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## Off

### T – Per Se

#### Prohibitions must forbid --- Governing standards are distinct

Chanell 90 --- William Chanell, Associate Justice, California Court of Appeals, “CITY OF REDWOOD CITY v. DALTON CONSTRUCTION COMPANY”, Dec 1990, https://caselaw.findlaw.com/ca-court-of-appeal/1769184.html

We agree with the trial court's conclusion. By its plain language, section 35704 exempts certain contractors from the application of an ordinance [221 Cal. App. 3d 1573] adopted pursuant to section 35701. Section 35701 permits cities to prohibit the use of city streets by heavy trucks. (See § 35701, subd. (a).) However, the portion of the city's hauling ordinance at issue in this case does not prohibit street use; it regulates users by requiring them to obtain a permit and pay a fee in order to lawfully drive their heavy trucks over city streets. (See Redwood City Code, §§ 20.62-20.74.) To determine the legislative intent behind a statute, courts look first to the words of the statute themselves. In so doing, we must give effect to the statute according to the usual, ordinary import of its language. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230 [110 Cal. Rptr. 144, 514 P.2d 1224].)

To construe section 35704, which specifically creates an exemption from prohibition of use, to exempt the regulation of that use would violate these cardinal rules of statutory construction. [2] The distinction between a regulation and a prohibition is well understood in municipal law. (See San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252, 254 [200 P. 393, 17 A.L.R. 513].) The term "prohibit" means "[t]o forbid by law; to prevent;-not synonymous with 'regulate.' " (Black's Law Dict. (5th ed. 1979) p. 1091, col. 1.) The term "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restriction; to subject something to governing principles of law. It does not include a power to suppress or prohibit [citation]." (In re McCoy (1909) 10 Cal. App. 116, 137 [101 P. 419].) [1b] Therefore, we are satisfied that section 35704 was not intended to apply to ordinances regulating street use, but only to those prohibiting such use.

**Business practices are ongoing conduct of many market participants**

**Macintosh 97** --- Kerry Lynn Macintosh, Associate Professor of Law, Santa Clara University School of Law, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, [Vol. 38:1465 1997], https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1691&context=wmlr

**\*\*Footnote 5\*\***

5. In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2).

**Only per se rules bans a PRACTICE --- rule of reason regulate anticompetitive effects for individual acts**

**Stucke 09** --- Maurice E. Stucke, Associate Professor, University of Tennessee College of Law, “Does the Rule of Reason Violate the Rule of Law?”, University of California, Davis [Vol. 42:1375 2009], https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5\_Stucke.pdf

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

**Vote neg for GROUND and LIMITS --- Other standards dodge topic uniqueness and links and they can pick something that’s broader but more permissive --- creating a bidirectional topic. Standard prolif makes the topic unmanageable**

### States

#### The 50 states and all relevant territories should pass laws modeling California’s Private Attorney General Act and public injunction

#### PAGA and PIs allow de-facto class action litigation and bypass the FAA

Molis 21 --- Cameron Molis, J.D., Columbia Law School, 2021, “CURBING CONCEPCION: HOW STATES CAN EASE THE STRAIN OF PREDISPUTE ARBITRATION TO COUNTER CORPORATE ABUSERS”, UNIVERSITY OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE, Vol 24 No 3, 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1260&context=jlasc

In a pair of arbitration decisions decided after Concepcion, the Ninth Circuit upheld state rules regulating arbitration in a manner it held to accord with both the FAA and Supreme Court precedent. While acknowledging the fact that class protections within arbitration are no longer viable after Concepcion, 47 the Ninth Circuit now preserves plaintiffs’ right to bring Private Attorney General Act (“PAGA”) actions and public injunctions against corporations.48 Under California law, a private attorney general action authorizes employees to recover civil penalties on behalf of themselves, other employees, and the state for violations of California’s labor code.49 This type of action allows multiple employees to recover from the same defendant through a single action. Similarly, under California law, a claim for a public injunction permits a single plaintiff to enjoin defendants engaging in unlawful acts that threaten the public as a whole.50 Both types of claims provide viable checks against corporate abuse and, in the view of the Ninth Circuit, are beyond the reach of restrictive arbitration agreements.

In Sakkab v. Luxottica Retail North America, Inc., the plaintiff brought a PAGA claim in California state court against his employer, alleging the company unlawfully withheld wages from him and his fellow employees.51 Although the arbitration agreement signed by all employees waived the use of “representative actions,” the Ninth Circuit held that a California state court rule invalidating such waivers did not frustrate the purposes of the FAA, meaning the waiver would likely be unenforceable on remand.52

Distinguishing this case from Concepcion, the Ninth Circuit explained that, while procedural complexity inherent in class action suits may frustrate the purposes of arbitration under the FAA, complexity flowing from the substance of a claim itself does not frustrate arbitration in the same way.53 In Sakkab, the court contrasted PAGA claims and other substantively complex actions like antitrust claims with procedurally complex class actions.54 The substantive complexity in PAGA actions, the court found, comes from the manner in which the defendant’s liability is measured, while the procedural complexity in class actions comes from the need to protect the due process rights of absent parties.55 Accordingly, the court permitted the employee-protecting provision to survive the weight of Concepcion and set a precedent through which state arbitration rules can survive federal preemption.

Four years later, the Ninth Circuit decided a similar case pertaining to public injunctive relief in the consumer arbitration context. In Blair v. Rent-A-Center, Inc., the plaintiff sought a public injunction to prevent Rent-A-Center from extorting consumers through rent-to-own contracts in violation of California state law.56 Although the plaintiff was bound by an arbitration agreement forbidding her from seeking relief that would affect other Rent-A-Center account holders, the Ninth Circuit found a California Supreme Court rule declaring such waivers unenforceable to not be preempted by the FAA.57

Citing Sakkab, the Ninth Circuit applied the same substantive versus procedural distinction to find that any complexity resulting from public injunctive relief flowed from the kind of substantive complexity characterizing PAGA claims and not the procedural complexity inherent in class actions.58 Accordingly, the court extended Sakkab’s holding and its carve-out from Concepcion to public injunctive relief and consumer arbitration.

Against the backdrop of Supreme Court precedent preserving the power of employers, companies, and their arbitration agreements, the Ninth Circuit’s recent holdings may appear as momentary aberrations. But in spite of the odds, the carefully crafted legal arguments in Sakkab and Blair appear to conform with the language of the FAA and Concepcion, and could spark a revolution in employee and consumer arbitration jurisprudence if adopted by courts nationwide.

### FTC CP

#### The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes anticompetitive business practices by the private sector that that prevent litigants from effectively vindicating their statutory causes of action in antitrust suits. . The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

#### The counterplan solves and competes---the FTC interprets current authority without creating new prohibitions.

Kahn 21 et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

### CP – Merger

#### Antitrust agencies should approve mergers subject to the condition that the merged entity promise not to impose or enforce predispute arbitration provisions

#### CP solves and avoids politics

Lemley & Leslie 15 --- Mark A. Lemley William H. Neukom Professor of Law, Stanford Law School, & Christopher R. Leslie , Chancellor’s Professor of Law, University of California Irvine School of Law, “ANTITRUST ARBITRATION AND MERGER APPROVAL”, NULR > Vol. 110 > Iss. 1 (2015) https://scholarlycommons.law.northwestern.edu/nulr/vol110/iss1/1/

Mergers among actual or potential competitors increase market concentration. Concentrated markets tend to heighten antitrust risks in various ways, including facilitating monopolization by a dominant firm and making it easier for the remaining firms in the market to collude.295 Because of these risks, the Hart–Scott–Rodino Act notes that the Antitrust Division and the Federal Trade Commission share responsibility for the review and preclearance of mergers that reach a size specified by the Act.296 At the conclusion of its review, the government can decide to not challenge the merger at all, to attempt to block the merger altogether, or to negotiate certain conditions designed to reduce the risk of harm to competition.297

When the government allows a merger subject to conditions, those conditions can take a variety of forms. One common form of condition is structural: the government might force the merging parties to divest or sell off certain assets or business units in order to preserve competition in particular markets.298 Those divestiture conditions in turn come in two flavors. Sometimes the parties and the government have already identified a buyer and require the transaction to happen before or immediately after the merger is approved.299 Such a divestiture is relatively easy to monitor.

Other conditional merger approvals mandate a “post-order” divestiture: a promise to sell specified assets at some point in the future assuming a suitable buyer can be found who is willing to pay a suitable price.300 The agencies typically enforce post-order divestitures by requiring the merging parties to hold themselves separate in certain respects during the merger process so that the separate assets can later be sold.301 Post-order divestiture conditions are theoretically binding on the merging entities. But in fact, effective enforcement is rare. The agencies may reserve the power to impose a “crown jewel” provision that requires divestiture of certain key assets in a merger in the event the merged entity fails to divest the agreed assets,302 but they rarely do so. As Gelfand and Ewing observe, “[c]rown jewel provisions are only rarely included in consent decrees by either agency and, even when they are included, they are almost never invoked.”303 They find only two examples in this century of enforcement of such a provision, one by the FTC and one by the DOJ.304 Post-order divestiture conditions, then, are difficult for the agencies to enforce.

A second type of merger condition is behavioral. Rather than requiring the company to sell assets, the antitrust agencies will often require the merged company to agree to behave (or to refrain from behaving) in certain ways. Merged companies might have to agree to license their intellectual property to others,305 to agree not to discriminate in business deals,306 or to restrict the flow of information between business units in the merged company.307 These sorts of conditions are less common than structural conditions such as asset divestiture, but they are still regularly imposed, and the Antitrust Division has increasingly relied on such remedies.308 We conducted a review of every merger consent decree entered into between 1996 and 2013.309 Of the 403 FTC and Antitrust Division merger consent decrees during this period, 124 included conduct conditions as well as divestiture.310

Conduct conditions are much harder to enforce, because the conduct being prohibited or required is much less visible to the outside observer than is the sale or nonsale of a division of a company. The antitrust enforcement agencies will sometimes place a monitor within the company to ensure compliance,311 and they have the power to ask the merged firm to produce information they can use to gauge compliance.312 But even with the assistance of a monitor it is hard to know whether, for instance, information is being shared informally between employees in different divisions of the same company. Our study of all 403 merger consent decrees that imposed ongoing conditions found only eleven cases in which the government sought to enforce a provision of a consent decree, and five of those eleven involved divestiture agreements. While it is impossible to know how many times merged entities violated a consent decree without being caught, or how many times the government detected a violation and resolved the issue informally, actual enforcement appears to be rare313 and limited to the most egregious violations of a consent decree.314

Even less likely to be enforced are representations made by the merging parties in an effort to persuade the agencies to approve a merger. Airlines, for instance, often make representations that they will continue or even expand a target’s hub when they merge with that target. But it doesn’t necessarily happen. American Airlines won approval for its acquisition of TWA, for instance, by saying it intended to shift more flights to TWA’s St. Louis hub to relieve congestion at its other hubs.315 But it made no legally binding commitment to do so, and instead American Airlines soon pulled most of its flights out of St. Louis,316 with the result that the merger eliminated a competitor but did not otherwise make American’s route structure more efficient. United Airlines did something similar in Cleveland after buying Continental Airlines,317 as did American Airlines in Pittsburgh after buying US Airways.318 Outside the airline industry, Oracle has repeatedly purchased competitors, including PeopleSoft and Sun Microsystems, ostensibly for the value of their software, and justified the purchases on the ground that it would not reduce software options for consumers,319 only to reduce support for that software once the merger went through.320 Comcast failed to adhere to the promises it made to antitrust regulators in acquiring NBC Universal, a fact that came out only when it sought to acquire Time Warner Cable, prompting scrutiny of its record of compliance.321 Whether or not these were good business decisions, they reflect the inability of regulatory agencies to bind merging firms to their claims about the economic effects of their mergers.

B. Negotiated Abandonment of Mandatory Arbitration for Antitrust Claims as a Condition of Merger Approval

Mergers, then, can risk harm to competition. The antitrust agencies can prevent that harm by blocking a merger altogether, and sometimes they do so. But more commonly they seek a less intrusive path—approving the merger subject to conditions designed to improve competition. And many of those conditional approvals impose behavioral rather than structural conditions, again in a laudable attempt to be less intrusive on the operation of the merged firm. Because the agencies have only a limited ability to police and enforce those behavioral conditions, however, private antitrust enforcement becomes even more important when mergers increase market concentration. And yet, as we have seen, the very fact of that increased market concentration, combined with Italian Colors, makes it all too easy for firms in concentrated markets to preclude effective private antitrust enforcement by using a standard for contract to deny antitrust victims access to federal courts.

Fortunately, there is a simple, if partial, solution to the problem of ineffective private enforcement of the antitrust laws after Italian Colors. We suggest that the antitrust enforcement agencies tasked with approving mergers should approve mergers subject to the condition that the merged entity promise not to impose or enforce predispute arbitration provisions on its customers.322 The government could elect to apply this policy more or less broadly depending on the circumstances. Agencies applying this policy in its most expansive form could prevent the imposition of any predispute arbitration agreement on customers. Doing so would be consistent with the problems with arbitration of consumer contracts we noted above, which are not limited to mandatory arbitration of antitrust disputes. Under a more focused application, the agencies could require that merging firms agree not to impose class action waivers on their consumers. The narrowest application would, at a minimum, impose a condition preventing the merged firm from imposing predispute arbitration on antitrust disputes with customers.323

There are several reasons to use the merger approval process to impose restrictions on predispute mandatory arbitration clauses. This is a decision point when government regulators are already examining the merging parties and the markets they are operating in. Antitrust officials at this juncture have leverage over the firms seeking to merge. Imposing arbitration limitations on merging firms is appropriately tailored to the problems with mandatory predispute arbitration agreements. As we have seen, arbitration agreements are most problematic when they are imposed in a standard-form contract on consumers who lack equal bargaining power, when they restrict class actions that make it possible to vindicate important public rights that would otherwise go unrepresented, and when there is no effective competition over contract terms.

Each of those circumstances is likely to be present for standard-form terms that preclude antitrust and other class actions in concentrated markets. Consumers are unlikely to be able to read, much less negotiate, the terms to which they are being bound.324 Considerable evidence suggests that virtually no one reads standard-form terms included in clickwrap and browsewrap contracts.325 And even if they did read them, they are unlikely to be able to negotiate those terms;326 they are always provided in “take it or leave it” form.327 Nonetheless, courts tend to enforce those contracts, even when they impose arbitration clauses.328

Conditioning merger approval on not imposing mandatory arbitration clauses in their contracts with customers would facilitate effective private antitrust enforcement. Without class actions, relatively long statutes of limitations, attorneys’ fees, and treble damages, private antitrust actions are not cost effective for many plaintiffs. That is particularly true of consumers, the group antitrust law purports to care the most about. Consumers are a diffuse group, and each individual consumer is unlikely to have enough at stake to bring an antitrust claim, particularly if they cannot recover their attorneys’ fees even if they succeed. That is also true of small business customers. The individual named plaintiff in Italian Colors, for instance, suffered less than $50,000 in harm, far too little to spend the over $1 million it would take to bring an antitrust case as an individual arbitration. Each individual plaintiff’s loss may be relatively small, but the cost of American Express’s anticompetitive conduct was, of course, not limited to the harm suffered by a single plaintiff. The collective harm to the groups of small businesses affected might well have ranged into the billions of dollars, a massive harm with implications for society at large that was essentially immunized from suit by a form contract’s bar on class-wide arbitration.

One possible counterargument is that market forces will achieve the same end point—that is, a world without socially inefficient arbitration agreements. Some have argued that firms will compete on contract terms just as they do on price, driving those terms to efficiency over the long run.329 In theory, then, customers who oppose arbitration terms could refuse to do business with firms that impose those terms. If enough customers did so, market pressure might force others to drop those terms. We are skeptical that that sort of competition actually happens. Empirical research has shown little competition on terms,330 perhaps because no one reads those terms and therefore no one knows that they might differ.331

Even if there were such competition in some markets, however, Hart– Scott–Rodino review is uniquely well positioned to provide relief in the markets where it is least likely to be true. Competition on arbitration terms would require, at a minimum, a competitive market in which otherwise equivalent products were differentiated only on the consumer friendliness of their contract terms. The antitrust agencies review mergers only when they reach a certain size, and they are likely to challenge those mergers or impose conditions on approval only when the risk of undue market concentration is substantial.332 Therefore, challenging predispute arbitration agreements during merger review will enable the government to target arbitration agreements imposed in those highly concentrated market conditions most likely to incubate anticompetitive behavior.

One effect of having the antitrust agencies impose such a limitation is that not all companies—and indeed not all dominant firms—will be subject to the restriction. While this may seem unfair, there is a certain equity to it. It is only the companies who seek to merge in already-concentrated markets that will face this limitation, and those are the very companies we should most want to be subject to the full scrutiny of the antitrust laws. It seems reasonable that a company that asks for an exemption from government antitrust scrutiny for its merger should have to forego effective immunity from private antitrust enforcement going forward.333

The fact that only some companies are subject to this condition offers a sort of natural experiment. If antitrust enforcement is effective even absent class actions and access to the courts, it should not matter whether a company is subject to such a condition. But if, as we argue here, effective private antitrust enforcement requires access to the courts and the strong remedial mechanisms of antitrust, we should expect varying patterns of private enforcement against companies that can block antitrust lawsuits and against those that forego the ability to do so. If the agencies chose to apply our proposal more broadly—imposing this condition not only with respect to antitrust claims but to class actions more generally—we would have a similar window into the effectiveness of class actions as a whole. Further, the uneven application of the rule may have an interesting side benefit: companies subject to the restriction on arbitration will have an incentive to make the best of their situation by promoting the more consumer-friendly nature of their terms and conditions.334 While we are skeptical that there is competition on terms and conditions now, if it is possible to prompt such competition, the best way to do so is by giving some companies no choice but to offer more consumer-friendly terms and hope that they can get some mileage out of advertising that fact.

To be sure, these advantages are partial. Because the imposition of mandatory arbitration clauses to ban class actions undermines effective private antitrust enforcement, the best possible alternative would be to forbid predispute mandatory arbitration of those claims altogether. But the Supreme Court has foreclosed that option in Concepcion and Italian Colors.

And that leads us to the final, most practical benefit of our proposal: in addition to being reasonably tailored to the antitrust circumstances facing the merging companies, a merger condition imposed by the antitrust agencies is likely to survive judicial scrutiny. There is precedent for federal agencies imposing such a condition, and it is likely (though not certain) to be upheld by the courts. The Securities and Exchange Commission (SEC), for example, regularly requires companies filing for an initial public offering (IPO) to disavow any mandatory individual arbitration agreements in securities cases, even though arbitration is permissible in disputes between brokers and their customers.335 The SEC first took this position in 1990, when an IPO applicant sought to include an arbitration provision in its governance documents. The SEC explained that:

[I]t would be contrary to the public interest to require investors who want to participate in the nation’s equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such a waiver is made through a corporate charter rather than through an individual investor’s decision.336

Put another way, it is one thing to mandate that disputes in a one-to-one business relationship situated against the background of a competitive market must be resolved through arbitration; it is another to make access to a company’s stock by the public at large contingent on their collective willingness to abandon valuable legal rights.337 The SEC has stuck by that policy, informing a registrant in 2012 that it would not approve an application that included an “agreement to require individual arbitration of any disputes relating to the agreement . . . , including disputes arising under the federal securities laws.”338 And it seems to have worked. Eisenberg and Miller find that only eleven percent of agreements filed with the SEC contain arbitration clauses.339

Our proposal could be implemented easily, without the need for new legislation or even new rulemaking by the agencies. The SEC, after all, did not adopt new rulemaking before restricting arbitration clauses; it simply began doing so under its enforcement authority. And while the no-antitrust class-action arbitration clause might not contribute directly to anticompetitive effects of the merger the agencies seek to remedy, it is directly related to the effective enforcement of post-merger conditions, as we established in Part III. In any event, it is well-established that antitrust agencies can include provisions in a consent decree that they could not obtain directly by suit.340

Consideration of our proposal’s likely fate in the courts is especially relevant given the Supreme Court’s recent hostility towards the rights of consumer plaintiffs. Since 1990, the Court has continued to cut back on consumer access to the courts, holding in Concepcion in 2011 that the Federal Arbitration Act preempted state laws that restricted predispute arbitration clauses that banned class actions.341 The Court also held that the class dispute could not be arbitrated either, requiring individual arbitrations instead, though that was based on a (strained) interpretation of the arbitration agreement rather than a holding that class disputes could never be arbitrated.342 And as noted above, Italian Colors extended that holding to conclude that arbitration clauses could trump federal as well as state public policy interests.343 All this is evidence of considerable hostility to consumer law enforcement, and a decided preference for arbitration, on the part of the current Supreme Court.

These decisions, however, do not foreclose our proposal. Each of those cases holds only that public policy does not preclude enforcement of an otherwise valid agreement to arbitrate protected under the Federal Arbitration Act. They do not hold that there is some legal right to impose an arbitration agreement in the first place that a party cannot negotiate away in a deal with the government. The SEC doesn’t say “you can’t impose predispute arbitration clauses,” but rather “you can’t impose predispute arbitration clauses if you want to take advantage of the federal securities laws to publicly trade stock.” An antitrust condition would be even more clearly a voluntary negotiation: “You can’t impose predispute arbitration clauses that foreclose private antitrust lawsuits (including class actions) in federal court against your company if you want the government to waive its power to challenge your merger.” While there are limits on the government’s power to impose certain kinds of conditions—the doctrine of unconstitutional conditions being particularly relevant344—these limits do not apply here. The government cannot take away or burden a constitutional right by imposing a requirement that a party waive that right.345 But there is no constitutional right to deny others effective access to the courts via contract. Even if the Supreme Court were correct that the Federal Arbitration Act346 encourages arbitration,347 that preference is a far cry from a constitutional right to impose arbitration agreements on others.

Some may object to the use of the merger approval process for nonmerger-related ends.348 For the reasons we articulated in Part III, we believe there is a connection between mergers and arbitration agreements and requiring arbitration of antitrust disputes is more problematic in more concentrated industries. But even if that were not true, we think the costs of imposing such a condition in the Hart–Scott–Rodino process will be minimal. It seems unlikely that companies will decide not to merge rather than agree to a deal, for instance. We emphasize that in a perfect world the Supreme Court would revisit Italian Colors. But since it seems unlikely to do so, our proposal is a second-best solution.

The condition that merging parties not require arbitration of antitrust claims in their contracts need not necessarily eliminate truly voluntary antitrust arbitration. Antitrust plaintiffs and defendants could still agree to have their case decided in binding arbitration after the dispute arises. An agreement to arbitrate an antitrust claim made after the dispute has arisen is less likely to be the product of coercion or a contract of adhesion.349 As Robert Pitofsky has noted, “there is no problem (as there often would be with arbitration clauses) of a party, because of unequal bargaining power, agreeing to a waiver of future rights without knowing exactly what those rights will be.”350 Even some courts that refused to enforce predispute arbitration clauses allowed parties to agree to arbitrate antitrust claims after the dispute had arisen.351 In his Mitsubishi dissent, Justice Stevens noted that arbitration agreements “made after the parties have had every opportunity to evaluate the strength of their position, are obviously less destructive of the private treble-damages remedy that Congress provided. Thus, it may well be that arbitration as a means of settling existing disputes is permissible.”352 Our proposal allows for the continued use of these post-dispute agreements.

Our proposal is ultimately quite modest. It merely increases the likelihood that the private antitrust claims Congress created more than a century ago will actually be heard in federal courts.353 This is more consistent with congressional intent than the current system. As Justice Stevens explained in his Mitsubishi dissent:

[A]n antitrust treble-damages case “can only be brought in a District Court of the United States.” The determination that these cases are “too important to be decided otherwise than by competent tribunals” surely cannot allow private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States.354

Some commentators may oppose our proposal by arguing that the objectives of merger review should be circumscribed.355 Our proposal, however, does not ask the antitrust agencies to use their powers of merger review to pursue non-antitrust goals. To the contrary, our proposal argues that in concentrated markets, antitrust agencies should try to prevent firms from using their postmerger market power to impose arbitration clauses that allow these firms to evade the effective antitrust scrutiny provided by private litigation. Many believe that Italian Colors was wrongly decided and should be overturned. But one need not hold that view to see the wisdom of limiting antitrust arbitration in increasingly concentrated markets.

CONCLUSION

We do not, in short, propose to ban all antitrust arbitration, only blanket predispute requirements that deprive antitrust plaintiffs of an effective remedy. That is what the Court’s Effective Vindication Doctrine purports to provide in theory. In the post-Italian Colors world, the antitrust agencies can take a substantial step towards truly effective vindication of antitrust rights by preventing defendants from forcing their customers to waive their right to sue in court.

The antitrust agencies are uniquely well suited to protect private antitrust enforcement—and perhaps class action enforcement more generally—in the set of cases that most need it. They have the power to prevent predispute blanket waivers of legal rights through mandatory arbitration of public law disputes. They should exercise that power as a condition of approving mergers, at least in doubtful cases.

### Court PTX

#### SCOTUS will avoid sweeping ruling in West Virginia v. EPA – a broad ruling wrecks climate response and turns the case

Farah 11-1 [Niina H. Farah, E&E News legal reporter, 11-1-2021 https://www.eenews.net/articles/what-the-supreme-courts-move-means-for-epa-climate-rules/]

The Supreme Court may be poised to put new guardrails on the Biden administration’s climate agenda after justices agreed last week to consider the extent of EPA’s authority to regulate carbon emissions. The court sent shock waves through the legal world when it agreed Friday to consider a consolidated challenge from Republican-led states and coal companies. The challenge stemmed from a federal court ruling that struck down a Trump-era regulation gutting EPA’s climate rule for power plants (E&E News PM, Oct. 29). When the justices issue their ruling in the EPA case, which is expected by next summer, the decision could provide the first indication of how the court’s new 6-3 conservative majority will approach questions of the federal government’s role in curbing global climate change. “This is likely to result in one of the most significant environmental rulings the court has ever reached,” said Robert Percival, director of the Environmental Law Program at the University of Maryland’s law school. The court’s decision could place new limits on how expansively EPA can interpret its authority to use the Clean Air Act to address climate change. Friday’s order coincided with the beginning of global climate negotiations at the 26th Conference of the Parties, or COP, in Glasgow, Scotland. It also comes as Congress is negotiating a Democratic spending package that would pump more than $500 billion into addressing climate change. The Biden administration’s goal is to cut U.S. greenhouse gas emissions in half by 2030 and put the electricity sector on a path to zeroing out carbon emissions by 2035. West Virginia Attorney General Patrick Morrisey (R) praised the justices’ decision to review the ruling earlier this year by the U.S. Court of Appeals for the District of Columbia Circuit, which scrapped the Trump administration’s Affordable Clean Energy rule and handed the Biden team a clean slate to draft a new regulation for coal-fired power plant emissions (Greenwire, Jan. 19). “This is a tremendous victory for West Virginia and our nation. We are extremely grateful for the Supreme Court’s willingness to hear our case," Morrisey said in a statement Friday. "This shows the Court realizes the seriousness of this case and shares our concern that the D.C. Circuit granted EPA too much authority," he continued. "Given the insurmountable costs of President Biden’s proposals, our team is eager to present West Virginia’s case as to why the Supreme Court should define the reach of EPA’s authority once and for all." White House national climate adviser Gina McCarthy said yesterday that the administration believes the high court will uphold EPA’s ability to regulate carbon emissions across the electricity sector. "The courts have repeatedly upheld the EPA’s authority to regulate dangerous power plant pollution," she told reporters on a call. She noted that the appeals court had struck down the Trump-era rule that would have weakened power plant regulations. McCarthy said the White House is confident that the Supreme Court will rule in a way that affirms that “EPA has not just the right but the authority and responsibility to keep our families and communities safe from pollution." Critics of the Supreme Court decision to hear the case said that in most instances, federal courts wait for an agency to enact a rule before they weigh in on a legal controversy around the agency’s power to regulate. "In that sense, this seems like a power grab. But we don’t know yet," said Bethany Davis Noll, executive director of the State Energy & Environmental Impact Center at New York University School of Law. Instead of reinstating the Obama-era Clean Power Plan — which interpreted the "best system of emission reduction" to include emissions trading or shifting generation to renewable energy — EPA under Biden opted to start from scratch. The power sector has already surpassed the 2015 Clean Power Plan’s emissions reductions target a decade early. The agency under Biden has yet to publish a draft proposal, and observers says it may now choose to wait for the Supreme Court’s decision before writing a new carbon rule. EPA did not respond to a request for comment on the Supreme Court’s order but agency Administrator Michael Regan defended the agency’s authority Friday on Twitter. "Power plant carbon pollution hurts families and communities, and threatens businesses and workers," he tweeted. "The Courts have repeatedly upheld EPA’s authority to regulate dangerous power plant carbon pollution." Agency powers Several observers said the Supreme Court’s eventual ruling in the case could be limited to power plants, while others predicted a bigger blow to emissions regulation for other sectors. "The issue just gets dumped back in Congress’ lap," said Jeff Holmstead, a partner at the law and lobbying firm Bracewell LLP, of the possible consequences of the court’s limiting EPA’s power. "Any kind of meaningful regulatory program could be well off the table," he said. A more concerning — but less likely — possibility would be if the high court used the case to more broadly undermine the regulatory authority of federal agencies. "It’s possible that what the court is seeking to review here is Section 111(d) itself," said Michael Burger, executive director of Columbia Law School’s Sabin Center for Climate Change Law. He referred to the part of the Clean Air Act that EPA used to regulate carbon emissions from existing power plants under former presidents Obama and Trump. "If that’s the case, the broadest threat here is not just about climate change, or about EPA’s authority, but it’s about the power of the court to review congressional authorizations of agency action," he said. In a worst-case scenario, the high court could give itself authority to tell Congress "in almost any instance" that it has to be more specific about delegating authority to agencies, Burger added. In their petitions to the Supreme Court, the coal companies and states targeting EPA’s power to regulate raised concerns about whether Congress had clearly given the agency the authority to address utility emissions on a broad, systemwide basis. The challengers also asked the justices to weigh in on whether Congress could lawfully allow EPA to act on emissions under Section 111(d) of the Clean Air Act under the non-delegation doctrine, which says that lawmakers cannot hand off their legislative authority to executive agencies. The Supreme Court’s conservative wing has expressed interest in reviving the long-dormant legal doctrine. That argument could threaten not only Biden’s rule proposals, but also existing regulations.

#### The plan causes institutional balancing – SCOTUS couple’s the plan’s expansion of agency enforcement with an equal and opposite ruling in West Virginia constraining agencies

HLR 11 – Harvard Law Review, “ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING”, June, 124 Harv. L. Rev. 2064, Lexis

In assessing the Court's power relative to the elected branches, it is first necessary to be clear about what motivates the Supreme Court. When exercising judicial review, the Court seeks to vindicate its constitutional vision by striking down legislation repugnant to that vision. This is true whether one believes that the Court seeks in good faith to divine the true meaning of the Constitution and impose it on the elected branches, attempts to interpret the Constitution faithfully but subconsciously imports its own policy views, or disingenuously strives to implement its policy preferences in the guise of neutral interpretation. For the purposes of the present argument it is irrelevant which view or combination of views is most accurate, and the phrase "constitutional vision" will stand for any and all of these. Yet as suggested above, the Court is not unconstrained when it seeks to effect its constitutional vision through judicial review: if it strays too far from the political mainstream, n55 it will face consequences that undermine its constitutional [\*2076] vision even more than would the upholding of a disfavored statute. n56 The upshot is that the Court operates under conditions of scarcity and must economize on its political capital to go as far in implementing its constitutional vision as political realities allow, which sometimes means upholding (or declining to review) government actions that contravene that vision. n57 And, as a distinct matter, most [\*2077] Justices have displayed a desire to conserve the Court's political capital and maintain its institutional prestige as much as possible even where the Court was not immediately threatened with any hard political constraints. n58 This conservatism is especially understandable given that the Justices are generally not political experts and lack the sophisticated public relations apparatuses of the elected branches, and that the elected branches have substantial capacity to shift public opinion about the Court if they so choose; these factors make it rational for the Court to be parsimonious with its political capital in order to avoid blind overreaching. [FOOTNOTE] n57. Thus, the Court's decisionmaking process in a judicial review case incorporates its internal preferences and its view of external constraints as follows: R = B / C, where B equals the benefits to the Court's constitutional vision of invalidating a given piece of legislation, C stands for the cost the Justices expect to incur in terms of political capital, and R gives the trade-off rate between costs and benefits in any given case, such that the Court will expend its political capital in those cases where R is highest, so long as R > 1. A reasonable objection to the model elaborated in this Part is that although the Court is politically constrained, this "bank account" model in which the Court has finite political capital to "spend" by striking down popular government actions is unrealistic: the Court can also increase its prestige - its institutional capital - by exercising judicial review, which has been the effect of Marbury and Brown, two decisions without which the Court would be much weaker now. Nonetheless, most countermajoritarian decisions do seem to cost the Court rather than increase its capital (Marbury was a refusal to make the countermajoritarian decision, see Friedman, supra note 53, at 60-62, and Brown jeopardized rather than solidified the Court's power over the years immediately following the decision, see Klarman, supra note 53, at 312-43). This is especially true in the short run, while the decision remains countermajoritarian, and it is the short run that counts for the current Justices: the fact that Brown is today sacrosanct did not help the Court when Southern resistance threatened that decision's efficacy in the years immediately after its announcement. Cf. Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 743 (2011) ("Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support."). The necessary implication of Levinson's statement is that the "savings account" - and thus the Court's countermajoritarian capacity - is finite. At any rate, the Court's position is no different from that of any other political actor: though the presidency as an institution, for instance, would certainly lose influence as a result of a string of weak, unassertive presidents, and might gain it through the acts of a strong leader, any given President at any given time is undoubtedly limited by political constraints.

#### Climate change causes extinction

Beard 21 --- S.J.Beard et al, Centre for the Study of Existential Risk, University of Cambridge, United Kingdom, “Assessing climate change’s contribution to global catastrophic risk”, Futures Volume 127, March 2021, https://www.sciencedirect.com/science/article/pii/S0016328720301646?casa\_token=by8gGKumaf0AAAAA:xT\_EyVIl562OPSIjbbfew8mdQsUCUq7tOJ7mF9HGjwOsZ8M4mfRkXkVIU1r7xYpO1ghAEKK2

While most of the impacts of climate change so far have fallen within the range of what was experienced during the Holocene, the rate of change is faster than in the Holocene and we are now beginning to see climate change push beyond these boundaries. In the latest edition of the planetary boundaries’ framework, climate change is placed in the zone of increasing risk, implying that while this boundary has been breached, there remains some potential for normal functioning and recovery (Steffen et al., 2015). It thus lies between what the authors identify as the ‘safe zone’ and other ‘high risk’ transgressions, such as disruption to the biochemical flows of nitrogen and phosphorus and loss of biosphere integrity.

As part of their discussion of BRIHN Baum and Handoh (2014) note that climate change is the planetary boundary for which the risk to humanity has received most meaningful consideration and they suggest that this attention is deserved. Yet little research attention has been paid to climate change’s extreme or catastrophic effects. Kareiva and Carranza (2018) argue that, despite currently falling outside of the area of high risk, climate change has the clear potential to push humanity across a threshold of irreversible loss by “changing major ocean circulation patterns, causing massive sea-level rise, and increasing the frequency and severity of extreme events… that displace people, and ruin economies.” Even if humanity was resilient to each of these individual impacts, a global catastrophe could occur if these impacts were to occur rapidly and simultaneously.

One scenario that has received comparatively more attention is that of the global climate crossing a tipping point that would trigger environmental feedback loops (such as declining albedo from melting ice or the release of methane from clathrates) and cascading effects (such a shifting rainfall patterns that trigger desertification and soil erosion). After this point, anthropogenic activity may cease to be the main driver of climate change, making it accelerate and become harder to stop (King et al., 2015).

Other scenarios can be discerned from the numerous historical cases in which the modest, usually regional, climatic changes experienced during the Holocene have been implicated in the collapse of previous societies, including the Anasazi, the Tiwanaku, the Akkadians, the Western Roman Empire, the lowland Maya, and dozens of others (Diamond, 2005, Fagan, 2008). These provide a precedent for how a changing climate can trigger or contribute to societal breakdown. At present, our understanding of this phenomena is limited, and the IPCC has labelled its findings as “low confidence” due to a lack of understanding of cause and effect and restrictions in historical data (Klein et al., 2014). Further study and cooperation between archaeologists, historians, climate scientists and global catastrophic risk scholars could overcome some of these limitations by identifying how the impacts of climate change translate into social transformation and collapse, and hence what the impacts of more rapid and extreme climatic changes might be. There is also the potential for larger studies into how global climate variations have coincided with collapse and violence at the regional level (Zhang, Chiyung, Chusheng, Yuanqing, & Fung, 2005; Zhang et al., 2006). However, these need to be interpreted and generalized with care given the differences between pre-industrial and modern societies.

Societies also have a long history of adapting to, and recovering from, climate change induced collapses (McAnany and Yoffee, 2009). However, there are two reasons to be sceptical that such resilience can be easily extrapolated into the future. First, the relatively stable context of the Holocene, with well-functioning, resilient ecosystems, has greatly assisted recovery, while anthropogenic climate change is more rapid, pervasive, global, and severe. Large-scale states did not emerge until the onset of the Holocene (Richerson, Boyd, & Bettinger, 2001), and societies have since remained in a surprisingly narrow climatic niche of roughly 15 mean annual average temperature (Xu, Kohler, Lenton, Svenning, & Scheffer, 2020). A return to agrarian or hunter-gatherer lifestyles could thus have more devastating and long-lasting effects in a world of rapid climate change and ecological disruption (Gowdy, 2020).7 Second, modern human societies may have developed hidden fragilities that amplify the shocks posed by climate change (Mannheim 2020) and the complex, tightly-coupled and interdependent nature of our socio-economic systems makes it more likely that the failure of a few key states or industries due to climate change could cascade into a global collapse (Kemp, 2019).

A third set of plausible scenarios stem from climate change’s broader environmental impacts. Apart from being a planetary boundary of its own, Steffen et al. (2015) point out that climate change is intimately connected with other planetary boundaries (see Table 1). Climate change is thus identified by the authors as one of two ‘core' boundaries with the potential “to drive the Earth system into a new state should they be substantially and persistently transgressed.” This transformative potential was elaborated on in subsequent work exploring how the world could be pushed towards a ‘Hothouse Earth’ state, even with anthropogenic temperature rises as low as 2 °C (Steffen et al., 2018).

The connection between climate change and biosphere integrity (the survival of complex adaptive ecosystems supporting diverse forms of life) is particularly strong. The IPCC is highly confident that climate change is adversely impacting terrestrial ecosystems, contributing to desertification and land degradation in many areas and changing the range, abundance and seasonality of many plant and animal species (Arneth et al., 2019). Similarly, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has reported that climate change is restricting the range of nearly half the world’s threatened mammal species and a quarter of threatened birds, with marine, coastal, and arctic ecosystems worst affected (Diaz et al., 2019). According to one estimate, climate change could cause 15–37 % of all species to become ‘committed to extinction’ by mid-century (Thomas et al., 2004).

### DA – FTC

#### Antitrust enforcement resources determine commitment to ongoing GAFA litigation – plan’s broadened agenda fatally overstretches

Kantrowitz 20 (Alex Kantrowitz, journalist covering Big Tech, Founder at Big Technology, independent newsletter and podcast, former Senior Technology Reporter at BuzzFeed, BA Industrial and Labor Relations, Cornell University, Special Student, Political Science and International Relations, Boğaziçi University, Istanbul; **internally citing former DOJ and FTC employees**; “‘It’s Ridiculous.’ Underfunded FTC and DOJ Can’t Keep Fighting the Tech Giants Like This,” Big Technology, 9-17-2020, - #E&F - https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators)

“The agencies are severely resource-constrained,” Michael Kades, an-ex FTC trial lawyer who spent 11 years at the agency, told Big Technology.

The Federal Trade Commission and Department of Justice’s antitrust division have a combined annual budget below what Facebook makes in three days. The FTC runs on less than $350 million per year, the DOJ’s antitrust division on less than $200 million. Facebook made $18 billion last quarter alone.

The funding disparity between the tech giants and their regulators leads to an unbalanced fight, current and ex-staffers said: The agencies can’t investigate the tech giants to the extent they’d like. They might shy away from complex cases fearing a resource-draining battle. And when they investigate the tech giants, they often see former colleagues with intricate knowledge of their strategy and ability to act (or lack thereof) representing these companies. Without significant budget increases, the tech giants may well continue to act unrestrained with little fear of repercussions.

“DOJ is under-resourced, FTC it’s ridiculous,” one ex DOJ-staffer told Big Technology.

This doesn’t mean these agencies are entirely hamstrung; they can typically marshall the resources to bring a clear-cut case. “They want to win,” one ex-FTC official said. “If it's really egregious, and they find that in discovery, the attorneys are going to put a case together and go after it.” But when you can only take up a limited number of cases due to resource constraints, things inevitably slip through.

“When I was there, the privacy wing had maybe 50 people, and that's probably generous. That's lawyers, support staff, everyone,” Justin Brookman, the former policy director at the FTC’s office of technology research and investigation, told Big Technology. “If they were to bring a case, that would tie up half the resources of the group. And they had two litigations ongoing and that took up most of everyone's time.” The agency’s budget has barely increased since Brookman left in 2017, while the tech giants have added trillions of dollars to their market caps.

Inside the FTC and DOJ, employees are aware of the tech giants’ ability to fight, and the corporations’ budgets tend to live inside their heads. “Facebook will have the ability to raise every single issue, if they want to,” Kades said. “It doesn't have to be a winner, doesn't have to be close to winner. If they wanted to take this position in litigation, they can make every procedural maneuver difficult, they can not cooperate on discovery, they can fight on scheduling, they don't have to win even half of those, but it would just suck up resources.” The ability to do this, not even the action itself, can impact regulators’ thinking.

Agency staffers are typically mission-driven and knowingly work for salaries below private-sector rates, but the resource-rich tech giants are now poaching directly from agencies at a rate remarkable even for Washington’s revolving door between the private and public sector.

Kate Patchen, a DOJ antitrust chief, went directly to Facebook in 2018. Bryson Bachman, a high-ranking attorney in the DOJ's antitrust division, became a senior counsel at Amazon in 2018. Scott Fitzgerald, who worked in the DOJ’s antitrust division for nearly 13 years, became a corporate counsel working on regulation for Amazon this May. At the FTC, senior attorney Laura Berger moved to Microsoft in 2018 to become a privacy director for LinkedIn. And Nithan Sannappa, a well-regarded attorney in the agency’s division of privacy and identity protection left for Twitter in 2017 and is now a lawyer for Google.

The FTC declined to comment. The DOJ did not respond to an inquiry.

Hiring this type of talent gives the tech giants a major advantage in their effort to fend off regulation. Ashkan Soltani, a former chief technologist at the FTC, recalled agency lawyers hugging a former colleague who was working for the tech giants as an outside counsel as they prepared to face off in court. “They would have a really personal relationship with staff, which is kind of awkward,” he said. “And they'd know, in detail, all of the cases that the agency has currently and would be able to advise their clients whether to push hard on an issue or not.”

#### Winning GAFA breakups is key to transatlantic tech alliance

Muscolo et al 21 (Gabriella Muscolo, Commissioner, Italian Competition Authority, Rome, Fellow of the Centre of European Law of King's College London, lecturer of Company Law at the School of Specialization for Legal Professionals at the University of Rome – La Sapienza; and Alessandro Massolo, Economic advisor of Commissioner Gabriella Muscolo, Italian Competition Authority, Rome, teaching assistant at Luiss University of Rome, PhD Law and Economics, Luiss University, MA European Law and Economic Analysis, College of Europe; “WILL THE BIDEN PRESIDENCY FORGE A DIGITAL TRANSATLANTIC ALLIANCE ON ANTITRUST?“ Concurrences, #1, February 2021, - #E&F - https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#muscolo)

1. After the Trump era and in the midst of the Covid-19 pandemic, the Biden presidency will inherit a country that—as the recent riot on the US Capitol building harshly demonstrated—is politically divided, weakening and, most importantly and consequently, in danger of losing its global leadership to China.

2. Indeed, the international community expects the Biden administration to re-establish the USA’s political and economic global leadership, especially in international fora such as the World Health Organization or the Paris Climate Agreement, as it did after the Second World War.

3. The pillars of Biden’s foreign policy can be summed up by three Ds: Domestic, Deterrence and Democracy. [246] As to the first, in order to revive the US economy and catch up on high technology, Biden’s policy cannot deviate much from that of Trump’s “America First.” Thus, massive investment is also expected in infrastructure, innovation, technology and education.

4. At the same time, US foreign policy will be guided by the principle of deterrence which characterized the Cold War period. This policy will have to be adapted to the new context and, especially, to the strategies adopted by the United States’ main counterparts such as China, Russia, North Korea and Iran, which no longer rely on missiles but on the information and communication technologies (ICTs).

5. Finally, the deterrence principle will catalyse the third pillar. Democracy will in fact be the main criterion for choosing US partners in order to consolidate the West against the expansion of the East.

6. Within this context, the digital economy represents an extremely important battlefield for the US to regain world leadership. The USA is well placed when it comes to digital competition—indeed, almost all the prominent Western online platforms are American.

7. However, over the last decade, Google, Amazon, Facebook, Apple and Microsoft (hereinafter “GAFAM”) have come under severe antitrust and regulatory scrutiny, starting in the European Union and ending in the United States. A “break-up” sentiment is spreading on both sides of the Atlantic and this will certainly represent one of the main issues on Biden’s agenda. Indeed, GAFAM’s huge market power is perceived as a threat to Western democracies and has been accused of hampering competition and innovation. Both the USA and the EU know that it is fundamental to shape global standards in order to face security and privacy concerns posed by the rise of Eastern tech giants. [247] Moreover, there is a growing feeling that the growth of big tech, combined with non-democratic governments, could lead to “techno-authoritarianism.” [248]

8. Therefore, will there be a transatlantic unity when clamping down on online giants in the name of protecting and strengthening Western “techno-democracies?” A digital transatlantic alliance shall not be taken for granted.

9. Indeed, over the last decade, the EU has markedly shaped its own way of building a European data market and of facilitating the emergence of European tech companies.

10. The White Paper on Artificial Intelligence and the Communication on data strategy have made it clear that the EU has put its own digital infrastructure and assets in place, catching up with international competition in order to become one of the leaders in the digital realm. This aim is the result of a long stream of actions which started in the second half of the 1990s with the need to tackle more specific and disparate needs, such as guaranteeing that consumer data is processed fairly, lawfully and with a specific purpose [249]; providing legal protection to databases, such as copyright protection and sui generis rights. [250]

11. Furthermore, at the beginning of the new century, the European Union issued the e-Commerce Directive [251] with the aim of removing obstacles to cross-border online services in the EU. Indeed, since 2010, there has been a significant change of pac e; due to the evolution of the digital paradigm, the European Union started to adopt a more strategic view. In that year, the European Commission launched its Digital Agenda, which, among other things, gave birth to the creation of a Digital Single Market that aimed primarily to promote e-commerce within the EU.

12. In 2015, the EU made it clear that the EU Digital Single Market was a priority and released a new strategy aiming at improving access to digital goods and services, building an environment where online networks and services could prosper, exploiting it as a driver for growth.

13. A well-functioning and dynamic data economy requires the flow of data in the internal market to be enabled and protected. This is why the European Union issued the 2016 General Data Protection Regulation and developed the “European data economy strategy.” Through the latter, the European Commission proposed a series of policies and legislative initiatives to unlock the potential for re-use of different types of data and create a common European data space. In particular, it adopted the measures put forward in the European Commission’s 2018 communication Towards a common European data space, in which it proposed: (i) a review of the Directive on the re-use of public sector information (PSI Directive); (ii) an update of the 2012 Recommendation on access to and preservation of scientific information; (iii) guidance on sharing private sector data in B2B and B2G contexts. A new EU Regulation on the free flow of non-personal data was also adopted.

14. Moreover, in 2019, in order to foster the growth of the EU Digital Single Market, the European Union published another regulation in order to promote fairness and transparency for business users of online intermediation services. [252]

15. The long European legislative excursus described above concluded with the latest new regulatory package published by the European Commission at the end of 2020. The package included the Data Governance Act (DGA), [253] the Digital Services Act (DSA) [254] and the Digital Markets Act (DMA). [255] Regarding the former, the European Commission aims to provide a legal framework in order to unlock unused data, increase data accessibility and share data. The DSA builds on the e-Commerce Directive and provides a set of rules for digital service providers in order to guarantee transparency and accountability and advocates for effective obligations to tackle illegal content online. As for the DMA, it is the result of a decade of EU antitrust public enforcement and EU studies on the digital economy.

16. Indeed, the European Commission has launched several cases against online giants. Suffice it now to mention the Google saga (i.e., Google Shopping, Android and AdSense cases) and the ongoing Amazon ones. These lawsuits were all abuses of dominant positions characterized mainly by self-preferencing conducts. Despite the high sanctions imposed, the Google cases were criticized because of the lengthy and complex investigations and ineffective remedies imposed. [256]

17. This contributed to fuelling scepticism that competition law alone would not be sufficient to restore competition within digital markets. [257] As a matter of fact, the European Commission issued the DMA in order to restore contestability and fair play in EU digital markets .

18. In a nutshell, the DMA identifies a list of “core platform services” which are characterized, among other things, by extreme economies of scale, strong network and lock-in effects, almost zero marginal costs and lack of multi-homing. For instance, online search engines and social networking services can be considered core platform services.

19. The DMA defines “gatekeepers” as large online platforms which provide these kinds of services and other specific criteria. Due to their strong economic and/or intermediation position, which is entrenched and durable, gatekeepers must comply with a list of “dos” and “don’ts.” For instance, gatekeepers shall “allow third parties to inter-operate with the gatekeeper’s own services in certain specific situations” and “their business users to access the data that they generate in their use of the gatekeeper’s platform.” If the gatekeepers do not comply with these obligations, they may incur fines (up to 10% of the worldwide turnover) or periodic fines (up to 5% of the average daily turnover). In case of systematic infringement, additional remedies may be imposed. If necessary and as a last resort, non-financial penalties can be imposed, which may include behavioural and structural measures, e.g., the divestiture of (parts of) a business.

20. Thus, following these new regulations, it seems that GAFAM—who are, indeed, the main providers of core platform services in the EU digital markets—will most likely be under the European spotlight in the coming years.

21. Besides antitrust and regulations, the EU has also demonstrated its strong desire for digital independency by taking the decisive step of setting its own agenda for transatlantic cooperation, even before Biden has been sworn in. [258] Indeed, the agenda proposes a tech alliance to shape technologies, their use and their regulatory environment. In particular, on data governance, the European Union advocates cooperation “to promote regulatory convergence and facilitate free data flow with trust on the basis of high standards and safeguards.” [259] Furthermore, as for online platforms, the European Union suggests strengthening cooperation between competent authorities for antitrust enforcement in digital markets, particularly, by setting common views in market distortions. Therefore, the European Union seems to be putting itself forward as a “worldwide factory of digital rules.” [260]

22. However, this may not necessarily mean a strengthening of the digital industry in Europe. For instance, Europe’s financial system appears to be biased towards bank lending rather than equity capital, which should be more suitable for risky tech start-ups. [261

23. Moreover, the “Brussels’ effect” should not be taken for granted either. Indeed, even if the European Union confirms its new regulatory proposal, especially the DMA, GAFAM still earn 51% of their revenues in America versus 25% in Europe. Therefore, they may most likely prefer to run their European branches under local rules instead of adopting EU rules globally. [262]

24. On the other side of the Atlantic, the strategy against online behemoths seems narrower and backwards-looking. [263] Indeed, as we have introduced, in the USA we are witnessing a “Sherman Act momentum” [264] strongly advocated by the new Brandeis movement. [265]

25. During the Trump administration, GAFAM were scrutinized by American antitrust authorities. Indeed, the Department of Justice (DoJ) filed a civil antitrust lawsuit in the US District Court for the District of Columbia to prevent Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the internet searches and search advertising markets and to remedy competitive harm. Furthermore, the Federal Trade Commission (FTC) has also filed a lawsuit against Facebook accusing it of engaging in a systematic strategy to eliminate threats to its monopoly. [266]

26. In both cases, reference is made to possible “break-ups.” In particular, in the DoJ’s case, the deputy attorney general made specific reference to historic antitrust cases such as Standard Oil (1911) and AT&T (1982), and in the FTC’s case, permanent injunctions are explicitly advanced which require, inter alia, the divestiture of Facebook’s assets, including Instagram and WhatsApp.

27. Most recently, the Texas attorney general filed a lawsuit, accusing Google of entering into an unlawful agreement that gave Facebook special privileges in exchange for promising not to support a competing ad system in the online advertising markets. [267]

#### Only way to avoid existential risks from hegemonic competition, democratic backsliding from BOTH techno-authoritarianism AND racial capitalism, failing multilateral coop, splinternet, and unregulated AI and quantum computing

Kop 21 (Mauritz Kop, Stanford Law School TTLF Fellow, Managing Partner at AIRecht, technology consultancy firm, studied intellectual property law, labor law, and contract law at Stanford Law School, Maastricht University and VU University Amsterdam, “Democratic Countries Should Form a Strategic Tech Alliance,” Stanford - Vienna Transatlantic Technology Law Forum, Transatlantic Antitrust and IPR Developments, Stanford University, Issue No.1, 2021, https://www-cdn.law.stanford.edu/wp-content/uploads/2021/04/Mauritz-Kop\_Democratic-Countries-Should-Form-a-Strategic-Tech-Alliance\_Stanford.pdf)

Just like we embed our own values in our hi-tech systems, the authoritarian regimes do the same. With authoritarianism I mean autocratic governments that have a culture with less political participation, less checks and balances and less civil liberties.15 Societies with social norms, democratic standards and ethical priorities that are incompatible with our own system.

Subsequently, the regimes export their undemocratic ideology to our society through the construction, dissemination and functionality of their technology. 16 Main contributors to this spread of culture and ideology through technology are the Belt & Road Initiative, Confucius Institutes and Chinese multinationals. 17 I am referring here to central 4IR technologies such as 5G infrastructures, AI, big data and quantum computing. 18 Excesses involve automated social profiling systems that monitor and hinder online dissidence. This process of exporting an incompatible political ideology through technology holds the danger of permanently weakening the health of our democracy, including the rights and freedoms we care so deeply about. We should prevent that from happening.

It is important to note that we do not intend to exclude the people who are living in authoritarian or even totalitarian regimes such as China, Russia, Iran and North Korea, nor the companies that are willing to abide to democratic technological standards. Instead, our strategy should be to avoid the ideas of the regimes that are incorporated in their technology, which is never neutral.

3. The Response

What needs to be done and who should do it?

Democratic Countries Should Form a Strategic Tech Alliance. That’s the first, foundational step. The US and its democratic allies should establish a strong, broadly scoped Strategic Tech Alliance with countries that share our digital DNA. An Alliance built on strategic autonomy, mutual economic interests and shared democratic & constitutional values. Main purpose of the Strategic Tech Alliance is to win the race / stay ahead of the competition.

Multilateral cooperation with any country that has matched concerns about the outcome of the race for AI & quantum dominance in view of democratic values, is paramount. A natural starting point for a geopolitical dialogue on disruptive technology that is also in the focus of President Biden, is Transatlantic cooperation.19 In addition to the US, EU, UK & Canada, countries such as India, Israel, Japan, South-Korea, Taiwan and Australia would be great candidates to join the cause. The Strategic Tech Alliance could also connect with existing structures such as NATO.

Moreover, it is crucial and urgent that democratic countries set worldwide technology standards together. This includes the development of globally accepted benchmarks and certification. Standards based on safety, security and interoperability, with respect for our common Humanist moral values.20 Values in which the rule of law and human dignity play a leading part.

Consequently, AI & quantum products and services made within the territory of the Strategic Tech Alliance or elsewhere in the world, should adhere to specific safety and security benchmarks, before they qualify for market authorization. These should follow the high technical, legal and ethical standards that reflect Responsible, Trustworthy AI & quantum technology core values. Ex ante certification comparable to the USA Compliance Marking or the European CE-marking should be mandatory before AI and quantum infused products and services are eligible to enter the Transatlantic markets.21

In this vision, the Strategic Tech Alliance should regulate transformative technology in a harmonized way across member countries. Using a risk-based approach that incentivises sustainable innovation. For example, the Strategic Tech Alliance would share core horizontal rules that govern the production and distribution of transformative tech systems. Think of universal, overarching guiding principles of Trustworthy and Responsible AI & quantum technology that are in line with the distinctive physical characteristics of quantum mechanics.22 Technology that gained the trust of the general public has significant marketing advantages.

To preserve pre-pandemic life as we knew it, we must bake our norms, standards, principles and values into the design of our advanced hi-tech-systems.23 From the first line of code. We can accomplish this by pursuing responsible, Trustworthy tech: by actually building socially & ethically aligned AI and quantum architectures and infrastructures. 24 We should incorporate our values en bloc and make our uniform design standards and (inter)operational requirements mandatory by law. A Strategic Tech Alliance could be the engine.

4. Political Feasibility

Let us discuss arguments against the formation of a democratic, value-based Strategic Tech Alliance that will set global technology standards. First, is establishing an Alliance that opposes the authoritarian tech agenda a realistic, politically feasible scenario or mere naive utopian thinking? Will the ambition of harmonized, global technology standards be limited by a cold shorter-term sum of costs and benefits? Will Realpolitik make it fade away in beauty?

Let’s start with the United States. After the Democrats recently recaptured Senate majority, progressive policies might regain momentum. But still, forming an Alliance and setting joint tech governance goals would require a bipartisan, bicameral effort. It would require large majorities to prevent legislative filibusters. Moreover, President Biden’s primary policy objectives are battling COVID-19 together with relief measures, Medicare for All, rebuilding the country’s infrastructure and fighting climate change. Regulating Big Tech and its impact on society might have less priority. However, winning the race for AI & quantum ascendancy should be high on any president’s agenda.25

Then the EU. In recent years, the European Commission has been very active and progressive in the field of legal-ethical frameworks for emerging tech, including the conception of responsible AI and data governance models. Since it has become clear that MAGA (Make America Great Again) will no longer be the leading ideology in America for the next 4 years, Ursula von der Leyen’s Team has not missed a single opportunity to strengthen transatlantic ties and inject political momentum into the relationship. With the main goal of implementing a mutual tech governance agenda, and jointly managing the geopolitics of exponential technology.

An exception to this rule was the recent EU-China deal, which raised quite a few eyebrows in Washington.26 This trade deal makes clear that economic interests of Western democratic countries in China, in this case prompted by commercial interests of the German car industry and the Silk Road Initiative, may stand in the way of the targeted team effort needed to achieve the envisaged Strategic Tech Alliance.27 As of 2020, the EU has surpassed the US as China's largest trading partner (numbers). The economic interests are gigantic and vary widely from one Member State to another.28 For example, the Netherlands, a country of 17 million people, has an annual trade deficit with China of no less than 70 billion euros. Therefore, one might think that the EU will be less likely to ‘turn away’ from China and choose sides.

It is to be hoped that Europe has not been lulled into blissful sleep by the Chinese Siren Song of smart partnerships, better working conditions, respect for intellectual property and fair trade & investment opportunities.29 The idea that the Chinese Party apparatus will allow more openness is a strategic misconception.30 The opposite of openness, reliability, honesty and a fair level playing field happens every day before our eyes in Hong Kong.31 And it doesn't get any better. Entirely in line with the autocratic paradigms of systematic repression, inequality, arbitrariness, state surveillance and control. 32 It is not expected that the political situation and civil liberties & human rights in China will change in the short or medium term. We are competing with a political ideology that is fundamentally at odds with our own system.33

In addition, internal divisions within the EU Member States may delay the rollout of progressive political initiatives.34 Facing the portrayed challenges, Europe should speak with one voice. Further, it is to be hoped that European ambitions towards strategic autonomy and data sovereignty will not stand in the way of transatlantic partnerships in the field of AI and quantum computing, quantum sensing and the quantum internet.

Second, is there sufficient political will, enough common ground between the various continents and countries to forge such an Alliance, comparable to the foundation of the United Nations in 1945 after World War II? There currently seem to be diverging opinions between the US and the EU on antitrust, digital tax and digital trade35, and consensus on IP policy, ethics, cybersecurity and the need for global value-based standards that respect democratic freedoms, human rights and the rule of law. On the other hand, it can be quite healthy to have mutual differences, and a varied pallet of perspectives within a partnership.

Moreover, who are we to pursue worldwide, culturally sensitive norms and standards? Could this be perceived by other countries as undesirable technologically expansionist behaviour? Will excessive standardization, certification and benchmarking have ramifications on rapid innovation, global competition and consumer welfare?

Brexit has made it painfully clear how difficult it is to agree on even the most trivial affairs. The question is whether the barriers to cooperation will be removed, just because a new wind is blowing from White House.36

In conclusion: political support to realize our ideal is a precondition for success. Preferably not in a weakened compromise form, but in a manner that reflects the power of the technology and the interests at stake. Instead of an isolationist MAGA approach, policy makers on both sides of the spectrum need to see the bigger picture and the urgency of the issues at hand. And reach out to nations that historically share our values and that demonstrably meet the democratic conditions set by the Alliance to qualify for membership.

With existential challenges ahead of us, normative choices must be made. We cannot get there with transactional politics and trade deals alone. We have to bring the best of both worlds together. A combination of normative choices - which are contextual, culturally sensitive and in constant flux - and Realpolitik is the key. Making the right choices today can result in the lasting partnerships we need to respond to the big questions we face. Partnerships based on mutual trust, strategic autonomy and shared sovereignty.37 Partnerships that acknowledge the need for regulatory cooperation and a values-based approach.

5. Are We Democratic Enough Ourselves?

Let's see if we can approach this matter from other, sociocritical perspectives.

First, are the Chinese the real threat, or is it us? Are we really democratic enough ourselves?38 Is making the distinction between the democratic and the authoritarian model the correct line of thinking, the proper approach for our proposed response to the identified challenges? Are technology and data capitalism coupled with the wrong kind of self-regulation causing filter bubbles, fake news and racial bias?39 In other words, could technology that originated from Western online platforms such as Facebook, Amazon, Google and Twitter be the real source of danger? Are the behemoth platforms, with market dominance and lobbying power greater than countries, menacing our democracy? In general, absent regulation, the tech platforms have corporate social responsibility and should adopt an Apollonian mindset towards responsible entrepreneurial ideology, world view and philosophy of life, instead of a Dionysian attitude. 40

One can argue whether the harmful societal influence of the social platforms was caused by naive idealism from Silicon Valley, or by unrealistic price and profit expectations of Wall Street.41 Or by a combination thereof. In this view, the algorithms42 have become less democratic not so much as a consequence of the wrong corporate ideology, but because of the increasing pressure that shareholders are putting on tech companies.43 Thus, the system is to blame.

But can you be a role model for the rest of the world this way? Are the dangers of our privatized technology governance model not as threatening, or even more dangerous to our society than the predictable authoritarian technology governance model could ever be? Is there an enemy within, that stands at the cradle of excesses like the Capitol Insurrection? 44 Is the privatized power over the digital world a similar existential challenge, for which solutions must be developed? The answer appears to be in the affirmative. Democratic countries themselves have serious internal problems.

Moreover, there is no empirical evidence that AI will endanger democracy and reinforce authoritarianism, totalitarianism or even fascism, since AI is ideologically neutral.45 That said, shouldn’t we better use machine values instead, since human values create biases in data and algorithms, fake news and conspiracy theories?46

Be that as it may, from a higher level, a strategic democratic alliance can provide a counterbalance to both the free-market capitalism based privatized digital governance model, and the authoritarian model. In the duel for AI dominance and the battle to be the first to build a functioning multi-purpose quantum computer, the West desperately needs the Tech Giants from the Silicon Valley and Massachusetts innovation clusters.

6. Two Dominant Tech Blocks

Currently, two dominant tech blocks exist: the US and China. The blocks have incompatible political systems. It is a battle between ideologies.47 Liberal democracy versus authoritarianism. Free market capitalism versus surveillance capitalism. Europe stands in the middle, championing a legal-ethical approach to tech governance. Its Member States often divided when it comes to Beijing: 12 of them participate in Xi Jinping’s Belt and Road program.

It is of crucial strategic importance to proactively consider potential alternative scenarios.48 Future scenarios in which our desired coalition of democratic countries did not materialize for whatever reason. We can use scenario planning for this. Scenario planning, or scenario analysis, is the development, comparison and anticipation of probable future scenarios, together with short- and longer-term transitions. 49 Impending scenarios meant to be used as thinking instruments.

Alternatives to the creation of a strong democratic Strategic Tech Alliance are no alliance or different alliances. Each scenario could bring both (trade) war and peace to the world. Please note that establishing a league of like-minded democratic countries does not guarantee winning the race for AI and quantum supremacy. Moreover, competition and rivalry between blocks could incentivize exponential innovation. The race for AI supremacy is not a zero-sum game.

Does one rule out the other? Could the US or the EU be both a partner and rival of China through smart partnerships? In theory, it is a position that both the US and the EU could take. In tandem with bolstering alliances with our allies, we should -to a certain extent- be open to dialogue and cooperation with the regimes. We also have to consider an unthinkable alliance of EU-China-Russia ‘against’ a pact between countries like US/Canada/UK/Israel/Australia/India/South-Korea/Japan.50

Another scenario is a protracted Cold War for AI Supremacy with no winner between the US and China.51 A no winner takes all scenario would eventually mark the Splinternet.52 On the one hand a China led internet, characterized by a top-down approach to tech. It would comprise of countries that adopt Chinese apps. Its rival would be a US influenced internet, including countries that adopt US built platforms and apps. From the server level, cloud computing and AI all the way down to the phone operating system level. Cyberbalkanization could result in two parallel worlds, each with distinct divisions regarding technology, trade and ideology. In practice, this implies two opposing ecosystems would exist, each using its own standards and architectures that are incompatible with one other.

In the event China wins the race for AI and quantum, it will have the power to overthrow the EU and the US.53 The world would see a new era of authoritarian surveillance capitalism. In the case that a strategic partnership of democratic countries led by the US and the EU will prevail, it may well coerce China to adopt Humanist values.

To prevent China Standards 2035, 54 we need a coalition of democratic countries that bakes its values into its technology and that sets worldwide interoperability standards for telecommunications, AI & quantum infrastructures.

7. Harms of Doing Nothing

The described advantages of the establishment of an alliance must be weighed against disadvantages, unintended consequences and the harms of doing nothing.

First, no alliance means fragmentation and division, without synergetic effects. A lack of action entails less chance of winning the race for tech dominance and securing the chance to set and control global standards. Standards that preserve democratic values. The danger of global autocratic values in technology and infrastructure increases in this analysis, because there is no en bloc counterbalance to emerging countries such as China, the country of the large numbers of consumers, hordes of AI talent, and huge amounts of machine learning training data, regurgitated by labelling farms. China has massive government budgets for the development of smart algorithms and quantum technology applications. Currently it’s everybody for himself; that won’t help us win the race. We need an alliance instead of division.

Second, quantum technology enhances AI. Together with blockchain it promises machine learning on steroids. Quantum and AI hybrids will give to the world a new perspective of science itself. In this context, it is crucial to raise awareness of their incredible potential for good, and their anthropogenic risks. The Fourth Industrial Revolution will bring about a world in which anything imaginable to improve, or worsen the human condition, can be built in reality.

Authoritarian countries obtaining this powerful technology and using it against us, poses serious national cybersecurity (cyberwarfare, hacking) threats.55 More importantly, the regimes would have the ability to impose their non-democratic values on us through technological expansionism. From our liberal-democratic viewpoint, this could lead to a dystopian scenario. AI driven facial recognition systems used for shadowing and social credit systems would become the standard. Surveillance machines are a dictator’s dream. Authoritarian a-moral machina sapiens will take over creation and invention. Privacy, mental security and freedom of thought will become a distant memory.

Our society will be better off when we forge Democratic Alliances. A united democratic tech block has a greater chance of winning the race for AI & quantum dominance.

Third, long term risks of underinvesting in 4IR technology are no less than existential. The US needs to invest heavily in safe & responsible AI and quantum. The market cannot pull this off on its own. The state should take the lead and launch a mission oriented, 2030 US Standards plan, backed by large-scale funding. 56 This plan should be sharply demarcated, and executed by golden triangle, public-private partnerships. These partnerships can be based on the triple helix innovation model, which guarantees synergistic effects between government, academia and business.

The portrayed advantages of bolstering an alliance, and actively shaping technology for good evidently outweigh the harms of remaining passive or indecisive. It is critical that the US does not hang back in a never-ending balancing of stakeholder concerns but that it is confident in formulating a vision and focussed in accomplishing its well defined national and global policy objectives. By doing nothing the US will fall behind economically. The US and the EU should set out the path along transatlantic lines and guide their democratic allies toward a Strategic Tech Alliance.57

## On

### Solv

#### Mass arbitration solves

Medintz 21 --- Scott Medintz, writer and editor for more than 25 years, focusing much of that time on pro-consumer service journalism, “How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants”, August 13, 2021, https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/

Fine print buried deep in the TurboTax website’s terms of service required them to bring their complaints not to a court but to “arbitration.” That’s a way for businesses and customers to settle disputes without heading to court—but that, consumer advocates say, often protects corporations at the expense of consumers.

So a group of enterprising lawyers representing about 40,000 TurboTax customers employed a kind of legal jiujitsu: They simultaneously filed thousands of arbitration claims, swamping Intuit with fees and prompting it to try to beat a hasty retreat.

But it was too late for the company: Several judges have now refused to let Intuit out of the arbitrations, with one commenting that the company has been “hoisted by [its] own petard.”

The TurboTax case is just one of around 15 recent examples of “mass arbitration” highlighted in a soon-to-be-published paper—the first on the topic—by Maria Glover, a professor at Georgetown University Law Center in Washington, D.C.

Rick Heineman, a spokesperson for Intuit, says that arbitration provides “customers who have real disputes quick and individualized resolution.” He also says the firm behind the filings, Keller Lenkner, had to withdraw thousands of claims from people who never used TurboTax or used it free of charge. “That is not mass arbitration,” Heineman says. “It is a scam.”

Glover, however, argues that mass arbitration is chipping away at an entrenched legal regime that currently prevents many consumers from seeking justice in court when they’re harmed or defrauded by a product or service.

And though still a new strategy, mass arbitration has already had a significant impact. It has pressured several corporate defendants—including Uber, Chipotle, and DraftKings—to grapple with accusations they otherwise could have swatted away. And it reportedly led at least one corporate giant, Amazon, to remove mandatory arbitration provisions altogether from its retail website’s terms of use.

How Arbitration Hurts Consumers

Mass arbitration is a response to what Glover calls the arbitration revolution: the decades-long campaign by corporations to keep entire categories of legal complaints out of open court and funnel them instead into the closed-door, virtually unappealable realm of arbitration.

Arbitration was established on a national level by the 1925 Federal Arbitration Act, largely as an efficient way for businesses to resolve conflicts with one another. Inserting arbitration clauses into take it or leave it contracts—where one party has far more power than the other—is a relatively recent development, driven by a string of court cases where business interests succeeded in enforcing arbitration clauses with consumers, employees, and small businesses.

Today, arbitration language now lurks almost everywhere in the consumer landscape. A 2019 study in UC Davis Law Review Online (PDF) found that 81 of the 100 largest U.S. companies now use arbitration in their dealings with consumers. And CR’s own 2020 report showed that more than two-thirds of the top-selling brands in the 10 product categories that get the most traffic on our website—including smartphones, televisions, and washing machines—use arbitration clauses.

Companies claim that consumers benefit from the efficiency of arbitration. And, indeed, when two parties willingly agree to allow an arbitrator to adjudicate their legal conflict, the process can be cheaper and faster than taking the matter to court.

But many studies suggest that consumers prevail less often in arbitration, and win smaller awards when they do, compared with traditional courts. And many of the safeguards built into the court system—the right to conduct “discovery” to establish basic facts, for example, and the right to an appeal—are missing from arbitration.

Arbitration also keeps legal complaints private, even if they allege blatantly illegal or fraudulent behavior. That imposed secrecy has, in practice, allowed everything from financial firm rip-offs to sexual predation to continue years longer than it would have if exposed in a public courtroom.

But perhaps the biggest problem—the one explicitly targeted by mass arbitration—is that most arbitration clauses prohibit consumers from joining together to bring their complaints as a group, or “class.” As a result, as Vanderbilt University law professor Brian Fitzpatrick wrote in his 2019 book, “The Conservative Case for Class Actions” (University of Chicago Press, 2019), the widespread use of arbitration clauses has all but eliminated consumer claims for small-dollar and nonmonetary harms, which generally can’t justify the time, energy, and cost of pursuing them individually.

And without the potential for consumer class-action lawsuits, companies have little incentive to treat consumers fairly when it doesn’t serve their economic interests. “The lion’s share of academic studies has found that . . . class-action lawsuits deter misconduct,” Fitzpatrick writes.

Calling the Arbitration Bluff

In this context, mass arbitration amounts to a kind of legal bluff-calling. If companies insist that consumers arbitrate their complaints individually—perhaps, as Glover argues, never expecting more than a handful of people to actually do it—the lawyers behind mass arbitrations are simply saying, fine, let’s arbitrate, over and over and over again.

Typically companies pay most or all of the fees associated with arbitration proceedings against them. These fees can range from a couple hundred to a few thousand dollars per individual claim—not much for a large company facing a small handful of cases, but potentially massive when thousands of such cases are brought in short order.

For example, in the TurboTax case, a judge tallied (PDF) Intuit’s potential costs for the arbitrations to be at least $128 million—$3,200 for each of the 40,000 clients represented by Keller Lenkner, the firm behind the mass arbitration.

Ironically, note consumer advocates, companies included those purportedly consumer-friendly fee provisions in order to convince judges not to deem the terms “unconscionable”—and therefore unenforceable—in the first place.

“This lays bare as a complete sham the claim by businesses that they are using arbitration to help consumers get problems resolved,” says George Slover, senior policy counsel at Consumer Reports. “They devised forced arbitration to make it hard for consumers to pursue claims at all, and they will readily abandon it when it doesn’t further that anti-consumer interest.”

Glover’s study portrays mass arbitration as, so far, the work of a handful of enterprising law firms willing to take on the financial risk and considerable work the approach requires.

Lawyers in a traditional class-action case need only file suit on behalf of a representative plaintiff. By contrast, the attorneys behind a mass arbitration must identify, contact, and form retention agreements with each of the hundreds or thousands of clients individually, document their stories, and formally initiate their arbitration proceedings.

These steps, plus ongoing communication, require special technology and teams of client-relationship managers. To pressure companies to settle all the claims at one time, the firms also need enough attorneys to move ahead with—or credibly stand ready to move ahead with—a large number of arbitrations simultaneously.

When these elements are in place, mass arbitration has been decidedly successful. Many claims that would be economically nonviable because would-be plaintiffs unwittingly “agreed” in the fine print not to bring class-action lawsuits are now able to generate substantial settlement pressure, Glover says. In fact, she says, the high cost of defending against mass arbitration has in some cases generated higher settlements than the cases could have as class-action suits. Keller Lenkner, the firm behind about half the cases Glover identified, says it has secured more than $200 million in settlements since 2018.

And after Amazon was threatened with some 75,000 arbitration cases from consumers saying that its Alexa-voiced Echo devices illegally stored recordings of users—potentially exposing it to tens of millions of dollars in filing fees—the company reversed course on arbitration, changing its terms of service to allow customers to file traditional lawsuits (albeit with other restrictions).

But the true power of mass arbitrations may be best reflected in the legal and logical contortions of companies trying to escape them. Almost all of the mass arbitrations Glover studied began as class-action lawsuits that were dismissed when the defendants asked a judge to “compel arbitration.”

Hit with arbitrations en masse, however, many of the companies not only begged judges to let them off the hook but also did so with arguments directly contradicting their previous ones.

“The irony is off the charts,” says Vanderbilt law professor Fitzpatrick. “These companies fought tooth and nail to get rid of class actions, and are now asking for class actions because the arbitrations they demanded are costing too much money. Judges have realized it and are laughing them out of court.”

Indeed, when the food-delivery service DoorDash tried to avoid arbitration with more than 6,000 of its contractors for alleged wage-theft claims—arbitration that it had insisted on to avoid a class-action claim—the judge refused, remarking on the “poetic justice” of the situation and writing in his opinion that the company’s “hypocrisy will not be blessed.” (DoorDash did not respond to multiple requests for comment.)

#### Deterrence wrong --- class action cost passed on to the consumers

Mullenix 14 --- Linda S. Mullenix, Morris and Rita Atlas Chair in Advocacy, University of Texas School of Law, “Ending Class Actions as We Know Them: Rethinking the American Class Action”, Emory Law Journal 2014, https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1184&context=elj

The most often-repeated rationale justifying the class action rule is that the rule deters defendants—in the class action arena, most typically corporate defendants—from future bad conduct. Indeed, some scholars have urged that deterrence is the primary purpose of the class action rule and that consequently all class actions should be mandatory in order to maximize the impact of class litigation.88 The class action deterrence theory is based on the simple concept that the sheer size of a class and the defendant’s potential exposure to massive compensatory and punitive damages induces corporate defendants to refrain from engaging in wrongful conduct.

Similar to the compensation rationale underlying the class action rule, the deterrence theory suffers from a lack of empirical evidence and is based on conjectured hypotheses about corporate behavior. It is likely that, in some cases, prudent corporate counsel guide their corporate clients’ actions in the shadow of prospective class action litigation. However, it is equally likely that the prospect of future class litigation serves little or no deterrent function and that at least some (if not many) corporate clients view class litigation as a cost of doing business, with costs passed along to consumers. We do not know, and social scientists have not been able to empirically measure, the deterrent effect of class litigation on prospective defendants. Thus, judicial and scholarly arguments relating to the deterrent effect of class litigation are largely theoretical, conclusory pronouncements.

#### No solvency and turn --- Reputational consequences --- not class action --- deters bad behavior --- but restrictions on arbitration causes more settlements which conceals behavior

Hirschmann 13 --- David Hirschmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness, US Chamber of Commerce, & Lisa A. Rickard, President, US Chamber Institute for Legal Reform, “Docket No. CFPB-2012-0017—Supplemental Submission”, December 11, 2013, http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/02/2013-12.11-CFPB-Arbitration-Letter.pdf

Plaintiffs’ attorneys have little incentive to choose cases based on the merits of the underlying claims—the merits question will never be reached, as the empirical data demonstrates. The plaintiffs’ lawyer’s goal, rather, is to find a claim for which the complaint can withstand a motion to dismiss and that can satisfy the (legitimately) high hurdles for class certification—standards that do not embody an assessment of the underlying merit of the claim.

Once a class is certified, settlement virtually always follows, driven by the transaction costs (including e-discovery) that such actions impose—which again have little or no correlation to the underlying merits of the case. The class action thus does not impose burdens only on businesses that engage in wrongful conduct. Instead, the burdens of class actions are chiefly a function of who plaintiffs’ lawyers choose to sue rather than who has engaged in actual wrongdoing. The threat of a class action therefore cannot—and does not—generally deter wrongful conduct.151

\*\*Footnote 151\*\* 151 Indeed, to the extent there is any effect associated with class actions, it is likely to deter both lawful and unlawful actions equally—requiring companies to take into account the risk of litigation costs without regard to the legality of the underlying action.

Businesses are far more likely to be deterred from wrongdoing by the reputational consequences of engaging in improper behavior, especially because reputational harm is often directly correlated to a business’s success or failure. Especially in an age of social media, consumer complaints can quickly go viral, impacting companies immediately and directly leading to changes in practices that gamer consumer opposition. Class actions, by contrast, do nothing of the sort. In sum, deterrence concerns provide no justification for maintaining the availability of private class actions.152

\*\*Footnote 152\*\* 152 Nor should arbitration be restricted or prohibited because—as some critics of arbitration sometimes contend— arbitration reduces publicly-available precedent. Most court cases are resolved by settlement, and virtually all class actions are settled; these cases offer no real guidance to other parties about what conduct will subject them to or insulate them from a future lawsuit. And most individual consumer cases brought in arbitration could not practically be litigated in court—and therefore would not produce precedent if arbitration did not exist. Consumer arbitration does not permit companies to conceal their wrongdoing, however. California, the District of Columbia, and several other states have required arbitration providers to publish information about the disposition of arbitration cases. And we are not aware of any arbitration agreement that prohibits a consumer from disclosing the substance of a claim asserted in arbitration and the disposition of that claim. (Arbitration proceedings themselves—the filings of the parties and any oral presentations—are confidential, but that restriction does not preclude parties from publicly discussing the nature of the claims and how they were decided.)

### Adv1

#### Anti-cartel enforcement high

Higbee et al 21 --- David Higbee, Djordje Petkoski and Matt Modell, “United States: Cartels”, Shearman & Sterling LLP, Oct 12th 2021, https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2022/article/united-states-cartels

The covid-19 pandemic brought forward a new series of unprecedented challenges for business and governments. Despite these challenges, including restrictions on travel and in-person meetings, there was no significant drop-off in criminal enforcement by the Antitrust Division. The number of criminal antitrust enforcement actions remained on par with the preceding three years, and fines collected for the last four years have continued to trend upward year-over-year. The Division has also seen an increase in activity through its Procurement Collusion Strike Force (PCSF), which focuses on bid rigging and other collusive conduct related to government contracts. This past year led to the first criminal enforcement actions against alleged “no-poach” agreements in the employment field. Finally, the Division provided more guidance on the benefits of leniency over deferred prosecution agreements (DPAs) and addressed the importance of a robust compliance programme.

This past year has also brought in a new administration in The White House. At the time of writing, President Biden had announced his intention to nominate Jonathan Karl as Assistant Attorney General to head up the Antitrust Division. This nomination is another indicator that the Division is likely to be more aggressive on all fronts, including criminal antitrust enforcement.

#### Cartels don’t harm growth or innovation

Schroter 13 --- Harm G. Schroter is professor of economic history at the University of Bergen, Norway, “Cartels Revisited: An Overview on Fresh Questions, New Methods, and Surprising Results”, Dans Revue économique 2013/6 (Vol. 64), https://www.cairn.info/revue-economique-2013-6-page-989.htm

As mentioned, the first research on cartels ever (Kleinwächter) related cartelization to downswings in the economy. He suggested cartels as a reaction of enterprise on crises (“Kinder der Not”). Since then many authors have related their case studies to this thesis and found evidence for and against it. However, more robust evidence on a large number of cases was unable to relate cartelization swings of the economy. Elmar Dönnebrink’s research found no empirical link between cartelisation and crises in Germany during an 18-years period from 1957 to 1975. [21], 24. The same impression provides the research by Martin Shanahan, David Round and Kerrie Round in this volume covering Australia between 1900 and 1940. However, a rough account for Switzerland indicates something into the direction of Kleinwächter’s idea. [22]. It seems that this question needs to be settled on the basis of solid international data. We also have to face the possibility that the result may vary according to periods, countries or even a combination of both.

When relating cartels to time, I suggest proceeding into another direction: a cartel is not just like a buying-contract on a commodity, a cartel-contract needs considerable trust on both sides, because cartel-partners vow for the future to abstain from potential steps and/or to carry out cost-generating others in order to receive a larger reward later. Trust needs time to emerge and grow, as well as a predictable environment. Exogenous shocks, such as war or revolution, create new realities after which trust needs to grow anew. This is why we have few cartels right after such external shocks. Usually time is needed on two levels, at the negotiation-table between decisive managers and on the market between the enterprises as organizations. It consequently requires a period of time to watch and test each other. Several international cartels, where managers did not know each other, singed pre-cartels for limited markets and periods as a test, before a comprehensive one was agreed upon (e.g. potash). Negotiations and test often consumed about two years. This span of time decoupled cartel-building from economic swings, even if the initial impulse was triggered by a crisis.

Many commodity-cartels were constructed with just the purpose to dampen economic swings. The focus was on stabilizing demand, production, prices and employment. Therefore governments often supported such cartels. In the interwar period several of such cartels functioned to the satisfaction of both, suppliers and customers (e.g. timber, paper). Though cartels can hardly be directly related to economic swings in the sense: more cartels in downturns, less during upswings, they still represent defensive instruments which are better remembered in times of depression than of booms. Thus the notion “Kinder der Not” is not totally wrong, but to be understood in a more abstract and long-term way.

One standard argument against cartels claims they obstruct innovation. Indeed, logic asks: why should a cartelized firm invest into r&d when competition is absent? There are also cases confirming this theory. However, in contrast to such assumptions John A. Cantwell and Pilar Barrera found: “cooperative learning [. . .] does seem to have increased innovative activity.” [23]. Innovative cartels included for… Most European cartels included organized transfer of innovation [24]. while with others no measurable impact could be detected. A third group definitely excluded transfer of knowledge (e.g. dyestuffs). However, a cartel member refraining from innovation would endanger its market share: during the periodic re-negotiation of one to three years cartel-members evaluate each other’s potential market share at an open market. A less than average innovative firm would run danger of receiving a reduced cartel-share. Furthermore, innovation cycles are often longer than these one to three years of cartel’s contracts. Consequently a non-innovative enterprise gambling on its cartel-share would undermine its own future. Because cartels exclude competition only on a defined field, the suggested behaviour of reduced investment into r&d is not found widespread in practical behaviour. There are, of course, within long-term cartels exceptional cases where smaller participants slowed their efforts (e.g. dyestuffs-cartel, which was signed for several decades). But any firm participating in an average cartel was badly advised not to be abreast with technologic development.

Margrit Müller detected another effect. Cartelized sectors used to be established ones with no high rates of growth. Participation in such cartels stimulated Swiss enterprise to invest in new innovative sectors which lay outside the cartelized field. Consequently cartelization could lead not to less but to more innovation! [25].

The question of misuse of economic power: Large firms represent a potential threat to small ones. Did large international cartels exploited small countries more easily than larger states? A first evaluation suggested: no, there was no difference to be found between the dimension of less and more powerful states. [26]. The question can be re-addressed to large, international cartels and cartel-members situated in small countries: Did such international cartels exploit their members in small nations more easy than large in large states? A more detailed evaluation could find no evidence for this thesis. It seems there was no discrimination according to the size of a member’s home-land. [28].

Cartels shelter from competition on the defined fields of the contract. This can make life easier for small enterprise. Evidence shows that cartels did not only safeguard small and medium enterprise (sme), but often sme received a larger share than in open competition. [29] Large cartel-players valued order in the market higher than a small share allocated additionally to sme. Knowing this, many sme asked aggressively for a larger share and often received it. According to George Symeonidis, cartels allowed an increased share and/or expansion of small members. These findings show cartels rather foster sme (and consequently potential competition). However, in the case of Swiss watch making the cartel prevented the industry from concentration and expansion abroad, which, according to Pierre-Yves Donzé, undermined the industry’s competitiveness. [30]. Indeed, cartels “freeze” the structure of their industry fore their defined time. From the general point of competition it is appreciated to have as many part-takers in the market as possible. However, from a perspective of a nations’s competitiveness more concentration and less national competition may be asked for. In order to strike a balance, several countries allow in certain cases sme forming a cartel, if their combined market-share does not exceed a certain margin. [31]. It is acknowledged that a cartel of sme is different from a cartel made of giant firms. But more important than firm-size is the share in the respective market.

A recent evaluation of cartels versus small states showed surprisingly no negative results concerning the latter. [32]. Cartels did not exploit customers in small countries more than in large ones. As small members the respective firms enjoyed preferential treatment not only as small firms, but often played the role of supervisor or arbitrator of the cartel. Cartel-partners from small countries were more trusted than from large states. In case large cartel-firms came from small states they did not behave differently from those based in large countries. Finally small states considered in many cases cartels as an indispensable tool for their economy. This is shown by Niklas Jensen-Eriksen in this volume, but applied also to many commodity-cartels (coffee, rubber, tin and so on) of developing countries. [33] It seems that being small was not detrimental, neither for firms nor for countries, as long as they were included as independent cartel-members.

First rank economic power is executed by government; states define legal rules and often also a frame of behaviour. It has been claimed that all types of administration, from governments to municipalities supported cartels during crises in order to maintain employment. That is passive politics. Active politics was to use them to prevent radicalization of workers (in Germany, see below), or governments used similar organizations, such as marketing boards, to pursue their ends. Why have governments permitted cartelization without asking for compensation from the cartel-members? Already Friedrich Kleinwächter suggested for to obtain a licence for a cartel, industry should guarantee social security to its workers. [34][34]For admission of a cartel, he suggested, firms should guarantee…

It has been claimed that cartels create barriers to entry into the respective industry and thus lower potential competition. [35] True, many cartels not only fought outsiders, but paid compensation for not using production facilities, thus easing competition. Several cartels had as one main aim to discourage as many potential competitors as possible (nitrogen, dyes). But is the accusation of creating barriers aimed exclusively at cartels? No, it is general practice in business. All firms try to safeguard their interest through technology, patents, know-how, amount of investment, etc. They also buy up and close down competitors and discourage newcomers with all possible means. As long as it has not been shown in comparative and representative research that cartels create more effective barriers than large enterprise it makes little sense accusing specially cartels for this practise.

Based on theoretical considerations, Manfred Neumann advocates anti-cartel policy: “Therefore, even if the per se rule against cartels may, in the short-run, yield losses, in the long-run it is the only appropriate policy to keep the competitive process going.” [36] George Symeonidis confronted this statement with practical research and came to a devastating conclusion on anti-cartel policy. In evaluating the result of uk anti-cartel legislation, he systematically compared the fate of cartelized and non-cartelized industries over two decades (mid 1950s to mid–1970s). According to him, anti-cartel policy caused prices to go up, the number of firms to decline, as well as a decrease in innovation. With other words, the theory-led political opening for more competition lead in reality to less competition. Furthermore, on profits the decision had no measurable effect. With other words anti-cartel policy achieved the opposite of its intentions, it undermined British competitiveness. Can any verdict be worse? [37] Indeed, if cartels had such a negative effect at the economy as assumed, one may ask why cartel-friendly countries such as Japan, Spain or Finland could point out to remarkable growth rates? These countries count into that group which not only allowed many forms of co-operation, including cartels, but considered them as normal or even indispensable. [38].

#### Slow growth doesn’t cause populist support

Mutz 18 --- Diana C. Mutz, Professor of Political Science and Communication Director, Institute for the Study of Citizens and Politics, “Status threat, not economic hardship, explains the 2016 presidential vote”, PNAS, May 8, 2018 115 (19), https://www.pnas.org/content/115/19/E4330

There are two reasons for skepticism regarding the assumption that personal economic hardship drove Trump support. First and foremost, over many decades of scholarship, evidence of voters politicizing personal economic hardship has been exceedingly rare (8). Although aggregate-level evidence has been suggestive of a public that blames incumbents for general economic downturns and rewards incumbents for economic gains, these relationships seldom hold up at the level of individual economic hardship. For example, those who recently lost jobs are unlikely to blame government policy for their personal circumstances (9), and those who have personally suffered financially under a given administration are no more likely to vote against the incumbent (10, 11). Across a wide range of issues, scholars have found that citizens seldom form policy or candidate preferences on the basis of their family’s personal economic self-interest. This is not to suggest that citizens never do so, but the conditions under which this occurs are very rare (12, 13). Even membership in groups with economic interests that have been helped or hurt seldom changes political preferences (14).

A second reason for skepticism regarding the left behind thesis involves timing. Trump’s victory took place in the context of an economic recovery. Throughout the year preceding the election, unemployment was falling, and economic indicators were on the upswing. Likewise, the dramatic drop in US manufacturing jobs took place during the first decade of the 21st century; since 2010, manufacturing employment in the United States has actually increased somewhat (15). Research on economic voting suggests that recent economic events are most influential for voting (16, 17). Given all of the positive economic indicators, why would 2016 be ripe for an economic backlash? The most common explanation is that it is precisely those who did not recover from the Great Recession of 2008 who elected Trump, those who were left behind by virtue of ongoing joblessness and/or stagnant wages.

#### Trade doesn’t solve war

Musgrave 20 --- Paul Musgrave is an assistant professor of political science at the University of Massachusetts Amherst, “The Beautiful, Dumb Dream of McDonald’s Peace Theory”, Foreign Policy, NOVEMBER 26, 2020, https://foreignpolicy.com/2020/11/26/mcdonalds-peace-nagornokarabakh-friedman/

Of course, I would explain to my students, war could also proceed from other causes. Economic integration may be no panacea to interstate war after all. John Vasquez writes: “War among equals has followed the failure of power politics to settle certain highly salient issues”—none, he writes, more than “issues involving territory, especially territorial contiguity.”

In the former Soviet Union, the wars over Chechnya, Georgia, Ukraine, and now Nagorno-Karabakh have all involved territory as a crucial element, a story much closer to what Vasquez’s theory would predict than to Friedman’s.

Globalization may have increased the costs of these wars, but they have obviously not prevented them. To be sure, Armenia has no McDonald’s, an issue grave enough to have been raised in the parliament at Yerevan earlier this year. The Azerbaijan franchise’s cheerleading was also slapped down by the Home Office.

Regardless, Friedman’s logic suggests the conflict shouldn’t have begun, or shouldn’t have been so bloody once it did. Both Armenia and Azerbaijan score highly (and almost identically) on the ETH Zurich KOF Globalisation Index. The pace of deaths suggests that the conflict could qualify as a so-called real war by the traditional 1,000 battle-related-deaths criterion. (Indeed, some reports say the death toll blew past that level quickly.)

And if the conflict has knocked the final support from the Golden Arches theory, it has also finally toppled whatever confidence remained in the 1990s belief in the eternal sunshine of the American order.

The resurgent Nagorno-Karabakh conflict provides yet another reason to worry that the world is entering a new phase of more violent conflict—including major wars—and globalization will no more prevent them than burgeoning trade before Archduke Ferdinand’s assassination prevented World War I.

After all, wars keep emerging that challenge the optimistic assessment that war is a relic of the past. The specific ways these conflicts emerge, moreover, point to the possibility that new wars could break out that make even bloody conflicts like those in Syria and Yemen seem relatively minor.

Driven by processes of imperial dysfunction and internal breakdown, today’s wars have causes that are enormously difficult to heal.

The conflicts in the former Soviet Union, from Chechnya in the 1990s to Nagorno-Karabakh today, represent a set of wars in the post-Soviet succession. Russia has attempted to maintain its central role against real and perceived rivals throughout that vast region including transnational Islam, the European Union, the United States, China, and now arguably Turkey.

In the Middle East, revisionist regional powers like Saudi Arabia and Iran contend for power as the United States continues to loudly proclaim that it is unwilling to continue playing its imperial stabilizing role (even if Washington never actually seems to find the exit).

And China, which once preferred to keep its border disputes quiet, seems increasingly willing to saber-rattle from the Taiwan Straits to the Himalayas.

### Adv 2

#### Your Helm evidence says class action isn’t necessary to solve health care

MSU = yellow

**Helm ’17** [Anne; 2017; Chief of Staff to the Chancellor & Dean at the Hastings College of the Law at the University of California; Saint Louis University Journal of Health Law and Policy, “Optimizing Private Antitrust Enforcement in Health Care,” vol. 11]

Although private antitrust litigation immediately conjures thoughts of large class action cases, most cases involving health care services and insurance premiums are individual actions by competitors, unlike the larger consumer cases against pharmaceutical companies. The scarcity of class actions in this arena is likely due to the individualized nature of damages in health care,124 which may deter plaintiffs from trying to satisfy the FRCP 23(b)(3) requirement that issues common to the class will predominate over issues specific to individual class members in the case.125 Nonetheless, a few notable class actions have been filed with some classes certified in this sphere

#### Your Gaynor evidence is about consolidation in hospitals --- banning arbitration agreements doesn’t solve that

MSU = yellow

**Gaynor ’21** [Martin; May 19; E.J. Barone University Professor of Economics and Public Policy at Heinz College in Carnegie Mellon University; Statement before the Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights U.S. Senate, “Antitrust Applied: Hospital Consolidation Concerns and Solutions,” <https://www.judiciary.senate.gov/imo/media/doc/Gaynor_Senate_Judiciary_Hospital_Consolidation_May_19_2021.pdf>]

4 Evidence on the Impacts of Consolidation

There is now a **considerable body** of **scientific research** evidence on the impacts of hospital consolidation (see Gaynor et al., 2015; Tsai and Jha, 2014; Gaynor and Town, 2012a,b; Dranove and Satterthwaite, 2000; Gaynor and Vogt, 2000; Vogt and Town, 2006, for reviews of the evidence).

4.1 Impacts on Prices

4.1.1 Hospital Mergers

There are **many studies** of hospital mergers. These studies look at **many** different mergers in **different places** in different **time periods**, and find **substantial increases** in price resulting from mergers in concentrated markets (e.g., Town and Vistnes, 2001; Krishnan, 2001; Vita and Sacher, 2001; Gaynor and Vogt, 2003; Capps et al., 2003; Capps and Dranove, 2004; Dafny, 2009; Haas-Wilson and Garmon, 2011; Tenn, 2011; Thompson, 2011; Gowrisankaran et al., 2015). Price increases on the order of **20** or **30 percent** are common, with some increases as high as **65 percent**.6

These results make sense. Hospitals’ negotiations with insurers determine prices and whether they are in an insurer’s provider network. Insurers want to build a provider network that employers (and consumers) will value. If two hospitals are viewed as good alternatives to each other by consumers (close substitutes), then the insurer can substitute one for the other with little loss to the value of their product, and therefore each hospital’s **bargaining leverage** is limited. If one hospital declines to join the network, customers will be “almost as happy” with access to the other. If the two hospitals **merge**, the insurer will now lose substantial value if they offer a network without the merged entity (if there are no other hospitals viewed as good alternatives by consumers). The merger therefore generates bargaining **leverage** and hospitals can negotiate a **price increase**.

Overall, these studies **consistently show** that when hospital consolidation is between **close competitors** it raises **prices**, and by **substantial amounts**. Consolidated hospitals that are able to charge higher prices due to reduced competition are able to do so on an **ongoing basis**, making this a **permanent** rather than a transitory problem. Moreover, there is no difference between not-for-profit and for-profit hospitals in the extent to which they raise prices due to increased market power.

There is also more **recent evidence** that mergers between hospitals that are not near to each other can lead to price increases. Quite a few hospital mergers are between hospitals that are not in the same area (see Figure 4). Many employers have locations with employees in a number of geographic areas. These employers will most likely prefer insurance plans with provider networks that cover their employees in all of these locations. An insurance plan thus has an incentive to have a provider network that covers the multiple locations of employers. It is therefore costly for that insurer to lose a hospital system that has hospitals in multiple locations – their network would become less attractive. This means that a merger between hospitals in these different locations can increase their bargaining power, and hence their prices.

There are two **recent papers** find evidence that such mergers lead to **significant** hospital price increases. Lewis and Pflum (2017) find that such mergers lead to price increases of 17 percent. Dafny et al. (2019) find that mergers between hospitals in different markets in the same state (but not in different states) lead to price increases of 10 percent.

Understanding the competitive effects of cross-market hospital mergers is an important area for further investigation, and determining appropriate policy responses (Brand and Rosenbaum, 2019).

4.1.2 Hospital Acquisitions of Physician Practices

Studies that examine the impacts of hospital **acquisitions** of physician practices find that such acquisitions result in **significantly higher** prices and more spending (Capps et al., 2018; Neprash et al., 2015; Baker et al., 2014; Robinson and Miller, 2014). For example, Capps et al. (2018) find that hospital acquisitions of physician practices led to prices increasing by an average of 14 percent and patient spending increasing by 4.9 percent.

4.2 Impacts on Quality

Just as important, if not more, than impacts on prices are impacts on the **quality of care**. The quality of health care can have profound impacts on patients’ lives, including their probability of survival.

4.2.1 Hospital Mergers

A **number of studies** have found that patient health outcomes are **substantially worse** at hospitals in more concentrated markets, where those hospitals face less potential competition.

Studies of markets with administered prices (e.g., Medicare) find that **less competition** leads to **worse quality**. One of the most striking results is from Kessler and McClellan (2000), who find that risk-adjusted one year mortality for Medicare heart attack (acute myocardial infarction, or AMI) patients is significantly higher in more concentrated markets.7 In particular, patients in the most concentrated markets had **mortality probabilities** 1.46 points higher than those in the least concentrated markets (this constitutes a 4.4% difference) as of 1991. This is an **extremely large** difference – it amounts to over 2,000 fewer (statistical) deaths in the least concentrated vs. most concentrated markets.

There are similar results from **studies** of the English **N**ational **H**ealth **S**ervice (NHS). The NHS adopted a set of reforms in 2006 that were intended to increase patient choice and hospital competition, and introduced administered prices for hospitals based on patient diagnoses (analogous to the Medicare Prospective Payment System). Two recent studies examine the impacts of this reform (Cooper et al., 2011; Gaynor et al., 2013) and find that, following the reform, risk-adjusted mortality from heart attacks fell more at hospitals in less concentrated markets than at hospitals in more concentrated markets. Gaynor et al. (2013) also look at mortality from all causes and find that patients fared worse at hospitals in more consolidated markets.

Studies of markets where prices are market determined (e.g., markets for those with private health insurance) find that **consolidation** can lead to **lower quality**, although some studies go the other way. In my opinion the **strongest scientific studies** find that quality is **lower** where there’s less competition. For example, Romano and Balan (2011) find that the merger of Evanston Northwestern and Highland Park hospitals had no effect on some quality indicators, while it harmed others. Capps (2005) finds that hospital mergers in New York state had no impacts on many quality indicators, but led to increases in mortality for patients suffering from heart attacks and from failure. Hayford (2012) finds that hospital mergers in California led to substantially increased mortality rates for patients with heart disease. Cutler et al. (2010) find that the removal of barriers to entry led to increased market shares for low mortality rate CABG surgeons in Pennsylvania. Haas et al. (2018) find that system expansions (such as those due to merger or acquisition) can pose significant patient safety risks. Short and Ho (2019) find that hospital market concentration is **strongly negatively associated** with multiple measures of patient satisfaction.

4.2.2 Hospital Acquisitions of Physician Practice

Research on the effects of hospital ownership of physician practices does **not find** evidence of **improved quality**. McWilliams et al. (2013) find that larger hospital owned physician practices have higher readmission rates and perform **no better** than smaller practices on process based measures of quality. (Scott et al., 2018) find no improvement in quality of care at hospitals that acquired physician practices compared to those that did not. Koch et al. (2020) do not find significant effects of hospital ownership of physician practices on Medicare patients’ health outcomes. Short and Ho (2019) also find a limited effect of hospital ownership of physician practices on Medicare quality measures, but find that increased market concentration is **strongly associated** with reduced quality. Further, the testimony of Dr. Kenneth Kizer in a recent physician practice merger case (Federal Trade Commission and State of Idaho v. St. Luke’s Health System, Ltd, and Saltzer Medical Group, P.A.) documents that clinical integration is achieved with many different forms of organization, i.e., that consolidation **isn’t necessary** to achieve the benefits of clinical **integration**.8

4.2.3 Patient Referrals

There has been concern about the possible impact of hospital ownership of physician practices on where those physicians refer their patients, and whether that is in the patients’ best interests (Mathews and Evans, 2018). A **number of studies** have found that patient referrals are **substantially altered** by hospital acquisition of a physician practice. (Brot-Goldberg and de Vaan, 2018) find that if primary care physicians in Massachusetts are in a practice owned by a health system they are substantially more likely to refer to an orthopedist within the health system that owns the practice. They also estimate that this is **largely due** to **anti-competitive** steering. (Venkatesh, 2019) examines Medicare data and finds a 9-fold increase in the probability that a physician refers to a hospital once their practice is acquired by the hospital. Hospital divestiture of a practice has the opposite effect (Figure 6). A study by Walden (2017) also employs Medicare data and finds that hospital acquisitions of physician practices “increases referrals to specialists employed by the acquirer by 52 percent after acquisition”, and reduces referrals to specialists employed by competitors by 7 percent. Whaley et al. (2021) find evidence of a substantial shift of referrals to hospitals as a result of hospital ownership of physician practices, and Young et al. (2021) find that hospital acquisitions of physician practices led to increases in inappropriate referrals for diagnostic imaging.

4.2.4 Labor Market Impacts, Monopsony Power

It is also possible that health care consolidation can have impacts on labor markets. Consolidation that causes competitive harm in the output market does not necessarily cause harm to competition in the input market (monopsony power is the term for market power in buying inputs). For example, two local grocery stores may merge to monopoly in an area, but they purchase frozen food items on a national market with lots of competition. Conversely, it is possible that a **merger** may have no harm to competition in the **output** market, but cause **competitive harm** in an **input** market. For example, consider two coal mines located in the same area that merge. Coal is sold on a national market, so the merger will not cause competitive harm. However, if the coal mines are the largest (or only) employers in the area, then the merger will cause harm to competition in the labor market.

In the case of health care, however, both the output market for health care services and the input market for labor are **local**. As a consequence, a merger that causes harm to competition in the market for health care services has nontrivial potential to harm competition in the labor market. The extent to which such a merger will cause labor market harms depends on the alternatives that workers have in terms of the types of other jobs available and where they are located. Nonspecialized workers, such as custodians, food service workers, and security guards are less likely to be affected by a merger, since their skills are readily transferable to other employers in other sectors.9 Workers who have specialized skills that are not readily transferable to other employers in other sectors are more likely to be harmed. For example, consider a town with two hospitals, a large automobile assembly plant, and multiple retail and service establishments. If the two hospitals merge to monopoly, hospital custodians and security guards will have alternatives at the assembly plant or at the retail or service establishments. As a consequence, competition for these workers may be little affected by the merger. Nurses and medical technicians, however, have nowhere else to turn in the local market, so there will be substantial harm to competition for health care workers.

There are a number of papers that have demonstrated the presence of monopsony power in the market for nurses (see e.g., Sullivan, 1989; Currie et al., 2005; Staiger et al., 2010). These papers demonstrate that hospitals possess and exercise monopsony power in the market for nurses. They do not, however, provide direct evidence on the impacts of consolidation. A recent paper, however, looks directly at the impacts of hospital mergers on workers’ wages. Prager and Schmitt (2021) look at the impacts of 84 hospital mergers nationally between 2000 and 2010. They find that hospital mergers that resulted in large increases in concentration **substantially reduced** wage **growth** for workers with **industry specific** skills, but not for unskilled workers. They find that “Following such mergers, annual wage growth is 1.1 percentage points slower for skilled non-health professionals and 1.7 percentage points slower for nursing and pharmacy workers than in markets without mergers.” This suggests that hospital mergers can **harm competition** in the labor market for workers with skills specific to the hospital industry.

The impacts of consolidation on labor markets (and input markets generally) is an area where study is needed to understand the nature of the impacts of consolidation and evidence of those effects. Moreover, antitrust authorities need to know to what extent merger enforcement focused on output markets addresses potential input market competitive harms, and to what extent input markets require a separate focus. Further, if the agencies are to pursue enforcement in this area they need to develop economic and legal approaches to this issue.

4.3 Impacts on Costs, Coordination, Quality

It is plausible that consolidation between hospital, physician practices or insurers, in a number of combinations, could reduce costs, increase care coordination, or enhance efficiency. There **may** be gains from operating at a **larger scale**, eliminating **wasteful duplication**, improved communications, enhanced incentives for mutually beneficial investments, etc. **However**, it is important to realize that consolidation is **not integration**. Acquiring another firm changes **ownership**, but **in and of itself** does **nothing** to achieve integration. Integration, if it happens, is a long process that occurs after acquisition.

While the intuition, and the rhetoric, surrounding consolidation, has been positive, the reality is less encouraging. The evidence on the effects of consolidation is mixed, but it’s safe to say that it does **not show** overall **gains** from consolidation (Neprash and McWilliams, 2019). Merged hospitals, insurers, physician practices, or integrated systems are **not** systematically **less costly**, **higher quality**, or **more effective** than independent firms (see Burns and Muller, 2008; Burns et al., 2015; Goldsmith et al., 2015; Burns et al., 2013; McWilliams et al., 2013; Tsai and Jha, 2014).

For example, Burns et al. (2015) find **no evidence** that hospital systems are **lower cost**, Goldsmith et al. (2015) find **no evidence** that integrated delivery systems perform **better** than independents, Koch et al. (2018) find higher Medicare expenditures for cardiology practices in consolidated markets, and McWilliams et al. (2013) find higher Medicare expenditures for large hospital-based practices. In contrast, Schmitt (2017) finds evidence of significant cost savings (4-7 percent) due to hospital mergers, with the exception of mergers of hospital in the same market (and thereby likely competitors). Gaynor et al. (2021) examine the merger of two large hospital chains. They find that the acquisition led to adoption of a new electronic medical record system, and similarity of management practices, but neither the **profitability** of the acquired hospitals or the acquiring hospitals increased, nor did patient outcomes improve. Beaulieu et al. (2020) report that “Hospital acquisition by another hospital or hospital system was associated with modestly **worse** patient experiences and **no** significant **changes** in readmission or mortality rates. Effects on process measures of quality were inconclusive.”

After more than **3 decades** of extensive **consolidation** in health care, it seems likely that the promised gains from consolidation would have materialized by now if they were truly there.

5 Anticompetitive Conduct

Firms that acquire a dominant market position usually wish to keep it. The **incentive** to maintain or enhance a dominant position can be **beneficial** when it leads the firm to **deliver value** to consumers in order to keep or gain their business. This can result in **lower prices**, **higher quality**, better service, or **enhanced innovation**. There may also be strong incentives for such firms to engage in **anticompetitive** practices in order to **disadvantage competitors** or make it difficult for **new** products or **firms** to enter the market and compete.

There are **prominent instances** of firms in the health care industry engaging in what appear to be anticompetitive tactics. Cooper et al. (2019) find that hospitals with fewer potential competitors are more likely to negotiate contracts with insurers that have payment forms that are more favorable to them (e.g., fee for service) and reject payment forms they dislike (e.g., DRG based payment). While this is not an anticompetitive practice, it suggests that hospitals with market power are able to negotiate contracts with insurers that contain anticompetitive elements. This indeed is the issue in some recent antitrust cases. These cases revolve around the use of restrictive clauses in hospital contracts with insurers.10

These clauses prevent insurers from using methods to direct their enrollees to less costly or better hospitals. One of these methods is called tiering - a practice where enrollees pay less out of their own pockets for care received from providers in a more favorable group (“tier”), and pay more if they see a provider in a less favorable tier. Insurers use tiering to give enrollees incentives to obtain care at less costly or higher quality providers. This system thus gives providers an incentive to do the things it takes to be in the more favorable tier, and is a way to promote competition. Another method is steering - enrollees are directed to providers who are preferred, due to lower costs or higher quality. Steering also promotes competition - providers have incentives to agree to lower prices or provide better quality or service in order to be in the preferred group. A third method employed by insurers is transparency – providing enrollees with information about the costs or quality of care at different providers. The intent is to provide enrollees with the information they need to choose the right provider, and by doing so to give providers incentives to compete on those factors.

In both of the antitrust suits mentioned above, the health systems had negotiated clauses in their contracts with insurers which **prohibited** the insurers from using any of these methods to try to direct patients to lower cost or better providers. The clauses prohibiting the use of these methods are called “**anti-tiering**,” “**anti-steering**,” and “**gag**” clauses. The concern with the use of these restrictive clauses is that they **harm competition** by preventing insurers by using methods that provide incentives to providers to compete to attract patients. The lawsuit by the DOJ against Carolinas Health System was settled, with the health system agreeing not to use these restrictive clauses.11 The California Attorney General’s lawsuit against Sutter Health System was also settled, with a similar outcome. 12

At present there is no systematic evidence on the extent to which anti-tiering, anti-steering, and gag clauses are being employed by health systems in their contracts with insurers, nor analysis of their impacts. This is an area which needs investigation to document the extent of the practice and its impacts.

Another practice that raises concerns is “**data blocking**” (Savage et al., 2019). Data blocking is a practice in which health systems **impede** or **prevent the flow** of patients’ clinical **data** to providers outside their system. It is also refers to a practice by **e**lectronic **m**edical **r**ecord (EMR) providers to **impede** the **flow of data** to rival EMR systems via **lack of compatibility**. Data blocking by providers makes it more **difficult** for patients to go to **rival providers**, **locking** them in, since their medical information **doesn’t go** with them. Reducing **patient mobility** across providers **harms competition** and benefits **incumbents**. While there are extensive reports of data blocking, there isn’t systematic evidence on the extent of the practice, or on its impacts. Study is needed to understand the nature of data blocking, and the extent to which it leads to harm to competition or to efficiencies.

# 2nc

### A2: Pre-emption

#### No preemption

Molis 21 --- Cameron Molis, J.D., Columbia Law School, 2021, “CURBING CONCEPCION: HOW STATES CAN EASE THE STRAIN OF PREDISPUTE ARBITRATION TO COUNTER CORPORATE ABUSERS”, UNIVERSITY OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE, Vol 24 No 3, 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1260&context=jlasc

While the Ninth Circuit’s interpretation of the FAA and Concepcion presents an attractive avenue for states looking to combat forced arbitration without risking federal preemption, success in other circuits will depend on bringing arguments in line with nationwide precedent. This Part begins in Section A by evaluating the complexity distinction’s compatibility with two Supreme Court decisions relied on by the Ninth Circuit in Sakkab and Blair. Section B then incorporates related decisions issued after the Ninth Circuit’s development of this interpretation, examining how these latter cases may further complicate the analysis. Finally, Section C expands to federal precedent nationwide and assesses the interpretation’s likelihood of adoption in other circuits.

A. The Complexity Distinction Is Consistent with Supreme Court Precedent

1. Concepcion’s application of FAA preemption specifically targets procedural complexity

The Ninth Circuit’s Sakkab and Blair decisions maintain that the FAA only preempts laws that increase the procedural complexity of arbitration, like the one mandating class action protections in Concepcion, and not those that may increase the substantive complexity of arbitration, like rules forbidding contractual waiver of PAGA claims in Sakkab or public injunctive relief in Blair. This assertion is both a reasonable interpretation of Concepcion’s view of FAA preemption and was directly contemplated in Conception itself.

Given that Concepcion ultimately pertains to a question of federal preemption of state law, it is necessary to examine how the case frames the FAA’s preemptive power. In Concepcion, the Court proposed a two-step analysis to evaluate FAA preemption.74 First, a court must determine whether the state law is eligible for protection under the FAA’s savings clause by identifying whether it is a “generally applicable contract defense.”75 A law found to target arbitration directly would fail this step.76 Second, the court evaluates whether the law is applied in a manner that disfavors arbitration.77 This determination is largely based on whether the law stands as an obstacle to the FAA’s objective of facilitating informal, streamlined proceedings.78

In order for the Ninth Circuit’s distinction between substantive and procedural complexity to conform with Concepcion’s view of FAA preemption, substantively complex claims must pass the second step of this analysis, i.e., they must not obstruct the FAA’s interest in efficient proceedings.79 In Concepcion, the Court presented three additional factors to determine if state protections obstruct the purposes of the FAA: (i) whether the law will sacrifice the informality of arbitration by making it slower and more costly; (ii) whether the law increases the procedural formalities required at arbitration; and (iii) whether the law causes an increased risk to the defendant.80 While the Court in Concepcion found that laws mandating the right to class action procedures failed on all three points,81 other laws creating only substantive complexity will likely fare better under the same analysis.

When the Court in Concepcion discussed how class protections make arbitrations slower and more costly, it specified that such procedures require an arbitrator to decide whether the class should be certified, whether the named parties were sufficiently representative of the broader class, and how discovery for the class should be conducted.82 The substantively complex PAGA claims at issue in Sakkab, however, have none of the same procedural requirements mandated by Rule 23 for class actions.83 The dissenting opinion in Sakkab argued that, nevertheless, the substantively complex PAGA claims still increase the procedural formalities required at arbitration and slow the process by requiring an arbitrator to make fact-intensive judgments about absent parties.84 The same argument could be made against Blair’s claims for public injunctive relief in which a defendant must account for the money obtained from consumers and notify these consumers of their statutory rights.85

The difference between these claims and the class procedures addressed in Concepcion is that any added complexity in substantively complex claims is introduced after the arbitrator has already ruled on the legal questions at issue.86 That is, in PAGA and public injunctive disputes, the added complexity facing the arbitrator is limited to determining the remedial actions required of the defendant. This distinction is important because Concepcion specifically focused on how the disruption of arbitration’s bilateral nature—the fact that it is adjudicated between just two parties—distorts the objectives of the FAA.87 Both PAGA claims and claims for public injunctive relief maintain the bilateral nature of arbitration and therefore do not sacrifice informality or increase procedural formality in the manner envisioned by the majority in Concepcion. 88

Because the stakes of an arbitration vary across claims and contexts, it is difficult to imagine that the Court’s remaining point regarding the level of risk to defendants can carry much weight on its own. While not addressed directly in Blair, the Sakkab court responded to this concern, contending that state protections for remedies cannot be preempted solely on the level of risk they may pose to defendants.89 Further, the Ninth Circuit suggests that parties can always prospectively decide to litigate high-stakes claims as many do in the antitrust context.90 While this argument is internally consistent on its own, it is further supported by Supreme Court precedent establishing that arbitration agreements cannot bar substantive rights afforded by statute.91

2. The complexity distinction is necessary to reconcile Supreme Court precedent

The Supreme Court’s decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth92 places an important limitation on Concepcion. In the former case, the Supreme Court held that parties entering into agreements to arbitrate statutory claims do not forgo the substantive rights afforded by those statutes.93 According to the Court, an agreement to arbitrate does nothing more than move a claim from a judicial to an arbitral forum, trading the additional procedures of a courtroom for the simplicity of arbitration.94 In light of this holding, Concepcion’s preemption analysis must be limited and cannot be deployed in a manner that would deny a party’s substantive rights as provided by law.95 In the context of the laws at issue in Sakkab and Blair, this means that the guarantees to pursue PAGA laims and public injunctive relief cannot be eliminated through FAA preemption.

Even if the Court in Concepcion did not contemplate a distinction between substantive and procedural complexity itself, a limitless application of FAA preemption would veer too close to upsetting the holding in Mitsubishi, which has been specifically endorsed in cases following Concepcion. 96 As the Court in Mitsubishi stated, “potential complexity should not suffice to ward off arbitration,”97 and arbitrators are sufficiently competent adjudicators to consider and manage substantively complex cases.

Between a straightforward reading of Concepcion and the need to harmonize Concepcion and Mitsubishi, the Ninth Circuit’s safe harbor for substantively complex claims is a fair interpretation of Supreme Court precedent. In order for the complexity distinction in Sakkab and Blair to remain viable across all federal courts, however, it is necessary that it accords with Supreme Court precedent decided after these Ninth Circuit cases.

#### The Supreme Court wont grant cert

Molis 21 --- Cameron Molis, J.D., Columbia Law School, 2021, “CURBING CONCEPCION: HOW STATES CAN EASE THE STRAIN OF PREDISPUTE ARBITRATION TO COUNTER CORPORATE ABUSERS”, UNIVERSITY OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE, Vol 24 No 3, 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1260&context=jlasc

2. Rejections of petitions for certiorari have not implicated the complexity distinction

While lower courts have at times appeared eager to discuss the viability of the Ninth Circuit’s complexity distinction, the Supreme Court has had decidedly less to say.109 Despite numerous petitions for certiorari on cases related to the representative actions addressed in Sakkab and Blair, no petitions have been granted, and no dissents from the denial of certiorari have been published. Although the Court has emphatically disputed that such denials express any opinion on the merits of these cases,110 it is worth briefly examining the parties’ arguments for why the underlying jurisprudence does or does not deserve further review.

While neither party in Sakkab submitted petitions for certiorari, and Blair was settled out of court,111 two Ninth Circuit cases addressing similar representative actions have been briefed and petitioned to the Supreme Court.112 Both cases involved employees seeking civil penalties and unpaid wages from the same employer on behalf of themselves and their coworkers under California’s PAGA law.113 After losing at the Ninth Circuit, the defendants in both cases petitioned for Supreme Court review, arguing that PAGA claims should be preempted by the FAA.

Two common points across both petitions were that: (i) the California PAGA law is not a rule of general applicability;114 and (ii) PAGA claims frustrate the bilateral nature of arbitration.115 An amicus brief from members of the business community additionally emphasized the “deluge” of PAGA claims following Sakkab and argued the increase was a matter of significant practical importance.116 While the business community may be correct that the increase in PAGA claims will accentuate the stakes of future petitions for Supreme Court review, the other two arguments advanced by the petitioners are unlikely to hold up under scrutiny.

Regarding the first step of Concepcion’s preemption analysis,117 a law applying to all contracts, whether or not they pertain to arbitration, should be classified as a per se generally applicable rule.118 Laws that fail at this step in the analysis generally target arbitration directly as opposed to disfavoring it in application, and a rule forbidding PAGA waivers does not apply differently to arbitration than it does to any other contract.119 Further, the petitioners’ contention that the California rule forbidding PAGA waivers has only ever been used to invalidate arbitration contracts is less a showing that the rule is not generally applicable and more a reflection on the propensity for arbitration agreements to deny plaintiff protections compared with other contracts.120 The fact that parties generally allow PAGA restrictions in settlement agreements is equally unresponsive to the question because settlements are profoundly distinct from original proceedings, whether civil or arbitral.121

The second argument, that the California rule frustrates the bilateral nature of arbitration, has already been thoroughly and convincingly addressed in the Ninth Circuit’s decisions.122 The Ninth Circuit has concluded that PAGA actions remain bilateral throughout their proceedings and only consider absent parties once the arbitrator has reached a legal conclusion and is calculating remedies.123

Notably, neither petition included arguments targeting the Ninth Circuit’s complexity distinction directly.124 While far from conclusive, this observation supports the general proposition that, even if the individual rules at issue in Sakkab and Blair could be preempted on other grounds in some future case, there do not seem to be any legal arguments that can convincingly target the logic of the Ninth Circuit’s complexity distinction itself.125

### A2: CAFA

#### CAFA can’t preempt the CP

Haines & Korobkin 18 --- Paul Haines, principal of Haines Law Group, APC. He represents employees in wage and hour class, collective, and representative actions, and in individual claims for wrongful termination, discrimination, harassment, and retaliation, Tuvia Korobkin, associate with Haines Law Group, APC, where he represents employees in a wide array of wage and hour claims, including wage and hour class and collective actions and PAGA claims, “PAGA: The Good, The Bad, And The Uncertain”, Advocate, 2018, https://www.advocatemagazine.com/article/2018-august/paga-the-good-the-bad-and-the-uncertain

Because a PAGA claim is neither an individual Labor Code claim nor a “class- action” claim, the aggregate value of the civil penalties sought by all “aggrieved employees” in a PAGA action cannot be aggregated for purposes of removal to federal court under either ordinary diversity jurisdiction or the Class Action Fairness Act. (See Urbino v. Orkin Svcs. of Calif., Inc. (9th Cir. 2013) 726 F.3d 1118, 1121-23 [holding that the claims of all “aggrieved employees” cannot be aggregated to establish the $75,000 threshold for diversity jurisdiction because aggrieved employees do not have a “common and undivided interest” in those penalties]; Baumann v. Chase Inv. Svcs. Corp. (9th Cir. 2014) 747 F.3d 1117, 1124 [holding that “PAGA is not sufficiently similar to Rule 23 to establish the original jurisdiction of a federal court under CAFA”]; Yocupicio v. PAE Grp., LLC (9th Cir. 2015) 795 F.3d 1057, 1062 [holding that the value of a PAGA claim cannot be aggregated and added to the value of class claims to establish the $5,000,000 amount-in-controversy requirement for CAFA jurisdiction].)

### A2: California Got Preempted (HLR)

#### This evidence is about the Concepcions case and a DIFFERENT California law that required class action be available --- not even in the ballpark of the CPs mechanism

#### The only circuit split on this would be immediately overturned post-CP

Molis 21 --- Cameron Molis, J.D., Columbia Law School, 2021, “CURBING CONCEPCION: HOW STATES CAN EASE THE STRAIN OF PREDISPUTE ARBITRATION TO COUNTER CORPORATE ABUSERS”, UNIVERSITY OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE, Vol 24 No 3, 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1260&context=jlasc

If the District Court is correct that Mitsubishi does not guarantee plaintiffs’ ability to pursue statutorily granted substantive rights, the FAA’s preemptive power over state protections would go unchecked, and any rule that guaranteed substantive or procedural rights would be preempted if it led to any increased complexity in arbitration. Put differently, the Ninth Circuit’s distinction between substantive and procedural complexity would be inapplicable, with all forms of complexity now putting state regulation of arbitration at risk of preemption.

It seems likely, however, that further review should overturn Joseph. The decision has generated little to no scholarly discussion, and the relevant passage has not been cited in any subsequent case.129 Further, the language conflicts directly with Supreme Court precedent acknowledging plaintiffs’ “right to pursue” statutory remedies.130 If the substantive complexity of statutory claims could put their statutes at risk of preemption, the decision to arbitrate would have a direct impact on a plaintiff’s ability to pursue a claim, in direct contrast to the Court’s directive in Mitsubishi. A plaintiff attempting to cite the Ninth Circuit’s complexity distinction in the Eastern District of Pennsylvania may have some difficulty in distinguishing Joseph, but Joseph’s conflict with Mitsubishi makes it highly unlikely that a future court would uphold the case if challenged.131

2. Support for the complexity distinction is found in the pre-Epic Systems circuit split

While the Eastern District of Pennsylvania is unique in concluding that the distinction between substantive and procedural rights has little impact on a preemption analysis under the FAA, the potential for other jurisdictions to adopt the Ninth Circuit’s distinction between substantive and procedural rights may depend on a previous circuit split that culminated in Epic Systems. (Recall that this case held that the NLRA does not guarantee a right to class and collective action in arbitration proceedings.132)

### Mass arb

Facebook stopped it, incur too many fines

#### Mass arbitration solves A2: Companies will wiggle out of it

Corkery & Silver-Greenberg 20 --- Michael Corkery is a business reporter who covers the retail industry and its impact on consumers, workers and the economy, Jessica Silver-Greenberg is an investigative reporter on the business desk, “‘Scared to Death’ by Arbitration: Companies Drowning in Their Own System”, NYT, April 6, 2020, https://www.nytimes.com/2020/04/06/business/arbitration-overload.html

Mr. Lenkner and his colleagues at Keller Lenkner, which is based in Chicago, also see a potentially viable legal niche in mass arbitration.

A former lawyer at Boeing who clerked for Justice Anthony M. Kennedy on the Supreme Court, Mr. Lenkner said most companies never expected that people would actually use arbitration.

“The conventional wisdom might say that arbitration is a bad development for plaintiffs and an automatic win for the companies,” he said. “We don’t see it that way.”

Keller Lenkner’s first wave of cases have focused on workers in the gig economy. Many of these workers, particularly at food delivery companies, have been thrust onto the front line of the coronavirus crisis by ferrying food and supplies to housebound consumers, while risking getting sick. A large number of their employers require these workers to sign arbitration clauses.

Mr. Lenkner said he believed that his firm could economically mount arbitration claims, one by one, because the gig workers had similar allegations against companies like Uber and Postmates — namely that they have been misclassified as independent contractors.

One of the firm’s latest showdowns is with DoorDash, a leading food delivery app in the United States. It shows the traction that mass arbitration is gaining with judges and the lengths that companies will go trying to stop it.

It began last summer when Keller Lenkner filed more than 6,000 arbitration claims on behalf of couriers for DoorDash, known as “dashers.”

Among them was Victoria Diltz, a single mother in the Bay Area who works at a fast-food restaurant and as a housekeeper, and relies on making deliveries for DoorDash to generate extra cash for a tank of gas, groceries or car payments.

She said the company’s formula for paying workers was inconsistent, but as an independent contractor she had no way to challenge that.

“They know we are desperate for the cash, so we will do whatever,” said Ms. Diltz, 46, who lived out of her car for a period while working for DoorDash.

The cases were taken to the American Arbitration Association, an entity that provides the judges and sets up the hearings for such disputes.

DoorDash specified in its contracts with its roughly 700,000 dashers that they had to use the association when filing an arbitration claim. The company also told the dashers that it would pay any fees that the association required to start the legal process.

Then DoorDash got the bill for the 6,000 claims — more than $9 million.

DoorDash balked, arguing in court that it couldn’t be sure that all of the claimants were legitimate dashers. The American Arbitration Association said the company had to pay anyway. It refused, and the claims were essentially dead.

The company made other moves seeking to limit the damage from mass arbitration.

DoorDash’s lawyers at the Gibson Dunn firm reached out to another arbitration provider, which turned out to be more accommodating on some issues important to the company.

The International Institute for Conflict Prevention & Resolution, or C.P.R., was willing to allow DoorDash to arbitrate “test cases” and avoid having to pay the fees all at once. C.P.R. also took feedback from Gibson Dunn on the proposed new rules, though it did not consult with the dashers’ lawyers.

In a statement, C.P.R. said the new rules for mass arbitration were broad based and not specific to the DoorDash case. It also said the new rules had provisions that were generally favorable to plaintiffs.

If they wanted to keep “dashing” for DoorDash, workers had to sign a new contract designating C.P.R. as the new arbitrator.

But a federal judge in San Francisco wasn’t willing to go along with it. The judge, William Alsup, ordered DoorDash in February to proceed with the American Arbitration Association cases and pay the fees.

In a statement, a spokeswoman for DoorDash said the company “believes that arbitration is an efficient and fair way to resolve disputes.”

But in a hearing, Judge Alsup questioned whether the company and its lawyers really believed that.

“Your law firm and all the defense law firms have tried for 30 years to keep plaintiffs out of court,” the judge told lawyers for Gibson Dunn late last year. “And so finally someone says, ‘OK, we’ll take you to arbitration,’ and suddenly it’s not in your interest anymore. Now you’re wiggling around, trying to find some way to squirm out of your agreement.”

“There is a lot of poetic justice here,” the judge added.

#### Mass arbitration solves --- de facto class action

Alimehri 20 --- Amir Alimehri, associate at Klafter Lesser LLP, “The Table-Turning Rise of Mass Arbitration”, Mar 20th 2020, https://lowey.com/blog/the-table-turning-rise-of-mass-arbitration/

Over the past decade, corporations have sought to avoid litigation by aggressively imposing arbitration clauses on consumers that remove their ability to seek redress in state or federal court. These “agreements,” which are often part of non-negotiable form contracts (e.g., website terms of service or cell phone contracts or employment agreements), typically include a class action/arbitration waiver that bars consumers from not only participating in class action litigation but from aggregating their claims before an arbitrator in a class arbitration.[1] Consumers vigorously opposed the use of forced arbitration clauses from the outset on unconscionability[2] and other grounds.[3] These cases helped to clarify the enforceability of forced arbitration clauses by developing a series of requirements. For example, recognizing that the costs associated with pursuing arbitration could discourage individual plaintiffs from filing claims,[4] courts across the country began requiring that arbitration clauses provide for the bulk of fees and costs to be paid by the defendant.[5] Language to this effect was quickly incorporated into the consumer rules established by arbitration forums (like AAA and JAMS), which both adopted higher fees for corporate defendants than individual plaintiffs.[6]

Plaintiffs have recently begun to leverage this to their advantage. In an emerging trend of “mass arbitration,” groups of similarly situated plaintiffs that could have been part of a class action initiate arbitration against the same defendant, simultaneously triggering the defendants’ obligation to pay fees and costs in each of their cases. This article examines how plaintiffs in two recent cases Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019) (“Postmates”) and Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020) (“DoorDash”) have used mass arbitration to capitalize on forced arbitration clauses imposed on thousands of plaintiffs.

Postmates

In Postmates, a group of more than 5,000 food delivery couriers alleged that they were being improperly misclassified as independent contractors instead of employees. See Postmates, 414 F. Supp. 3d at 1248. These couriers notified Postmates that they intended to individually initiate arbitration under the terms of the “Mutual Arbitration Provision” contained in the Postmates “Fleet Agreement” for its violation of the Fair Labor Standards Act (FLSA). Id. at 1249-50. At that time, the Fleet Agreement required Postmates to pay “all arbitration filing fees,”[7] which amounted to more than $9.3 million. Id. at 1250. The Postmates plaintiffs, in contrast, were required to pay an aggregate amount of just over $99,000. See id.

Unwilling to pay millions in upfront fees, Postmates refused to proceed with arbitration. See id. at 1250-51. The Postmates plaintiffs then moved to compel arbitration in federal court, seeking an order requiring Postmates to pay the filing fees for all current and future arbitration demands. Id. Postmates responded by arguing that, while arbitration was appropriate, the way in which plaintiffs had initiated arbitration amounted to “a de facto class action” that violated the Mutual Arbitration Provision. Id. at 1252. According to Postmates, each plaintiff should be required to “refile his or her demand as an individual arbitration demand containing additional factual information and legal authorities” applicable to that particular plaintiff before proceeding with arbitration on an individual basis. Id. at 1255.

### Class action

#### AT litigation doesn’t deter --- time lag

Crane 10 --- Daniel A. Crane, Professor of Law, University of Michigan Law School, “Optimizing Private Antitrust Enforcement”, 63 Vand. L. Rev. 675 (2010), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1129&context=articles

The relevant time intervals in two recent private antitrust cases, in which the plaintiffs won substantial damages awards at trial and had them affirmed on appeal, are instructive. In LePages Inc. v. 3M, the allegedly anticompetitive bundled rebates were put in place in 1992; LePage’s filed suit in 1997 but did not prevail until 2004, when the Supreme Court denied certiorari.88 In Conwood Co. v. U.S. Tobacco Co., the plan to eliminate Conwood was hatched in 1990, Conwood sued in 1998, and the Supreme Court denied certiorari in 2003.89 In both cases, the time between the decision to engage in the challenged conduct and the end of the legal process was well over a decade.

This time lag should be paired with the fact that the managers who put into place anticompetitive schemes are increasingly unlikely to be around to internalize their effects at judgment day. During the 1980s, the turnover rate among senior managers in large corporations was just above ten percent.90 By all accounts, the turnover rate increased significantly—perhaps even doubling—in the 1990s and 2000s as various capital market factors accentuated shareholder demand for short-term performance.91 Today, the average CEO holds her job for about six years.92 Mid-level executives, such as divisional managers, typically hold their jobs for an even shorter period, perhaps less than four years.93 Thus, most of the executives responsible for an antitrust violation will no longer be with the firm by the time a damages award is entered against the company.

High managerial turnover rates might not thwart the deterrence objective if managers were to internalize some of the detrimental effects of antitrust judgments rendered after they leave the defendant firm. In particular, managers might incur a reputational cost in lost future employment opportunities or take a prestige hit in the business community by virtue of their past roles in a later-adjudicated antitrust violation.94 But there is scant evidence suggesting that individual managers’ reputations are much affected by antitrust judgments against their former employers. Individual managers are not often named as co-defendants in private antitrust cases and usually do not appear in any public pronouncement of liability. Liability in complex antitrust cases seldom turns on the culpability of a single manager, but rather on a cluster of managerial decisions over time, making it difficult to pinpoint blame.95 Relatedly, judicial opinions in private antitrust cases often omit the names of individual managers, instead referring to the acts of an impersonal corporation or “the defendant.” For example, in the much-publicized LePage’s Inc. u. 3M case, neither the district court nor the Third Circuit opinion referred to a single 3M executive by name.96 In most cases, an outsider to the litigation would find it difficult to impose a reputational sanction against any present or former firm manager.

In light of these facts, it is difficult to see how the threat of a future damages judgment disciplines managerial decisionmaking. When managers plan conduct that brings immediate large profits but only potential liability at some future date, the extent to which the future liability deters them from choosing immediate profits is a function of their implicit discount rate for the potential damages award. The longer the perceived time until judgment day, the more likely it is that managers will discount the threat of damages. If managers believe that they are unlikely to be employed by the firm at the distant judgment day, they will tend to disregard the threat of future liability altogether.

# 1NR

#### And – changing membership on Court make it a real possibility

Liptak 10-29 [Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002, 10-29-2021 https://www.nytimes.com/2021/10/29/us/politics/epa-carbon-emissions-supreme-court.html]

The Supreme Court agreed on Friday to hear appeals from Republican-led states and coal companies asking it to limit the Environmental Protection Agency’s power to regulate carbon emissions under the Clean Air Act.

“This is the equivalent of an earthquake around the country for those who care deeply about the climate issue,” said Richard J. Lazarus, a law professor at Harvard.

The court’s decision to take the case came days before President Biden is to attend a global climate summit in Scotland where he seeks to reassure other nations that the United States will continue to pursue aggressive policies to combat global warming.

In January, on the last full day of Donald J. Trump’s presidency, a federal appeals court in Washington struck down his administration’s plan to relax restrictions on greenhouse gas emissions from power plants. The move cleared the way for the Biden administration to issue stronger restrictions.

A divided three-judge panel of the court, the U.S. Court of Appeals for the District of Columbia Circuit, ruled that the Trump administration’s plan, called the Affordable Clean Energy Rule, was based on a “fundamental misconstruction” of the relevant law, prompted by a “tortured series of misreadings.”

The panel did not reinstate a 2015 Obama-era regulation, the Clean Power Plan, which would have forced utilities to move away from coal and toward renewable energy to reduce emissions. But it rejected the Trump administration’s attempt to repeal and replace that rule with what critics said was a toothless one.

The Obama-era plan had aimed to cut emissions from the power sector by 32 percent by 2030 compared to 2005 levels. To do so, it instructed every state to draft plans to eliminate carbon emissions from power plants by phasing out coal and increasing the generation of renewable energy.

The measure never came into effect. It was blocked in 2016 by the Supreme Court, which effectively ruled that states did not have to comply with it until a barrage of lawsuits from conservative states and the coal industry had been resolved. That ruling, followed by changes in the Supreme Court’s membership that have moved it to the right, has made environmental groups wary of what the court might do in cases on climate change.

Shortly after Mr. Trump’s election, his E.P.A. repealed the Clean Power Plan.

Professor Lazarus said the Supreme Court’s decision to hear the case threatened “to sharply cut back, if not eliminate altogether, the new administration’s ability to use the Clean Air Act to significantly limit greenhouse gas emissions from the nation’s power plants.”

#### That’s true in the antitrust context – there is a perceived ideology of enforcement that it’s liberal – justices make decisions factoring in those external variables

Ventoruzzo 15 – [Marco Ventoruzzo - Full Professor of Business Law at Bocconi University in Milan and Full Professor of Law at Penn State Law School, 2015, “Do Conservative Justices Favor Wall Street: Ideology and the Supreme Court's Securities Regulation Decisions”, <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1277&context=fac_works>, eph]

C. Ideology in the Supreme Court's Securities Regulation Decisions

Probably the best evidence that political ideology can play a role in the area of securities regulation is the set of rules concerning the composition of the Securities and Exchange Commission (SEC). Section 4(a) of the 1934 Exchange Act sets forth that the SEC should be composed of five members appointed by the President with the "advice and consent" of the Senate, but also requires that "[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as may be practicable."8 ° The statutory call for a bipartisan SEC indicates that regulation and enforcement activities concerning the financial markets can be subject to diverging philosophies along political lines.8 1 It is obviously impossible here to fully discuss the general economic tenets of conservative and liberal policies with respect to the regulation of financial markets. General intuition, noted above, is that ''conservative" views of economic policy emphasize the efficacy of markets over government intervention and regulation, while for liberals the position is reversed. The consequence is that conservatives tend toward deregulation based on the conviction that market failures rarely justify protections for perceived weaker parties in a private transaction. Liberals, on the other hand, are more skeptical about the virtues of free markets and believe that regulation should curb the possible inefficient and inequitable outcomes of laissez-faire market operation.8 2 In short, the former tend to be more "pro-business," the latter more "pro-investor." 83 An illustration of this possible political divide is the legislative history of the so-called Private Securities Litigation Reform Act of 1995.84 In the 1990s, there was a growing concern that frivolous securities lawsuits could arise as attorney-driven class actions, in particular invoking section 10(b) and Rule lOb-5 of the Exchange Act, forcing defendants to settle in light of the potential costs of discovery.8 5 Congress created this piece of legislation to curb such a phenomenon through different measures like raising the pleading standards.86 In order to survive a motion to dismiss, a plaintiff had to plead false statements "with particularity," and that pleading had to create a "strong inference" of scienter, one of the elements of a Rule lOb-5 cause of action; in addition, the court granted a "stay of discovery" before the decision on the motion to dismiss. 87 Congress enacted the bill into law over a veto by President Bill Clinton.88 Numerous Democratic representatives voted in favor of the law,89 but the diverging views of President Clinton and Congress evoke the traditional dividing line between liberals and conservatives in this area. This Section briefly addresses the room for policy consideration- politics-in the enforcement of the securities laws. The intent is not to offer a comprehensive account of the degree of freedom that courts have in the interpretation of all the provisions of the securities laws, but more simply to give a flavor of the possible different interpretations of the relevant statutes that a particular set of beliefs concerning the proper scope of the regulation might influence. To begin, note that the U.S. securities laws enacted in the 1930s were among the first modem regulations of the financial industry, and they have served as a model for several foreign jurisdictions.90 These laws, however, apply to one of the most dynamic and innovative industries. Inevitably, enforcing the existing rules to the ever-evolving factual circumstances that characterize this sector leaves wiggle room for different policy considerations. A good starting point is the scope of the securities laws. The definition of "security" that triggers the obligation to register and disclose information, as well as the availability of specific private causes of action designed to protect investors, is broad but also vague. For example, consider the notion of what constitutes an "investment contract" set forth in section 2 of the Securities Act (and section 3 of the Exchange Act) that the Supreme Court had to define on various occasions. 91 Another crucial area concerns the availability of private causes of action to plaintiff-investors allegedly harmed by false, misleading, or incomplete statements in the purchase or sale of securities and the burden of proof that they must satisfy to prevail.92 Furthermore, in several cases, the remedies granted to plaintiffs are based on private causes of action implied by the courts and not explicitly regulated by the legislature, most notably section 10(b) and Rule lOb-5 of the Exchange Act. In these instances, significant interpretative latitude exists. Consider, for example, problems such as the need to prove reliance vis-h-vis the fraud-on-the- market theory, the scienter requirement, or the extension of liability to aiders and abettors.93 The extension of the insider-trading prohibition, a rule largely created by courts, is another area in which different ideological perspectives might affect the decision-making process.94 Conservatives and liberals also often have divergent views about the powers of the government (i.e., the SEC) to enforce the law, particularly the securities laws. For example, some interesting cases in this respect deal with the burden of proof that the SEC must satisfy to establish a violation of the securities laws.95 Rulings on takeover regulation also might indicate different policy preferences of the Justices. These cases, however, show the difficulty of properly coding certain decisions as pro-business or pro-investor, a problem that more generally affects the analysis undertaken later in this Article.96 On one hand, it is possible to argue that takeovers, and more specifically hostile tender offers, favor investors by allowing them to sell their shares at a premium over market prices. On the other hand, some tender offers may not be value-maximizing, and in this case to allow the target corporation, as well as its controlling shareholders and managers, to resist an inadequate or coercive offer could be in the best interest of shareholders. In any case, the proper role of the market for corporate control and how to create a level playing field for bidders and targets in the takeover context are also areas where there is room for competing policy considerations. 97 In addition, litigation concerning the constitutionality of state antitakeover statutes is instructive as to the position of the Supreme Court on issues relating to the relative powers of the federal government and the states in regulating commerce, an area that implicates the politically charged question of the role of the federal government.9" The legislature resolved some of the controversies mentioned above, and the Court unanimously finds this, easy solution. Even assuming that ideological preference might be embedded in their decision-making, judges and, to a lesser but not unsubstantial extent, Supreme Court Justices face several constraints while speaking from the bench: Sometimes statutes and regulations are fairly straightforward and do not leave room for policy considerations; Lower judges might desire not to be reversed on appeal; 99 Fear of "government retaliation" might play a role (in the sense, for example, that striking down a statute might lead the legislature to introduce other measures that the Justice opposes); And public opinion might unconsciously influence them. There are, however, several "hard cases" where the solution does not seem to appear in either the Constitution or in statutory or case law. These hard cases leave room for the different policy approaches of the decision maker, as also indicated by the practice of dissenting opinions. This Article proposes that by examining a significant number of cases, it is possible to detect economic policies preferred by the Justices. In short, there are problems in the area of securities regulation in which ideology can play a role, considering the indeterminacy of the applicable laws.

II. AN OVERVIEW OF EXISTING LITERATURE ON THE ROLE OF IDEOLOGY IN JUDICIAL DECISION-MAKING

This Part begins by discussing the different ways to measure the elusive concept of ideology. Then, after considering the ideology of the Justices, this Part explores the correlation between that Justices' ideology and the way they vote on different decisions. A. Measures of Justices' Ideology One of the interesting and challenging problems of any study that investigates the correlation between the "ideology" of Supreme Court Justices and their voting patterns is how to precisely code such an ambiguous and elusive concept as the ideology of each Justice. There are three major techniques used in the political and legal literature to attribute a position to Justices (and lower court judges) on the political spectrum: (1) the party of the appointing president; (2) the Segal-Cover scores; and the (3) Martin-Quinn scores. The first two are "ex ante" measures because they classify the Justices based on proxies for their ideology measured before their tenure on the bench, and they remain static for the entire period the Justices work on the Court. The last one is an "ex post" measure, ranking Justices from liberal to conservative based on their actual voting in published opinions. The party of the appointing president is probably the most common measure used to code the political affiliation of Justices. This measure is based on the assumption that Republican presidents will appoint conservative Justices and Democratic ones will appoint liberal Justices. It has several advantages: "it is unambiguous, . . . easy to [apply and] understand."' 00 It also raises a separate issue: to what extent presidents are able to effectively influence the activity of the Court. This measure, however, also has some clear drawbacks. The first drawback is that, as with all ex ante measures, the measure is static and does not take into account the possibility (indeed, the likelihood) that some Justices might change their ideological position during their often long tenure, as mentioned above.' 01 In fact, empirical literature suggests that most Justices "drift" in their position on the ideological spectrum throughout their years on the bench.10 2 This variable is also problematic because it assumes that all Republican presidents are conservative and that all Democratic ones are liberal, or at least that they are all conservative or liberal in the same way, which is clearly not true. An interesting study ranked the U.S. presidents from Franklin Roosevelt to Bill Clinton based on their social and economic liberalism.' 0 3 The ranking is based on a 1995 survey of a random group of political scientists, and the results-used in this Article's empirical analysis-are as follows (100 being extremely liberal and 0 extremely conservative): In addition, not all presidents want or can appoint a Justice who precisely mirrors their views. 10 4 Other considerations might affect the decision, such as the need to take into account the geographical origins of the candidate and-especially in more recent years-the need to create a diverse Court in terms of gender and race to appeal to part of the electorate (consider President Ronald Reagan's appointment of Justice Sandra Day O'Connor or President Barack Obama's appointment of Justice Sonia Sotomayor). Political and party necessities can influence the President: for example, senators can play a role in the selection, especially the senator of the same party as the President from the state of the nominee, though this is more likely to occur in the selection process for the lower federal courts and is probably less relevant in Supreme Court nominations. Finally, the President can make a mistake in assessing the position of the appointee on the political spectrum,' 0 5 or simply may not care so much. Notwithstanding these caveats, this Article uses the party of the appointing president as one proxy for the ideology of the Justices, for the reasons indicated above. A second very common measure for the ideology of Supreme Court Justices is the so-called Segal-Cover index.' 0 6 This is also an ex ante measure that ranks Justices on a conservative-to-liberal spectrum based on a content analysis of editorials published in two liberal and two conservative newspapers about the nominees in the period from their nomination to their confirmation.'0 7 In its original formulation, to determine the Segal-Cover index, each paragraph of an article receives a score: +1 if it indicates a liberal attitude of the candidate, 0 if a moderate one, or -1 if a conservative one. The position of the Justice is measured according to the following formula: In the above formula, "1" is the number of paragraphs indicating a liberal ideology, "c" is the number of paragraphs indicating a conservative ideology, and "total" is the total number of paragraphs. Results can vary between -1 (extremely conservative) and +1 (extremely liberal). In line with other studies, this Article has renormalized the score from 0 (conservative) to 1 (liberal). 10 8 However, the Segal-Cover index is not devoid of shortcomings. Like the Republican/Democratic appointing president variable, the SegalCover index is static and does not consider changes in the Justice's attitudes. A specific bias of this index is that the policies and preferences of the newspaper influence op-ed pieces on prospective Justices. For example, there are certain issues that might receive more emphasis than others, e.g., social issues versus economic ones. In addition, the newspaper can influence the length of the article and therefore affect the balance between paragraphs emphasizing a conservative or a liberal inclination.109 This methodology does not take into account other possible important sources that indicate the ideology of a Justice, from scholarly articles to books published before the nomination. 110 Professors Lee Epstein, William Landes, and Richard Posner have created a more comprehensive index that also considers these elements, but this Article does not use it in this analysis. 11 Another possible bias of the Segal-Cover index is that, in the period between nomination and confirmation, the authors of the editorials might write "strategically"--trying to make a candidate appear more liberal and less self-restrained to enrage Republican Senators, for example. The Segal-Cover index is, however, popular in the literature, and it has the advantage of comporting with general scholarly evaluations of the Justices.112 In addition, unlike the party of the appointing president, the Segal-Cover index ranks the Justices on a continuous scale from -1 to + 1 (or from 0 to +1), offering a more nuanced measure of the position of the Justices and allowing for more precise correlations. The most important ex post proxy of the ideology of the Justices is the Martin-Quinn index. 113 It is based on a classification of the actual votes of the Justices during their terms, adjusted to take into account possible alignments among Justices, and it returns an "ideal point" representing a Justice's ideology in a space ranging from very liberal (-6.656) to very conservative (3.884).114 This proxy is useful because it accurately positions the Justices' ideology in different terms and therefore does not suffer from the static nature of ex ante measures. The major problem with this approach is its circularity or endogeneity. Arguably, this measure only shows that a Justice who usually votes conservative is more likely to vote conservative; it does not provide any information on the cases in which a Justice, perceived as liberal at the time of her appointment, voted more conservatively than expected.115 Removing cases on the particular issue researched and evaluating the correlation between the votes cast in other cases and those the research focuses on can partially mitigate this problem. For example, if one intends to test how Justices vote on First Amendment issues, one can factor in the votes cast in cases not dealing with First Amendment claims and verify if these votes predict how Justices will vote on First Amendment controversies. This Article's analysis of securities regulation decisions uses all these variables (the party of the appointing president, economic liberalism of the appointing president, Segal-Cover scores, and Martin-Quinn scores) to test the existence of a correlation between Justices' ideologies and their voting behavior. Combining the most commonly used measures will offer important and interesting insights on this Article's query. 11 6

B. Studies on the Correlation Between Ideology (and Other Factors) and Decisions

As examined above, the empirical literature of judicial behavior is vast.1 17 It would be difficult to provide here a complete account of the numerous studies published by political scientists and legal scholars in this broad area. This Article therefore limits its overview to some select works, pointing out in particular how the studies generally indicate a correlation between the ideology of Justices and judges and the way they vote. 118 One of the forerunners of empirical legal studies in this area was Professor C. Herman Pritchett, who in the 1940s started to keep track of the votes of the Supreme Court Justices, noting in particular the number of dissents and the allegiances among Justices sharing a political view. 19 The work of Professor Pritchett attracted a lot of interest as well as criticism, while several studies have confirmed his intuition that ideology plays a role in judicial behavior. The work of Professors Jeffrey Segal and Albert Cover offers a good illustration of the major results of this line of research. In their study, they find that ideology explains in a robust way (the correlation coefficient is 0.80) the aggregate voting behavior of the Justices. 120 Many other studies indicate a relationship between the policy preferences of the Justices and their voting. Ideology might play a role in the very selection of cases that the Supreme Court will hear. Studies have found that liberal Justices tend to grant certiorari more often when the lower court rendered a conservative opinion, and vice versa for conservative Justices. 121 This is particularly interesting considering that according to other studies, Justices want to hear cases they intend to reverse, and in fact empirical evidence indicates that between 1953 and 1994 the Supreme Court reversed the majority of the decisions it reviewed (61.3 %).122 Especially since the 1960s, conservative Justices have been proportionately voting to overturn more liberal precedents and strike down more liberal statutes, and the opposite is true for liberal Justices. 1 23 Other studies have shown an inclination of some Justices to vote for the defendants in criminal law cases if the litigation involves either statutory interpretation or Constitutional issues, which suggests coherence with a particular ideological view.124 At least one empirical study has also examined the interpretative techniques employed by the Justices-in particular their use of legislative history. According to its authors, not only are liberal Justices more likely than conservative ones to use this interpretative technique, but Justices are more inclined to refer to legislative history "when it favors their ideologically preferred outcomes.' 125 Another line of research investigates the sensitivity of the Supreme Court to external pressures, whether real or perceived. While these studies do not examine the role of ideology in the Supreme Court's decisions, they are relevant because they seem to confirm that Justices pay attention to extra-legal considerations, which might be a way that politics influence them. For example, one research study shows that when there is an ideological difference between the Court and Congress, the Court is less likely to invalidate a federal statute, which might be a concern for possible "retaliations" from Congress-either enacting a new statute with similar effects or other possible actions such as a reduction of the Court's budget. 126 More generally, other works find that the Justices are responsive to changes in the public opinion.' 27 Even more central to the topic of this Article is the finding that the Supreme Court reacts to the business cycle, for example by siding with the government in times of economic growth and tending to rule against it during economic downturns, but deferring to government efforts in times of crisis. 128 The instant empirical analysis has tested the hypothesis that Court decisions in securities regulation cases have some correlation with economic conditions.129 Scholars have conducted extensive research on lower court decisions, focusing on decisions of the federal courts of appeals. Of course, the institutional context is different in such cases. Federal judges can face more constraints than Supreme Court Justices in their decision-making for reasons that this Article has already mentioned (fear of reversal, hopes of elevation to a higher court, etc.). It is important to note, however, that even with respect to lower federal judges, there are strong indicia that ideology affects judicial decision-making. For example, judges close to the Democratic Party vote more consistently against corporations in antitrust cases and for unions in labor disputes.' 3 ° An article on the Chevron doctrine claims that "panels controlled by Republicans were more likely to defer to conservative agency decisions (that is, to follow the Chevron doctrine) than were the panels controlled by Democrats." ' 31 Similarly, "Democrat-controlled panels were more likely to defer to liberal agency decisions than were those controlled by Republicans."' 3 2 In addition, according to a study of the U.S. Court of Appeals for the Second Circuit, conservative Justices tend to align their votes with conservative judges, and liberal Justices and judges similarly align. 1 There is also evidence of constraints on judicial behavior and of strategic voting. District court judges are adverse to reversal, or at least to a high frequency of reversals, and in their voting they seem to take into account the policy preferences of the court that will hear an appeal. On average, judges appointed by a Democratic president tend to impose lower prison sentences if a mostly liberal court of appeals reviews them and longer ones if the appellate judges are mostly Republican. 134 Also, researchers have tested "panel effects": male judges seem more likely to vote for women in employment discrimination disputes if a woman is on the panel, 135 while white judges more frequently vote in favor of voting rights if a black judge sits on the panel.13 Researchers have also conducted important studies on state judges, especially to investigate the behavior of elected judges. Elected judges rule more frequently in favor of in-state plaintiffs and against out-of-state businesses than appointed judges, especially when the decision transfers wealth to the state. 137 Additionally, sentences in violent criminal cases are more severe if the judge is approaching reelection.' 38 Statistically, state supreme court justices are more likely to confirm death sentences when the electorate supports them. 139 This brief overview of some contributions indicates evidence that ideology informs judicial decisions and that judges take into account external variables like the panel composition, public opinion, Congress's political composition, fear of reversal, and economic cycles. The results of previous research make interesting and relevant the questions that this empirical analysis investigates in the next Part, in particular whether the ideology of the Justices plays a role in securities regulation disputes.

#### They’ll pair decisions to preserve PC

Bazelon 15 (Emily Bazelon is a staff writer for the magazine and the Truman Capote Fellow at Yale Law School, Marriage of Convenience, 2-1, New York Times, l/n, y2k)

When Roberts was nominated to be chief justice 10 years ago by President George W. Bush, he exuded calm neutrality at his confirmation hearing, comparing judges to umpires who call balls and strikes. At the end of his first term, he emphasized the importance of the court's ''credibility and legitimacy as an institution,'' in an interview with the George Washington University law professor Jeffrey Rosen. But in 2010, Roberts supplied the fifth vote for the court's remarkably unpopular ruling in Citizens United. By striking limits that Congress set on campaign spending by corporations, the court was perceived as favoring the interests of the wealthy. The court's approval rating fell 10 percentage points, to barely break even, from 61 percent. Since then, the court has fared better with the public when it pairs conservative decisions with progressive ones. And same-sex marriage is part of that equation. In 2013, the term ended with a splashy ruling in which five justices -- Roberts not among them -- struck down part of the Defense of Marriage Act, which restricted federal benefits for spouses to male-female couples. This decision came one day after the court gutted a central component of the Voting Rights Act, in a 5-to-4 decision written by Roberts.

#### Independently, Courts are jurisdiction hoarders – the plan’s agency enforcement produces judicial backlash to curb agency power

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) - https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles]

In recent years, the Commission has frequently tied itself to the Sherman Act.11 Why would it choose to accept that baggage? Of late, the FTC has been shell-shocked by its treatment in the courts when it has invoked an independent Section 5. There is a wide gulf between the theoretical availability of an expansive Section 5 and actual judicial affirmation of FTC decisions to enjoin behavior that would not violate the Sherman Act. The courts have frequently quashed the FTC’s efforts to develop an independent Section 5, even while paying lip service to the independence principle.12 As Bill Kovacic remarked during his opening comments at the FTC’s October 2008 workshop on the meaning of Section 5, it is difficult to find even ten successfully litigated Section 5 antitrust cases over the Commission’s nearly hundred-year history.13

The reason is institutional. Courts tend to be jealous of their jurisdiction. To cite a venerable precedent to which we will return at end, courts are loathe to abandon their prerogative “to say what the law is.”14 In an early decision—subsequently overruled but never quite forgotten—the Supreme Court applied a Marbury v. Madison thematic to the FTC: “The words ‘unfair competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include.”15 Courts are wary of agency assertions that the agency should be accorded independent space to develop legal norms. As Bob Pitofsky has explained, a construction of Section 5 that would make the same behavior lawful at the Department of Justice and unlawful at the FTC is “untenable.”

#### Antitrust is perceived---it’s in the spot, spot, spotlight

Waller 19 (SPENCER WEBER WALLER, John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, ANTITRUST AND DEMOCRACY, 46 Fla. St. U.L. Rev. 807, y2k)

Another important aspect of an engaged civil society is the presence of a robust academic sector that teaches and studies competition law, economics, and policy. In the United States, the directory of the Association of American Law Schools lists approximately 200 accredited law schools with more than 260 professors who teach, or have taught in the past, antitrust law as full-time faculty members. 298This is in addition to numerous part-time adjunct members who teach antitrust courses in addition to their full-time jobs as practicing attorneys, judges, economists, or enforcers. U.S. law schools also offer masters level programs in antitrust and trade regulation both on [\*852] campus, and on line, for students who are currently working in field, hope to work in the field, and who plan to seek academic careers in this area. 299These subjects also are taught in varying degrees in business schools, economics departments, and public policy schools at both the graduate and undergraduate levels. There are numerous antitrust conferences held throughout the year exploring practice, policy, and theory issues. The result is a robust debate about the values, techniques, and results of competition law and policy that continues no matter which party is in office or who runs the enforcement agencies. The government agencies also play a role in creating an engaged civil society in addition to operating in a transparent manner as discussed above. The agencies post a tremendous amount of material on their respective web sites, frequently speak to legal and business groups, publish guidelines for both professional and lay audiences, hold press conferences on high visibility cases, and other enforcement actions. The agencies also testify in front of Congress, hold workshops, post on social media, respond to freedom of information act requests, and maintain libraries and databases for the public. 300 Equally important, the agencies receive input from the public as well as send information out to the public. The Agencies receive complaints and white papers from interested parties and the public. 301They obtain testimony and comments from the public in workshops, review responses to draft guidelines, and communicate on an informal basis with members of the competition community on a daily basis. 302 The ways an agency receives input from the public are limited only by its imagination. The Competition and Consumer Commission of Singapore used to hold a contest for the best animated short submission on the evils of cartels. 303Other agencies have come up equally creative ways to receive feedback and input from the public, in addition to the material they make available to the public. 304 [\*853] The general and business press plays an equally important role in reporting on competition matters. Major publications such as the Wall Street Journal, New York Times, Washington Post, The Economist, and many business magazines regularly feature stories about criminal cartel cases and investigations, issues involving allegedly dominant firms, the flood of mergers and acquisitions in the United States and abroad, and major private damage cases. 305More analytical stories appear on such topics as the role of big data in antitrust, algorithmic competition, and the pros and cons of the EU's enforcement actions against Google and pending investigations of other high-tech firms. 306 Social media increasingly is both supplementing and partially substituting for traditional press coverage of competition law and policy matters. There is a plethora of forums for competition law topics and well as numerous individuals who post on Twitter and/or link to news stories published elsewhere as well as on other social media platforms. 307There is even a substantial number of twitter posts about the merits of so-called "#hipster" antitrust. 308 The result is a vigorous debate about most issues of importance in the competition law world and very few issues of any kind that escape notice and comment in the antitrust profession. The more important and salient of these issues also receive at least some general public attention and comment suggesting that antitrust policy operates in the spotlight, at least among lawyers and business people most directly affected by the decisions and policies at issue. While competition policy is an area of specialization, and competes with many other issues of more life and death importance for the time and attention of the public, it is heartening to see the number and resources of the actors in civil society who devote time and resources to the promotion of what they consider sound competition law and policy. 309

#### Microsoft proves – Antitrust cases are politicized

Swanson 1 (Carol B. Swanson, Professor of Law, Hamline University School of Law. A.B., Bowdoin College; J.D., Vanderbilt Law School, ANTITRUST EXCITEMENT IN THE NEW MILLENNIUM: MICROSOFT, MERGERS, AND MORE, 54 Okla. L. Rev. 285, y2k)

The highly publicized battle between Microsoft and the Antitrust Division of the Department of Justice sharply focused public attention on antitrust law, a sleepy substantive area that had been dormant for years. In the 1980s, antitrust enforcement was uncontroversial because it largely disappeared; 11 some even speculated that competition no longer needed protection. In stark contrast, the past ten years witnessed antitrust's resuscitation. Regulators have begun looking upon antitrust targets with renewed interest; at the same time, innovative technologies in the so-called "new economy" 12 are arguably rendering traditional competition regulation obsolete. Microsoft's antitrust woes have personalized and heightened the arguments concerning the vitality of current antitrust regulations in the modern high-tech landscape. The protracted "big case" nature of the Microsoft litigation only underscores these regulatory concerns. Today, with a new President and new policies finally in place, 13 significant changes may be in the works. Antitrust law has taken [\*288] center stage, and its relevance and application demand serious review. 14

They read an impact card for warming in Juhn ’21, then read a impact D to their own card,

There is scientific consensus warming is deleterious

**Yes extinction**

**Sharp and Kennedy, 14** – is an associate professor on the faculty of the Near East South Asia Center for Strategic Studies (NESA). A former British Army Colonel he retired in 2006 and emigrated to the U.S. Since joining NESA in 2010, he has focused on Yemen and Lebanon, and also supported NESA events into Afghanistan, Turkey, Egypt, Israel, Palestine and Qatar. He is the faculty lead for NESA’s work supporting theUAE National Defense College through an ongoing Foreign Military Sales (FMS) case. He also directs the Network of Defense and Staff Colleges (NDSC) which aims to provide best practice support to regional professional military and security sector education development and reform. Prior to joining NESA, he served for 4 years as an assistant professor at the College of International Security Affairs (CISA) at National Defense University where he wrote and taught a Masters' Degree syllabus for a program concentration in Conflict Management of Stability Operations and also taught strategy, counterterrorism, counterinsurgency, and also created an International Homeland Defense Fellowship program. At CISA he also designed, wrote and taught courses supporting the State Department's Civilian Response Corps utilizing conflict management approaches. Bob served 25 years in the British Army and was personally decorated by Her Majesty the Queen twice. Aftergraduating from the Royal Military Academy, Sandhurst in 1981, he served in command and staff roles on operations in Northern Ireland, Kosovo, Gulf War 1, Afghanistan, and Cyprus. He has worked in policy and technical staff appointments in the UK Ministry of Defense and also UK Defense Intelligence plus several multi-national organizations including the Organization for Security and Cooperation in Europe (OSCE). In his later career, he specialized in intelligence. He is a 2004 distinguished graduate of the National War College and holds a masters degree in National Security Strategy from National Defense University, Washington, D.C. AND is a renewable energy and climate change specialist who has worked for the World Bank and the Spanish Electric Utility ENDESA on carbon policy and markets (Robert and Edward, 8-22, “Climate Change and Implications for National Security” <http://www.internationalpolicydigest.org/2014/08/22/climate-change-implications-national-security/>

Our planet is 4.5 billion years old. If that whole time was to be reflected on a single one-year calendar then the dinosaurs died off sometime late in the afternoon of December 27th and modern humans emerged 200,000 years ago, or at around lunchtime on December 28th. Therefore, human life on earth is very recent. Sometime on December 28th humans made the first fires – wood fires – neutral in the carbon balance. Now reflect on those most recent 200,000 years again on a single one-year calendar and you might be surprised to learn that the industrial revolution began only a few hours ago during the middle of the afternoon on December 31st, 250 years ago, coinciding with the discovery of underground carbon fuels. Over the 250 years carbon fuels have enabled tremendous technological advances including a population growth from about 800 million then to 7.5 billion today and the consequent demand to extract even more carbon. This has occurred during a handful of generations, which is hardly noticeable on our imaginary one-year calendar. The release of this carbon – however – is changing our climate at such a rapid rate that **it threatens our survival and presence on earth.** It defies imagination that so much damage has been done in such a relatively short time. The implications of climate change are **the single most significant threat to life on earth** and, put simply, we are not doing enough to rectify the damage. This relatively very recent ability to change our climate is an inconvenient truth; the science is sound. We know of the complex set of interrelated national and global security risks that are a **result of global warming** and the velocity at which climate change is occurring. We worry it may already be too late. Climate change writ large has informed few, interested some, confused many, and polarized politics. It has already led to an increase in **natural disasters** including but not limited to droughts, storms, floods, fires etc. The year 2012 was among the 10 warmest years on record according to an American Meteorological Society (AMS) report. Research suggests that climate change is already affecting human displacement; reportedly 36 million people were displaced in 2008 alone because of sudden natural disasters. Figures for 2010 and 2011 paint a grimmer picture of people displaced because of rising sea levels, heat and storms. Climate change affects **all natural systems**. It impacts temperature and consequently it affects water and **weather patterns**. It contributes to desertification, **deforestation** and **acidification of** the **oceans**. Changes in weather patterns may mean droughts in one area and floods in another. Counter-intuitively, perhaps, sea levels rise but perennial river water supplies are reduced because glaciers are retreating. As glaciers and polar ice caps melt, there is an albedo effect, which is a **double whammy of less temperature** regulation because of less surface area of ice present. This means that less absorption occurs and also there is less reflection of the sun’s light. A potentially critical wild card could be runaway climate change due to the release of methane from melting tundra. Worldwide permafrost soils contain about 1,700 Giga Tons of carbon, which is about four times more than all the carbon released through human activity thus far. The planet has already adapted itself to dramatic climate change including a wide range of distinct geologic periods and multiple extinctions, and at a pace that it can be managed. It is **human intervention** that **has accelerated the pace dramatically**: An increased surface temperature, coupled with more severe weather and changes in water distribution will create uneven **threats** to our **agricultural systems** and will foster and support the spread of insect borne **diseases** like Malaria, Dengue and the West Nile virus. **Rising sea levels will** increasingly **threaten** our coastal population and infrastructure centers and with more than 3.5 billion people – **half the planet** – depending on the ocean for their primary source of food, ocean acidification may dangerously undercut critical natural food systems which would result in reduced rations. Climate change also carries significant inertia. Even if emissions were completely halted today, temperature increases would continue for some time. Thus **the impact is** not only to the environment, water, coastal homes, agriculture and fisheries as mentioned, but also would **lead to conflict and thus impact national security**. **Resource wars are inevitable as countries respond, adapt and compete for the shrinking set of** those available **resources**. These wars have arguably already started and will continue in the future because climate change will force countries to act for national survival; the so-called Climate Wars. As early as 2003 Greenpeace alluded to a report which it claimed was commissioned by the Pentagon titled: An Abrupt Climate Change Scenario and Its Implications for U.S. National Security. It painted a picture of a world in turmoil because global warming had accelerated. The scenario outlined was both abrupt and alarming. The report offered recommendations but backed away from declaring climate change an immediate problem, concluding that it would actually be more incremental and measured; as such it would be an irritant, not a shock for national security systems. In 2006 the Center for Naval Analyses (CNA) – Institute of Public Research – convened a board of 11 senior retired generals and admirals to assess National Security and the Threat to Climate Change. Their initial report was published in April 2007 and made no mention of the potential acceleration of climate change. The team found that climate change **was a serious threat to national security** and that it was: “most likely to happen in regions of the world that are already fertile ground for extremism.” The team made recommendations from their analysis of regional impacts which suggested the following. **Europe** would experience some fracturing because of border migration. **Africa** would need more stability and humanitarian operations provided by the United States. **The Middle East** would experience a “loss of food and water security (which) will increase pressure to emigrate across borders.” **Asia** would suffer from “threats to water and the spread of infectious disease.” In 2009 the CIA opened a Center on Climate Change and National Security to coordinate across the intelligence community and to focus policy. In May 2014, CNA again convened a Military Advisory Board but this time to assess National Security and the Accelerating Risk of Climate Change. The report concludes that climate change is no longer a future threat but occurring right now and the authors appeal to the security community, the entire government and the American people to not only build resilience against projected climate change impacts but to form agreements to stabilize climate change and also to integrate climate change across all strategy and planning. The calm of the 2007 report is replaced by a tone of anxiety concerning the future coupled with calls for public discourse and debate because “time and tide wait for no man.” The report notes a key distinction between resilience (mitigating the impact of climate change) and agreements (ways to stabilize climate change) and states thA2: Actions by the United States and the international community have been insufficient to adapt to the challenges associated with projected climate change. Strengthening resilience to climate impacts already locked into the system is critical, but this will reduce long-term risk only if improvements in resilience are accompanied by actionable agreements on ways to stabilize climate change. The 9/11 Report framed the terrorist attacks as less of a failure of intelligence than a failure of imagination. Greenpeace’s 2003 account of the Pentagon’s alleged report describes a coming **climate Armageddon** which to readers was unimaginable and hence the report was not really taken seriously. It described: **A world thrown into turmoil by drought, floods, typhoons**. Whole **countries rendered uninhabitable**. The capital of the Netherlands submerged. The borders of the U.S. and Australia patrolled by armies firing into waves of starving boat people desperate to find a new home. Fishing boats armed with cannon to drive off competitors. Demands for access to water and farmland backed up with **nuclear weapons**. The CNA and Greenpeace/Pentagon reports are both mirrored by similar analysis by the World Bank which highlighted not only the physical manifestations of climate change, but also the significant human impacts that threaten to unravel **decades of economic development**, **which will** ultimately **foster conflict**. Climate change is the quintessential “Tragedy of the Commons,” where the cumulative impact of many individual actions (carbon emission in this case) is not seen as linked to the marginal gains available to each individual action and not seen as cause and effect. It is simultaneously huge, yet amorphous and nearly invisible from day to day. It is occurring very fast in geologic time terms, but in human time it is (was) slow and incremental. Among environmental problems, it is uniquely global. With our planet and culture figuratively and literally honeycombed with a reliance on fossil fuels, we face systemic challenges in changing the reliance across multiple layers of consumption, investment patterns, and political decisions; it will be hard to fix!

#### Turn case if time

#### Turns the case – nondelegation causes rollback

Millhiser 11-3 [Ian Millhiser is a senior correspondent at Vox, 11-3-2021 https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court]

Moreover, Gorsuch’s approach would effectively consolidate an enormous amount of power within the judiciary. When the Supreme Court hands down a vague and open-ended legal standard like the one Gorsuch articulated in his Gundy opinion, the Court is shifting power to itself. What does it mean for a statute to be “sufficiently definite and precise” that the public can “ascertain whether Congress’s guidance has been followed”? The answer is that the courts — and, ultimately, the Supreme Court — will decide for themselves what this vague language means. The courts will gain a broad new power to strike down federal regulations, on the grounds that they exceed Congress’s power to delegate authority. And Gorsuch would also apply this rule retroactively to statutes drafted long before the Court’s decision in Gundy — an approach with profound implications for the West Virginia case. The section of the Clean Air Act at issue in West Virginia was enacted in 1970. Perhaps, if the Nixon-era Congress had known it needed to write that law with greater precision, it might have drafted it in a way that Gorsuch would deem acceptable (although it is unclear whether judges like Gorsuch would deem any meaningful environmental protection regime acceptable). But it’s simply unreasonable to expect lawmakers in 1970 to comply with a rule announced by a dissenting justice in 2019. Gorsuch’s approach to nondelegation, in other words, wouldn’t simply strip Congress of much of its power to delegate authority to agencies. It would allow the most conservative panel of justices to sit on the Supreme Court since the early days of the Franklin Roosevelt administration to run roughshod through decades of federal statutes, invalidating or severely weakening hundreds of provisions drafted at a time when the nondelegation doctrine was widely viewed as a crankish notion that was correctly abandoned in the 1930s. West Virginia contains the seeds of a constitutional revolution. It could, as Roosevelt warned in 1937, enable the Supreme Court to “make our democracy impotent.”

#### Even with fiat, non-delegation revival destroys agency capacity to enforce effectively

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This appeals court opinion is now being reviewed by the justices in West Virginia, and the various parties that brought this case urge the Court to state definitively that the Clean Power Plan is not allowed. Such a decision is likely to fundamentally alter the EPA’s powers in ways that could make it very difficult for the Biden administration — or any future administration — to abandon Trump’s policies. How federal agencies shape policy The Clean Air Act relied on a type of governance that is ubiquitous in federal law. Congress lays out a broad policy — in this case, that power plants must use the “best system of emission reduction” — and then delegates to the EPA the task of implementing that policy through a series of binding regulations. Countless federal statutes rely on a similar structure. The Affordable Care Act, for example, requires health insurers to provide certain preventive treatments — such as birth control, many vaccinations, and cancer screenings — at no additional cost to patients, and it delegates the task of determining which treatments belong on this list to experts at the Department of Health and Human Services. The Department of Labor may raise the salary threshold governing which workers are eligible for overtime pay, in part to keep up with inflation. There are several reasons why this sort of governance, where a democratically elected legislature sets a broad policy and then delegates implementation to a federal agency, is desirable. For one thing, Congress is a dysfunctional mess. If a new act of Congress were required every time environmental regulators wanted power plants to install new technology, it’s likely that those plants would still be using devices that were on the cutting edge in 1993. Delegating power to agencies also ensures that decisions are made by people who know what they are doing. Imagine, for example, if Congress had to pass a law every time the Food and Drug Administration wants to make a new drug available to the public. Even if Congress had time to vote on such a decision, most members of Congress know very little about biology, chemistry, or medicine. Delegation also insulates important decisions from political horse-trading. The decision about whether to approve a new drug should be made by scientists in the FDA, not by lawmakers who might be concerned that the drug’s manufacturer is in Arizona, and that they need to butter up Sen. Kyrsten Sinema (D-AZ) to secure her vote for the Build Back Better Act.