ministerial task of “identifying whether a particular piece of information falls within the scope of Congress' command.” Post, at 3. But determining which documents meet the statutory standard of “detrimental to the security of transportation” requires the exercise of considerable judgment. For example, the Government says that Section 114(r)(1) requires the Under Secretary to prohibit disclosures like MacLean's. The Government also says, however, that the statute does not require the Under Secretary to prohibit an employee from disclosing that “federal air marshals will be absent from important flights, but declining to specify which flights.” Reply Brief 23. That fine-grained distinction comes not from Section 114(r)(1) itself, but from the Under Secretary's exercise of discretion. It is the TSA's regulations—not the statute—that prohibited MacLean's disclosure. And as the dissent agrees, a regulation does not count as “law” under the whistleblower statute. See post, at 1.

#### Section 5 has a better deterrent effect than treble damages---our ev is comparative.

Melamed ’16 A. Douglas Melamed - Professor of the Practice of Law, Stanford Law School – “PREPARED STATEMENT For the SENATE COMMITTEE ON THE JUDICIARY SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS on SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT” - April 5, 2016 #E&F - https://www.judiciary.senate.gov/imo/media/doc/04-05-16%20Melamed%20Testimony.pdf

(2) Some have emphasized that only the FTC can enforce Section 5 and that the only remedy for Section 5 is a “cease and desist” order issued by the FTC. Because there are no treble damages for Section 5 violations, it is suggested, there should be no fear that businesses will be unfairly punished for engaging in conduct that they did not understand to be unlawful or that businesses will be deterred from engaging in procompetitive conduct for fear of violating an ambiguous Section 5. Of course, if that were true, the prospect of standalone Section 5 enforcement would also not deter anticompetitive conduct.

There are two problems with this argument. First, the premise that remedies for violating Section 5 are inconsequential is incorrect. The FTC has for decades taken the position that its authority to issue “cease and desist” orders permits it to enter broad injunction orders that require parties to take a wide range of actions to rectify alleged harm and to ensure that they will not engage in the future in what the FTC regards as conduct similar to that alleged to have violated Section 5. Businesses sometimes find the prospect of such intrusive or sweeping restrictions on how they conduct their business to be far more worrisome than the prospect of treble damage liability.

#### Guidance uniquely avoids rollback---it’s not judicially reviewable because it’s not legally binding---guidance is neither ripe nor final.

Kessler 21 (Jeremy Kessler, Professor of Law at Columbia University; Charles Sabel, Maurice T. Moore Professor of Law at Columbia University; “The Uncertain Future of Administrative Law;” 08-01-21, Daedalus, Vol. 150, Issue 3, pp. 188-207, <https://doi.org/10.1162/daed_a_01867>, TM)

Yet government-by-guidance has provoked significant legal controversy, for at least three related reasons.18 First, as notice-and-comment rulemaking became accepted as the paradigmatic mode of administrative rulemaking, the less procedurally onerous issuance of guidance began to strike some scholars, litigants, and judges as a potential cheat. As Justice Elena Kagan put it during an oral argument in 2015, this is the recurrent concern that “agencies more and more are using interpretive rules and are using guidance documents to make law and that … it is essentially an end run around the notice and comment provisions.”19 A second, related fear is that because the provisionality of guidance documents makes them difficult to challenge in court, agencies can use guidance to evade not only the pre-issuance notice-and-comment process but also post-issuance judicial review as well.20 A final concern relates to the proliferation of doctrinal deference to agencies' interpretation of their statutory mandates and prior regulations. Critics warn that such deference perversely shelters agency interpretations announced in guidance documents from judicial scrutiny, even though they do not reflect the deliberation and evidence-gathering required by the notice-and-comment process or by formal agency adjudication.21

Underlying these technical legal objections are deeper normative concerns about the relationship of regulation as “current thinking” to conventional forms of legal authority–legislative, executive, and judicial–that help to explain why guidance continues to bedevil American courts and legal commentators. Guidance, unlike notice-and-comment rules, cannot be seen as analogous to and directly descended from legislation as a natural outgrowth of the constitutional order. But neither does guidance have the finality that marks the culmination of lawful executive or judicial action. Unlike prosecutorial indictments and administrative enforcement actions, it does not purport to represent the executive branch's determination that a particular private party has violated the law; unlike administrative orders and judicial decisions, it is not an assessment of the guilt or liability of an accused party. Guidance is always ripening into a conclusive decision, but it is never ripe; for this reason, unlike administrative rules and orders, it is not reviewable by the courts as a matter of course.

#### Even if it gets challenged, agencies will win on ripeness and finality grounds.

Raso ’10 CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

5. Judicial Challenge

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use guidance documents more frequently relative to legislative rules. Guidance documents are advantageous because they are less likely to be challenged. Even if challenged, agencies have a reasonable probability of winning on ripeness or finality grounds.

#### Their cards are about deference for determining ‘unfair methods of competition,’ an interpretation of the counterplan could be an ‘unfair trade act,’ which is also under Section 5 of the FTCA.

Bush 16 (Darren Bush, Professor of Law, University of Houston Law Center; “Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency;” Fall 2016, Willamette Law Review, Vol. 33, Issue 1, Accessed through HeinOnline, TM)

B. FTC Receives Little Deference in Court

The FTC receives almost no deference with respect to cases it brings under the "unfair methods of competition" prong of the Federal Trade Commission Act. In contrast, the FTC usually receives Chevron deference 57 when it acts under the "unfair or deceptive trade acts or practices" prong of section 5 of the FTC Act. Theories abound as to why this is so.

The most obvious theory is that the dual enforcement scheme clouds the ability of the courts to offer the FTC any deference. Unlike with the FTC's "unfair methods of competition" actions, the courts do not face a non-agency duplicate that appears in the bulk of cases before the courts regarding "unfair or deceptive trade acts or practices."5 The FTC and DOJ both enforce the Clayton Act, and while the Sherman Act is exclusively within the confines of the DOJ, the FTC cases, to the courts, are parallel actions. 59 With an "ugly stepsister" in the midst, it is difficult for the FTC to make a claim of deference successfully. 60

## ADV 1

### 2NC – SQ Solves – T/L

#### Concentrated permissionless OR permissioned blockchains can be resolved using existing antitrust law

Pike and Capobianco ’20 [Chris; Gabriele; 2020; Partner and Managing Director (Head of Digital Markets) at Fideres, an economics firm that focuses on antitrust litigation exclusively from the complainant-side and an associate at the Centre for Competition Policy at the University of East Anglia; Junior Competition Expert at the Competition Division; OECD Blockchain Policy Series; “Antitrust and the trust machine,” https://www.oecd.org/daf/competition/antitrust-and-the-trust-machine-2020.pdf]

A more likely concern is that validation of a permission-less blockchain may over time lose its decentralised nature and instead become highly concentrated. In that case, the co-ordination problems on setting prices that we identified might become significantly less challenging. A validator with a high share of validation capacity, for instance, one that employs thousands of validators in order to operate what is known as a ‘mining-pool’ might then be able to change protocols to raise prices, either unilaterally, or through co-ordination with a small number of other validators. Competition agencies may therefore wish to keep an eye on the degree of concentration of validation capacity on any permission-less blockchains that would hold market power if they were centrally controlled.

In addition, this loss of its highly decentralised nature would mean that a permission-less blockchain with a concentrated list of validators starts to resemble a permissioned blockchain with a small list of validators. Fortunately, however, in such circumstances the blockchain’s highly concentrated nature would also make identification and enforcement against the small number of validators easier, as is already the case for the permissioned blockchains to which we now turn.

3.2 Market power and enforcement against permissioned blockchains

Like firms with a traditional corporate structure, permissioned blockchains are operated by a single, well defined, centralised entity (or consortia of entities) that has developed the protocols that govern its actions. These therefore embody the traditional paradox that firms that compete in markets are governed by hierarchical command and control (non-market) mechanisms.8

This means these blockchains are perfectly capable of exercising any market power that they have. Indeed we might expect that there would be particularly strong network effects in the increasing number of ‘industry’ blockchains that are being formed by consortia of upstream and downstream firms that serve a certain market (see for instance those in shipping or diamonds) or that serve a broader set of markets (for example in the case of Libra).

In contrast to permission-less blockchains there should not be the same enforcement challenges in these cases. This is because there is both a centralised governing entity and a list of permissioned validators, and so it is therefore clear where a competition agency would need to direct any enforcement action that it needs to take. Such action might be required in a host of familiar situations, which we consider in the following sections.

#### Agencies are adapting – no durable impact

Weinstein ’21 [Samuel; 2/19/21; Associate Professor of Law, Benjamin N. Cardozo School of Law; Georgia Law Review; “Blockchain Neutrality,” vol. 55, p. 499-592]

Another general enforcement challenge blockchain poses stems from its decentralized nature, which could make it tricky to effectively remedy unlawful conduct undertaken on these networks. Enforcing injunctions against an organization controlled by a disparate group of pseudonymous users may be difficult. Professor Thibault Schrepel warns that some blockchain networks will continue to operate even if governments sanction their developers. 180 This is not a substantive antitrust issue, but it may vex antitrust enforcers and plaintiffs who win judgments against blockchain networks. However, remedies, including injunctions, could be enforced against users, whose identities are not anonymous. Further, these problems will not necessarily arise in all or even in most blockchain-related antitrust cases.

There are reasons to believe that the antitrust laws are being underenforced generally, but that trend is broader than and separate from the growth of technology markets. As an enforcement matter, the antitrust laws have proved adaptable to technological change in the computer and Internet eras, and that flexibility should continue in the blockchain era. 181 The straightforward nature of the antitrust claims likely to arise out of blockchain networks reinforces this intuition.

#### Squo concept of the ‘firm’ is enough – “single entity” immunity has never been granted to blockchain by courts and there’s no reason to believe it would be

Pascarella ’22 [Pat; 1/21; Antitrust attorney with BonaLaw, formerly with the U.S. Department of Justice Antitrust Division and former Chief Antitrust Counsel at AT&T; The Antitrust Attorney Blog; “Don’t Let Antitrust Stick a Fork in Your Blockchain,” https://www.theantitrustattorney.com/dont-let-antitrust-stick-a-fork-in-your-blockchain/]

Can a blockchain itself violate the antitrust laws much like a firm or company today? Say a blockchain influenced by its founders, developers, and users (and in some instances miners), enables some conduct or practice with the purpose and effect to exclude or raise the cost of a rival entity (e.g., a competing blockchain, or perhaps a competitor relying on a centralized control solution). Or the blockchain is used to implement rules that permit an exchange of data among its users that enables collusion to the mutual benefit of the conspirators and blockchain (a hub and spoke conspiracy).

I think it is safe to assume that the answer to that question is yes. This is not to say however that the prosecution of such claims will not pose some interesting questions. For example, is the blockchain a firm or person like a corporation for purposes of antitrust enforcement? Who is “the blockchain?” Is there some control group and what are its bounds? (See, Blockchain + Antitrust, Thibault Schrepel (2021) for an interesting and well-informed discussion of this and other potential antitrust-related issues in a blockchain world.) While questions such as these are today unanswered, I would suggest that they will be relatively simple issues for courts to deal with. Contrary to whimsical theoretic discussions, these issues will be decided in the cold light of facts – i.e., who did what to whom. Nothing courts haven’t been called on to do with every new technology and marketplace. What is the alleged injury? And who caused it?

Intra-Blockchain Violations

Obviously, there are scenarios that might cause damage or injury primarily within a single blockchain that also give rise to antitrust liability. Most will involve some amalgamation of control among participants (and potentially outsiders) who then proceed to act to the detriment of other participants in the blockchain (and possibly outsiders impacted by the conduct). See, e.g., United American Corp. v. Bitmain Inc., et al., Case No. 1-18-cv-25106 (S.D. Fla.). I suspect key issues in most such cases will be defining the relevant market and whether the proffered harm amounts to antitrust injury.

There will no doubt continue to be countless articles, reports, and even books written about antitrust and blockchain. These books and articles will raise an array of interesting hypothetical scenarios that arguably may confound the antitrust laws. My point—I have yet to see a real world blockchain-related issue that can’t be resolved by the simple application of the current antitrust laws to the relevant facts—assuming, of course, your antitrust attorney knows the difference between a dApp and a DAO.

#### Every practice can be prosecuted – takes out second advantage too

Thomas and Julian ’20 [Ryan; Julian; Fall 2020; Partner in the Washington, DC office of Jones Day. Associate in the firm’s San Francisco office; The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association; “Blockchain Technology: a Future Antitrust Target?” vol. 30, p. 18-35]

Blockchain and other emerging technologies, like artificial intelligence and “big data” analytics, are evaluated under the same antitrust laws and analytical framework as “old tech,” like smokestack industries.55 In the United States, use of blockchain technology primarily raises potential issues under Sherman Act § 1 (no collusion), Sherman Act § 2 (no monopolization), Federal Trade Commission (FTC) Act § 5 (no unfair competition), and Clayton Act § 7 (no anticompetitive transactions).56

In recent years, politicians, competition agencies, and mainstream media in the United States and around the world have devoted significant attention to the question of whether technology companies, and more broadly, “high tech” products or services, should be subject to different antitrust enforcement rules. Although there is not always unanimity across or even within jurisdictions, U.S. leadership at the DOJ and a majority of the FTC Commissioners have made statements suggesting that existing laws are sufficient. In 2019, for example, the head of the DOJ Antitrust Division addressed this directly: “Some have suggested changing the antitrust laws, creating new agencies or even regulating the conduct of some firms . . . it bears repeating that our existent framework is flexible enough to detect harm in any industry and emerging ones.”57 In 2018, another DOJ official voiced similar sentiments:

Lately, there has been discussion about whether certain conduct—the use of computer algorithms to set prices, for example—should attract the same level of scrutiny as “traditional” price fixing conduct. To be clear, where competitors agree to restrict competition between them, whether by agreeing to display identical gasoline prices at gas stations on opposite street corners, or by fixing prices using advanced technology like online trading platforms or algorithms, they violate the Sherman Act. The agreement to fix the price is the illegal act; the means through which the agreement is carried out is less important.58

This statement directly implicates Sherman Act § 1, which prohibits anticompetitive collusion, such as price fixing, bid rigging, or market allocation.59 Depending on how a blockchain is formed and operated, it may also implicate other antitrust laws, including those that prohibit monopolization and anticompetitive transactions. For most blockchain collaborations among rival businesses, however, the greatest practical antitrust risk involves collusion and improper information sharing. Participants might use blockchain technology to facilitate a “naked” agreement to fix prices or allocate markets or customers, or to improperly share competitively sensitive data, which might reduce competition. As the head of the DOJ Antitrust Division recently hypothesized:

There is also, most certainly, potential for abuse. Incumbents could use blockchains anticompetitively to exclude competition. For example, consider seafood harvesters that establish a permissioned blockchain to track food through the supply chain and assure quality and sourcing. If multiple competing harvesters conditioned access to that permissioned blockchain on agreeing to certain prices or output, competition and consumers would suffer tremendous harm.60

A. Collusion and Improper Information Sharing—Sherman Act § 1

A § 1 violation requires concerted action (an “agreement”) between two or more firms. Most agreements are reviewed under the rule of reason,61 which examines whether the agreement’s procompetitive benefits outweigh the likelihood of anticompetitive harm.62 Certain other agreements between or among competitors, however, such as fixing prices, allocating markets, and rigging bids, are found to always or almost always harm competition. Such conduct is presumed unlawful without any inquiry into claimed procompetitive benefits (per se analysis).63

Private blockchains can be procompetitive. Because the participants are known to each other, the arrangement could result in reduced transaction costs, improved connections between nodes, and a more equitable validation of the transactions on the chain. However, the same arrangement may increase antitrust risk, such as when competitively sensitive terms such as price, quantity, and customer-specific features and specifications are shared between competitors. In fact, a private blockchain could facilitate an antitrust violation by providing a method to share the information or to monitor participants to ensure they are following the agreement’s terms—i.e., not “cheating” on the arrangement. For example, private blockchains could be used to facilitate a price fixing arrangement, which as noted above is a per se violation of § 1, without regard to actual or claimed procompetitive effects.

Beyond more obviously anticompetitive agreements, blockchain participants could also violate § 1 if they use it to facilitate improper exchanges of competitively sensitive information or to unreasonably exclude rivals’ access to the blockchain. Agreements to exchange competitively sensitive information may reduce competition, and the exchange itself also may provide evidence of unlawful coordination. Unlike price fixing or customer/ market allocation agreements, however, such exchanges are less likely to be deemed per se unlawful under U.S. law. The conduct is instead evaluated under a “rule of reason” analysis, which requires balancing the anticompetitive harm against the procompetitive benefits of the information exchange.64

A number of factors are considered to determine whether an information exchange results in anticompetitive harm:

• Source of the information provided (does it involve actual or potential competitors?);

• Nature of the information exchanged (is it competitively sensitive?);65

• Industry structure (is the industry composed of many or few competitors?);66

• Whether there is an anticompetitive effect;67 and

• Business rationale (could the legitimate business goals have been achieved with

less or no exchange of competitively sensitive information?).

The head of the DOJ Antitrust Division recently noted:

Blockchain solutions might, for instance, facilitate sharing of competitively sensitive information. As Dr. Thibault Schrepel has observed, by virtue of its distributed ledger, the blockchain “turns private information into genuinely public information.” It may be difficult (or impossible) to identify which actors are sharing what information because the blockchain is based on pseudonyms and largely anonymous transactions. This combination of factors could embolden competitors to share more competitively sensitive information through the blockchain than they would otherwise. Moreover, blockchain’s smart contract capabilities could facilitate the design and implementation of anticompetitive agreements68

In addition, private blockchain participants also may face § 1 risk if they unreasonably exclude competitors from the blockchain.69 If a blockchain were to become critical to compete in a particular industry, competitors may need to be a part of the blockchain. Take costs, for example. Benefits from increased economies of scale (improving cost through greater output of a single good) and scope (improving cost through greater variety of goods) are critical elements of competition in most sectors. In banking and healthcare, for example, using blockchain technology can significantly reduce transactions costs. In healthcare, providers may not be able to provide the same level of care or generate necessary operating efficiencies without access to data on certain blockchain networks or pharmaceutical supply chains. If private blockchain members exclude competitors from accessing a blockchain that has become essential to doing business, nonmembers may not be able to compete effectively. Excluding rivals from a “must have” blockchain may give rise to claims that the blockchain’s membership rules are being used to unfairly exclude or limit competition.

Exclusionary conduct also can result from a blockchain’s architecture—for example, the consensus mechanism chosen to resolve discrepancies. In private blockchains, owners or designated blockchain participants may have the authority to resolve discrepancies in the chain unilaterally, as opposed to a more objective and equitable consensus mechanism. Certain participants could agree to resolve discrepancies against rival competitors and to prioritize others.70 Although a decision to exclude a competitor from a membership association is typically analyzed under the rule of reason, excluding a rival solely to impede its ability to compete and without a legitimate business justification may be deemed to be anticompetitive conduct.

B. Monopolization—Sherman Act § 2

Sherman Act § 2 generally prohibits monopolization and attempts to monopolize.71 Importantly, monopoly power alone is not enough to prevail on a Section 2 claim.72 Rather, the entity must use its monopoly power to willfully maintain that power through anticompetitive exclusionary or predatory conduct.73 Courts have found exclusionary conduct in a number of circumstances, including, for example, when a monopolist has refused to deal with its rivals, has engaged in exclusive supply or purchase agreements, or has denied an essential facility to its competitors.74

The analysis is intensely fact specific, but blockchains may provide evidence of a Section 2 violation if, for example, as part of an exclusive supply arrangement a firm with monopoly power requires its customers to use its blockchain to complete transactions and that requirement results in customers having to abandon a competitor’s blockchain. Section 2 also can be triggered in certain limited circumstances when a monopolist refuses to deal with a competitor. Although a company generally has no duty to deal with its rivals, courts have found antitrust liability when a monopolist had a prior course of dealing with the competitor but then terminated the relationship without any legitimate business reason.75 Accordingly, a monopolist owner of a blockchain may face Section 2 scrutiny if it previously allowed a competitor access to its blockchain, but later excluded that rival without a reasonable business justification.

C. Unfair Competition—Federal Trade Commission Act § 5

Section 5 of the FTC Act prohibits unfair competition.76 The FTC has adopted an expansive and at times controversial interpretation of its enforcement powers under this statute, asserting that Section 5 applies to any “deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition,” including conduct that is not covered by the Sherman Act.77 One of the more common applications of Section 5 involves invitations to collude—efforts by one firm to enter into an anticompetitive price fixing or market allocation agreement with one or more of its competitors.78

Because blockchains can be used to share information, they could potentially be used to “signal” future plans to rivals and invite them to follow suit. For example, a competitor could use blockchain transaction histories to demonstrate to its competitors that it had been consistently charging a particular price, and then—successfully or unsuccessfully— suggest that they do the same. Or if a blockchain allowed rivals’ access to prospective pricing or other competitively sensitive information, that could be used to signal plans and invite others to follow. Such activity may be viewed as an invitation to collude in violation of Section 5, particularly if there is evidence that competitors’ subsequent transactions and posted prices were impacted by the signal.

D. Anticompetitive Transactions—Clayton Act § 7

Section 7 of the Clayton Act prohibits anticompetitive transactions, including mergers and acquisitions and certain joint ventures and competitor collaborations.79 The key question is whether the proposed transaction is likely to create or enhance market power, or to facilitate its exercise.80 A transaction is less likely to be anticompetitive if entry or repositioning in the market is easy, or if the merged firm and its remaining rivals could not profitably raise prices or otherwise reduce competition. In addition, when competitive concerns are more limited the agencies are less likely to challenge a transaction if there are significant and verifiable transaction-specific efficiencies.81

Mergers or other transactions that involve rival blockchains may raise antitrust concerns. As part of its analysis, the DOJ or the FTC will consider several factors, including the number and significance of competing blockchains, the likelihood that existing or new firms could and would constrain the combined firm in the future, and efficiencies. Blockchain remains a relatively nascent technology still finding its use cases, with many startups and ventures looking to successfully commercialize the technology. This suggests that competition is dynamic and entry is common. In addition, as described above, blockchains may result in significant cost savings and other efficiencies. This could be a critical part of the analysis, particularly as competition agencies may have relatively less confidence about predicting adverse competitive effects and more confidence in accepting verifiable efficiencies and synergies. The combination or even interoperation82 of rival blockchains could potentially result in significant cost savings and other operational synergies that may be credited as part of an agency’s merger analysis.

#### And blockchains will self-regulate

Pike and Capobianco ’20 [Chris; Gabriele; 2020; Partner and Managing Director (Head of Digital Markets) at Fideres, an economics firm that focuses on antitrust litigation exclusively from the complainant-side and an associate at the Centre for Competition Policy at the University of East Anglia; Junior Competition Expert at the Competition Division; OECD Blockchain Policy Series; “Antitrust and the trust machine,” https://www.oecd.org/daf/competition/antitrust-and-the-trust-machine-2020.pdf]

Blockchains should be seen as platform products that compete to attract both users and validators. The success of any blockchain therefore relies on its ability to attract users, who use the blockchain to validate actions, and to attract validators, who collectively do the work of validating those actions. In the case of permission-less blockchains the pool of validators is potentially vast, while in contrast, permissioned blockchains will be looking to attract more trustworthy validators. In this sense, they are not open to all; like say Airbnb, but rather, like a luxury hotel-booking platform, they look to attract ‘premium’ sellers.

As in any other digital platform, a blockchain therefore has to set terms that are attractive to both groups in order to get them on-board. For example, the security, price and speed of verification must be attractive to users, and the rewards for verifying must be attractive to validators. Cross-platform network externalities are likely since more users increase the value of the platform and its tokens, and hence increase the rewards to validators, while more validators increase the security and speed of the verification process, and keep down the verification price for users. As in other digital platforms, this price may be near zero (provided there is sufficient competition between validators).

As with other multi-sided platforms (e.g. ride-hailing services), each blockchain platform may compete with other platforms with the same application, or with non-platform alternative technologies that have the same application. These markets may often be intermediate product markets within a supply chain that final consumers might be unaware they are using (as has become the case with Linux-based operating systems). From a competition perspective, what matters is the users’ and validators’ view of the substitutability between these different technologies. It therefore does not follow that there is a specific market for blockchains, or that a blockchain will comprise its own separate market, since different blockchains can be suitable for different applications, where they may compete with non-blockchain technologies that final users consider meet the same needs.

#### Soft power fails – can’t prevent conflict or convince hostile actors

Shah, 14 (Ritula Shah, 11-19-2014, "Is US monopoly on the use of soft power at an end?", BBC News, http://www.bbc.com/news/world-29536648#ER, DA: 7-8-2015)

But the limits of soft power are also apparent everywhere. If you look back across the period since the end of the Cold War, the US has actually deployed rather a lot of "hard power" around the world; two wars in Iraq, Bosnia, Kosovo and Afghanistan and the current airstrikes in Iraq and Syria, to name a few and not to mention the use of drones. In all these cases, soft power wasn't enough to avert a conflict or military intervention. Also, as Prof Nye concedes, soft power can only work when people are receptive to the messages it's peddling. So the movies may help to spread a US vision of what a free, democratic life might look like, but only if the people watching, recognise the importance of those values to them. It seems unlikely that the violent jihadists of Islamic State will be persuaded to abandon their anti-Western vision.

#### Existing ex ante AND ex post regulatory efforts thump

Reyes 16 (Carla L. Reyes, Perkins Cole LLP, JD, LLM International & Comparative Law, Duke University School of Law, MPP Duke University Terry Sanford School of Public Policy, “Moving Beyond Bitcoin to an Endogenous Theory of Decentralized Ledger Technology Regulation: An Initial Proposal,” Villanova Law Review, 61(1), 4-1-2016, https://www.villanovalawreview.com/article/10297.pdf)

C. The Impact of the Current Landscape: Confusion, High Risk, and Disincentives to Innovation

The policy priorities related to bitcoin and other decentralized virtual currencies are now relatively clear. The implementation of those policies through existing law remains a mystery in several areas, however. As a result, a common critique leveled at the regulatory efforts related to decentralized ledger technologies described above is that it evidences what appears to be development and implementation absent a master plan. To date, the United States has made great efforts to understand the unique characteristics and potential risks of virtual currency. Nonetheless, virtual currency hearings have not yielded any formal recommendations or guidance. As a result, regulatory bodies, courts and state legislatures have acted independently resulting in a regulatory mishmash of guidance, clarification, extension and ongoing discussion.117

The reality, however, is that the present regulatory approach to decentralized virtual currencies reflects mainstream approaches to financial regulation generally, using a combination of ex ante and ex post regulation to mitigate systemic risk in the financial system.118 Leading literature on approaches to financial regulation offers this insight:

Complete ex ante financial regulation, whereby regulators prevent every failure, is [ ] a futile goal. And even if it were feasible, it would not necessarily be desirable. Ex ante regulation can provide an incentive for regulatory arbitrage. Furthermore, any ex ante regulation that attempts to prevent all financial failures may end up being too chilling, thereby dampening economic growth. Ex post remedies will therefore always be needed to try to prevent financial failures—when they inevitably occur—from spreading and becoming systemic.119

The regulatory history of decentralized virtual currency to date reads like a textbook example of this commentary: a heavy emphasis on ex ante attempts to prevent financial harm in the decentralized virtual currency industry, complemented by ex post prosecutions of harmful activity when failures nevertheless occurred.

Nontheless, the heavy emphasis on ex ante efforts to prevent decentralized virtual currency-related market failures when coupled with the innovative nature of the underlying technology has led to confusion and uncertainty, while the ex post efforts to punish and correct failures highlight the high risk faced by anyone connected to the decentralized ledger technology industry, whether working with a payments applications like virtual currency or not. Even a cursory review of the state of the industry supports this position. There presently exists no fully licensed, U.S.-based decentralized virtual currency exchange.120 Any entity offering a product or service connected in any way to decentralized public ledger technology finds difficulty obtaining and maintaining banking relationships to enable the operation of its business.121 Furthermore, the regulatory history is replete with evidence of the practical difficulties resulting from shoehorning decentralized ledger technologies, related applications, and the businesses that offer products and services related to them into a regulatory scheme first designed for centralized technologies. Compliance with the Funds Transfer and Funds Travel Rules122 and the valuation of virtual currency assets when applying for money transmission licenses under statutes that contemplate only fiat currency123 offer two examples of such difficulties. If the regulatory approach to decentralized ledger technologies to date is a clear example of traditional financial regulation, and the result is confusion, uncertainty, and disincentive for innovation, the urgent question facing regulators, consumers, and entrepreneurs alike is whether an alternative approach that nevertheless remains consistent with leading legal regulatory theory is possible.

## ADV 2

#### It’s impossible for machine intelligence to out-pace humans

Edward Moore Geist 15, MacArthur Nuclear Security Fellow at Stanford University's Center for International Security and Cooperation, 8/9/15, “Is artificial intelligence really an existential threat to humanity?,” <http://thebulletin.org/artificial-intelligence-really-existential-threat-humanity8577>

As this example suggests, Bostrom believes that superintelligences will retain the same goals they began with, even after they have increased astronomically in intelligence. “Once unfriendly superintelligence exists,” he warns, “it would prevent us from replacing it or changing its preferences.” This assumption—that superintelligences will do whatever is necessary to maintain their “goal-content integrity”—undergirds his analysis of what, if anything, can be done to prevent artificial intelligence from destroying humanity. According to Bostrom, the solution to this challenge lies in building a value system into AIs that will remain human-friendly even after an intelligence explosion, but he is pessimistic about the feasibility of this goal. “In practice,” he warns, “the control problem ... looks quite difficult,” but “it looks like we will only get one chance.”

Convinced that sufficient “intelligence” can overcome almost any obstacle, Bostrom acknowledges few limits on what artificial intelligences might accomplish. Engineering realities rarely enter into Bostrom’s analysis, and those that do contradict the thrust of his argument. He admits that the theoretically optimal intelligence, a “perfect Bayesian agent that makes probabilistically optimal use of available information,” will forever remain “unattainable because it is too computationally demanding to be implemented in any physical computer.” Yet Bostrom’s postulated “superintelligences” seem uncomfortably close to this ideal. The author offers few hints of how machine superintelligences would circumvent the computational barriers that render the perfect Bayesian agent impossible, other than promises that the advantages of artificial components relative to human brains will somehow save the day. But over the course of 60 years of attempts to create thinking machines, AI researchers have come to the realization that there is far more to intelligence than simply deploying a faster mechanical alternative to neurons. In fact, the history of artificial intelligence suggests that Bostrom’s “superintelligence” is a practical impossibility.

# 1NR

#### Even if there’s permanent fiat for this narrow Aff, false positives cause SCOTUS latching. SCOTUS broadly whittles all anti-trust - hurting enforcement vs. all false negatives – turning case.

Kades ’18

Michael Kades - Director, Markets and Competition Policy - Washington Center for Equitable Growth - Comments of the Washington Center for Equitable Growth. Michael worked as Antitrust Counsel for Sen. Amy Klobuchar (D-MN), the ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, where he led efforts to reform antitrust laws. Previously, he spent 20 years investigating and litigating some of the most significant antitrust actions as an attorney at the Federal Trade Commission. Topic 1: The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, since the Pitofsky Hearings - August 20, 2018 - #E&F - <https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0051-155290.pdf>

But not all antitrust scholars agree that false positives are more costly than false negatives in antitrust law. In particular, recent economic theory and empirical work provide numerous objections that should be explored. For instance, the premise that markets correct more quickly than judicial error are empirical claims that have not been tested.21 The market may take longer to correct anticompetitive activity than is presumed. Entry may be difficult,22 and cartels can last a long time.23 Similarly, false negatives can be costly and long-lived. False negatives may occur more frequently than false positives.24 If the empirical evidence is showing these costs to be much higher than previously anticipated, then the relevant question should be how to balance enforcement to achieve the most competition and greatest benefit.

Despite the lack of systematic evidence, the judiciary has largely accepted that over-inclusive rules, which generate false positives, are costlier to consumers than under-inclusive rules, which generate false negatives. And, application of error-cost analysis has justified doctrine that is more lenient toward business conduct under the antitrust laws. The U.S. Supreme Court has restricted monopolization claims to avoid false positives.25 Initially, in antitrust challenges to pharmaceutical patent settlements, courts implicitly relied on concerns about false positives in justifying lenient rules allowing reverse payments.26 Even in merger cases, courts have warned about the dangers of false positives.27 They, however, very rarely discuss the dangers of underinclusive rules. Consequently, it would not be surprising if courts have over-emphasized false positives in designing antitrust rules, making these concerns an important line of inquiry during the hearings.

#### False Negatives snowball – they spill outside the permanent fiat of the Aff.

Kades ’18

Michael Kades - Director, Markets and Competition Policy - Washington Center for Equitable Growth - Comments of the Washington Center for Equitable Growth. Michael worked as Antitrust Counsel for Sen. Amy Klobuchar (D-MN), the ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, where he led efforts to reform antitrust laws. Previously, he spent 20 years investigating and litigating some of the most significant antitrust actions as an attorney at the Federal Trade Commission. Topic 1: The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, since the Pitofsky Hearings - August 20, 2018 - #E&F - <https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0051-155290.pdf>

A False negative occurs when a rule incorrectly allows an anticompetitive practice; for example, if a judicial rule allows mergers that substantially reduce competition, generating higher prices and deadweight loss. The rule is under-inclusive. An antitrust rule that generates too many false negatives—that fails to catch illegal behavior—will encourage anticompetitive activity. The cost is not simply the defendant in a specific case avoiding liability— firms will engage in more anticompetitive conduct because it is profitable.

#### Yes, spill-over – error rates *aren’t compartmentalized* and ripple *through the entire economy*.

Dagen ‘10

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

Price cutting and choosing with whom to deal are among the areas of “core competition.” They also share the characteristic that they are transactional necessities. At the most basic level, for there to be a sale of goods or services in a free market, the seller must choose a product to sell – a process that might include product design, setting a price, and choosing with whom to purchase and sell. In a capitalist society, as opposed to a command economy, these are among the basic underpinnings of the market. It is always necessary to pick a price; it is always necessary to pick with whom to deal.80 In addition, it is impossible for firms to operate in a vacuum – they must continually observe and react to their competitors.

Although under some circumstances, even conduct involving transactional necessities or core competition can subject a firm to antitrust liability, on balance, antitrust law gives firms significant leeway in these areas.81 This limits court involvement in the most fundamental, internal workings of the firm.82 Courts are ill-equipped to do so “because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects.”83 A false positive involving an element of core competition or a transactional necessity can cause harm throughout the economy.

#### FTC expertise solves – avoids error-laden courts and juries.

Rosch ‘10

Remarks of J. Thomas Rosch - Commissioner, Federal Trade Commission before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA - March 23, 2010 - #E&F - https://www.ftc.gov/sites/default/files/documents/public\_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

Third, the Commission should consider whether the Commission’s special expertise adds any value to the case at hand. When Congress enacted Section 5 it gave the FTC – and only the FTC – authority to enforce Section 5. To my mind, this delegation of authority means if the FTC is going to sue a firm under Section 5, it must go after conduct that Congress did not intend for private plaintiffs to be able to pursue under the other federal antitrust laws. Or, put differently, there must be something about the conduct that the FTC, as an expert and independent administrative agency, is optimally positioned (in comparison to the average private plaintiff) to claim is anticompetitive.

When would the FTC add special value? I can envision a few types of cases. One category of cases might be those instances where the conduct is in its incipient stages. The Sherman Act has never been thought of as an incipiency statute and there are undoubtedly good reasons for that fact: determining what conduct in its nascent stage is likely to lead to conduct that is more anticompetitive than procompetitive is a challenging task – one that private plaintiffs, generalist judges, and lay juries are arguably ill-suited to attempt. Moreover, the cost of them getting it wrong – creating liability for procompetitive conduct – is far too high. The FTC with its ability to engage in precomplaint discovery and its in-house experience and expertise in competition and economics is arguably uniquely suited to make those difficult decisions.

#### CPlan doesn’t link - Section 5 sets clear standards and doesn’t rest on private litigations. It wouldn’t chill pro-competitive conduct.

Dagen ‘10

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

Section 5 can play and has played a central role in gap filling and upholding the spirit of the antitrust laws. This is particularly true where the conduct at issue does not involve transactional necessities or core competitive values and where the conduct is already condemned under external norms. Under these circumstances, the FTC can craft a clear standard, and there is little risk of chilling procompetitive conduct.

The Section 5 cases discussed in this article also easily fit within the limiting principles suggested in recent speeches by FTC officials as well as recent cases.298 The scope for Section 5 discussed here is not meant to set an outer boundary or universal standard for Section 5. Rather, the discussion here centers around what one might call the low-hanging fruit that the Sherman Act does not grab.

Notably, since 1992, the FTC has issued numerous complaints and consent agreements based on Section 5 as a gap-filling statute. During the period between Dell and N-Data, there has been little uproar in the antitrust or business community. Some will answer that those were only consent agreements. But antitrust counseling takes into account consent agreements. And of course, Dell and N-Data themselves were consent agreements. Indeed, many fear that antitrust and other substantive law is made primarily by consent. So to denigrate the pure Section 5 actions between Dell and N-Data as consent agreements would be disingenuous.

The hostility toward Section 5 is often phrased in terms of the horrible effects on innovation from vague standards.299 But Section 2 is subject to this same criticism,300 as are equitable estoppel and other patent defenses. In short, that claim can be, and likely has been, made with respect to any private or public action that could potentially diminish the incentive to innovate. In the ranking of potential harms to innovation, Section 5 should likely be relatively low.

#### A new round of US Econ decline kills global economic stability.

* Even if other nations comprise a larger statistical share of the global economy, uncertainty in the US – not other nations – is what would trigger a global spiral.

Bloom ‘21

et al ; Nicholas Bloom Professor of Economics, School of Humanities and Sciences Senior Fellow, Stanford Institute for Economic Policy Research - “From COVID-19 to Brexit, this is how uncertainty affects the global economy” – WEF – January - #E&F - https://www.weforum.org/agenda/2021/01/global-uncertainty-index-economics-us-uk-covid-coronavirus-pandemic-brexit-china/

Economic growth in key systemic economies, like those of the United States and European Union, is a key driver of economic activity in the rest of the world. Is this also true when it comes to global uncertainty? For example, given the higher interconnectedness across countries, should we expect that uncertainty from the U.S. election, Brexit, or China-U.S. trade tensions spill over and affect uncertainty in other countries?

To answer this question, we construct an index that measures the extent of “uncertainty spillovers” from key systemic economies—the Group of 7 (G7) countries plus China—to the rest of the world. In particular, we identify uncertainty spillovers from systemic economies by text mining the Economist Intelligence Unit country reports, covering 143 countries from the first quarter of 1996 to the fourth quarter of 2020.

Uncertainty spillovers from each of the systemic economies are measured by the frequency that the word “uncertainty” is mentioned in the reports in proximity to a word related to the respective systemic-economy country. Specifically, for each country and quarter, we search the country reports for the words “uncertain,” “uncertainty,” and “uncertainties” appearing near words related to each country. The country-specific words include country’s name, name of presidents, name of the central bank, name of central bank governors, and selected country’s major events (such as Brexit).

To make the measure comparable across countries, we scale the raw counts by the total number of words in each report. An increase in the index indicates that uncertainty is rising, and vice versa.

Our results reveal two key facts:

First: Yes, uncertainty in systemic economies matters for uncertainty around the world.

Second: Only the United States and the United Kingdom have significant uncertainty spillover effects, while the other systemic economies play a little role, on average.

Starting with the United States, the chart below displays the global (excluding the United States) average of the ratio of uncertainty related to the United States to overall uncertainty. It shows that uncertainty related to the United States has been a key source of uncertainty around the world since the past few decades

For instance, during the 2001–2003 period, U.S.-related uncertainty contributed to about 8 percent of the uncertainty in other countries—about 23 percent of the increase in global uncertainty from the historical mean. n the last 4 years, U.S.-related uncertainty has contributed to about 13 percent of uncertainty in other countries—with peaks of about 30 percent—and approximately 20 percent of the increase in global uncertainty from historical mean.

#### Econ *stability* structurally dampens multiple existential risks

* Extinction via Great Power Conflicts;
* Extinction via engineered pandemics ;
* Extinction via Nuclear war

Ord ‘20

Toby Ord is a Senior Research Fellow at the University of Oxford's Future of Humanity Institute, where his work is focused on existential risk. Toby founded Giving What We Can, an international society whose members pledge to donate at least 10% of their income to effective charities, and is a key figure in the effective altruism movement, which promotes using reason and evidence to help the lives of others as much as possible. Ord holds a B.Phil., and a D.Phil. from the University of Oxford - From the book: The Precipice: Existential Risk and the Future of Humanity - From PART THREE: THE PATH FORWARD, chapter 6. “The Risk Landscape” – published March 2020 - available via google books.

While I've presented this analysis in terms of which risks should get the highest priority, these exact same principles can be applied to prioritizing between different risk factors or security factors. And they can help prioritize between different ways of protecting our potential over the long term, such as promoting norms, working within existing institutions or establishing new ones. Best of all, these principles can be used to set priorities between these areas as well as within them, since all are measured in the common unit of total existential risk reduction.

In the course of this book, we have considered a wide variety of approaches to reducing existential risk. The most obvious has been direct work on a particular risk, such as nuclear war or engineered pandemics. But there were also more indirect approaches: work on risk factors such as great-power war; or on securitv factors such as a new international institution tasked with reducing existential risk. Perhaps one could act at an even more indirect level. Arguably risk would be lower in a period of stable economic growth than in a period with the turmoil caused by deep recessions. And it may be lower if citizens were better educated and better informed.