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#### 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).

**2**

**Scope is when the law applies**

**Dernbach 21** --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute **applies**. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action **is not addressed in the statute, the statute is not applicable**. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

**Expanding requires a reversal of legislative intent**

**Garubo 84** --- Angelo G. Garubo, Senior Vice President and Corporate Secretary, Commercial Credit Group, Juris Doctor, magna cum laude, from California Western School of Law, “Severing the Legislativ ering the Legislative Veto Provision: The Aftermath of Chada vision: The Aftermath of Chada”, California Western law Review, Vol 21 No 1, 1984, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1559&context=cwlr

Since a veto provision can qualify as a proviso, the rule in Davis v. Wallace 147 and Frost v. Corporation Commission 148 can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In Davis and Frost, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute. 149 The Court reasoned that severing such a provision would result in an extension of the scope of the statute.' 50 Such an extension would be contrary to the legislative intent of a statute by **including subject matter** which the **legislature expressly chose to exclude**.151 The Davis and Frost analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso 152 and (2) severing a veto provision will **expand the scope** of the statute **contrary to legislative intent**. 5 3 By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation **would constitute a defacto contradiction of legislative intent** by **altering the purview of the statute**.' 54 A veto provision is a control mechanism.' 55 Its mere presence in a statute indicates the legislature's desire to restrict the scope of that statute. 5 6 **By removing it, the court would affect a fundamental change in the** nature of the **statute**, which was not accounted for when the legislature enacted the law. 157 Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

**Violation --- Removing judicial immunity doesn’t expand the scope --- vote neg for limits and ground --- allows affirmatives to defend the status quo and circumvents core neg links**

**ARENA 11** --- AMEDEO ARENA, Associate Professor of European Union Law at the School of Law of the University of Naples, “Institute for International Law and Justice Emerging Scholars Papers”, IILJ Emerging Scholars Paper 19 (2011) (A Sub series of IILJ Working Papers) Finalized 01/18/2011, https://iilj.org/wp-content/uploads/2016/08/Arena-The-Relationship-Between-Antitrust-and-Regulation-in-the-US-and-in-the-EU-2011.pdf

According to a recent survey, approximately **20 percent** of the US economic activities are to some degree **exempted from antitrust law.**22 Federal statutory antitrust exemptions can be divided into **proper “exemptions**”, which entail immunity from antitrust rules, and “**pseudo-exemptions”,** which merely imply a differential application of antitrust law. The “exemptions” category’ can be split up into two sub-categories: “**full exemptions**”, which exempt a given activity from all antitrust rules, and “**partial exemptions**”, which grant exemption only from certain antitrust rules.

Full exemptions are, for the most part, a creature of their time, a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Indeed, only five of them are still in force.2’ In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.24 In some cases, however, the scope of regulation turned out to be narrower than that of antitrust immunity. For example, the Secretary of Commerce is supposed to police fishermen’s agreements against excessive pricing, yet apparendy it has never engaged in any real regulatory oversight.23

Turning to the **nineteen partial exemptions currently in force**,26 the discrepancy between the scope of the exemption and that of regulator}\* oversight is even greater, possibly because those exemptions authorize only specific conducts otherwise prohibited by antitrust law, thus mitigating the need for comprehensive regulatory oversight. The typical regulator}- scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority. The intensity of the assessment carried out by the relevant authority, however, varies considerably. As per the Need-Based Educational Aid Act, coordination on need-based financial aid programs, for instance, is not subject to regulator}- review at all.2 Under the Defense Production Act, the allocation of markets for military materials in time of national emergency is subject to approval by the Secretary of Defense, which must withdraw the immunity if it establishes that the “action was taken for the purpose of violating antitrust law”.28 Between those extremes, the ICC Termination Act provides for that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a “public interest” standard;29 in addition, the Board can require compliance with “reasonable conditions” to ensure that the agreement furthers transportation policy.30

Unlike **full and partial exemptions**, the eight **pseudo-exemptions** in force **do not** bring economic activities **outside the scope of antitrust provisions** to subject them to sector-specific regulation, but rather modify the substantive standards, the remedies, or the forum of “general” antitrust law, thus creating “special” antitrust rules.3’ While pseudo-exemptions are generally not accompanied by regulatory schemes, in some cases the “special” antitrust rules themselves can be regarded as regulatory lato sensu.

ii) Judge-made Implied Antitrust Immunities and Regulation-Related Defenses

**3**

#### 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 petitioning by the private sector. The FTC should release a policy statement and data sets that reflects this and enforce accordingly. The FTC should indicate that it is engaging in Administrative Constitutionalism and that they believe the immediate issue is grounded in the need for a broader protection of procompetitive petitioning.

#### 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.

#### Our planks about *clear statements* and *data sets* mean CP avoids politics and rollback.

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

Kovacic 15 et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions. A. Greater Specification of Authority One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power. B. More Transparency, Including Reliance on Policy Statements and Guidelines Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful barrier to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of complete data sets that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation. Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, the Commission strengthened external perceptions (within the business community and within Congress) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban unfair methods of competition, and the failure to do so has impeded the effective application of this power. A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, the FTC’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use section 5 of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. By issuing a policy statement before commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely increase confidence within industry and within Congress that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

#### Independently, the CP engages in “Administrative Constitutionalism”. This *solves FTC independence* because the agency’s perceived as leading, not reacting. It also *solves the Aff precedent* and *avoids rollback*.

* Creates same legal/Constitutional norms – but has the FTC be in the lead;
* No rollback – the Federal Courts may have Originalists, but the actually history of Administrative Constitutionalism would fare-well if appealed.

Lee ‘19

Sophia Z. Lee - Professor of Law, University of Pennsylvania Carey Law School – “OUR ADMINISTERED CONSTITUTION: ADMINISTRATIVE CONSTITUTIONALISM FROM THE FOUNDING TO THE PRESENT” - University of Pennsylvania Law Review - Vol. 167: 1699 – June - #E&F – continues to footnote #19 - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3086&context=faculty\_scholarship

I found my way to the term "administrative constitutionalism" through historical research. I was encountering mid-twentieth-century agency interpretations of the Constitution that differed notably from those of the Supreme Court and did not know what to make of them.16 Legal scholarship on the role Congress plays in making constitutional law gave me a way to make sense of that historical record. It also gave me a nomenclature: if Congress's engagement with the Constitution was "legislative constitutionalism," what I was finding was "administrative constitutionalism."17 In 2010,1 first used the term to describe agencies' interpretation and implementation of the United States Constitution.18 Since then, historians who encountered the Constitution in agency archives have built a burgeoning literature on how agencies have interpreted and implemented the Constitution.19

Using this history, scholars of constitutional and administrative law have developed a rich literature on the theoretical and normative questions administrative constitutionalism raises. These include how public, self-conscious, or determinative constitutional considerations have to be to count as administrative constitutionalism; what institutional factors foster, deter, and shape administrators' engagement with the Constitution; when, if ever, agencies can interpret the Constitution differently than the courts; and whether courts should defer to agencies' constitutional interpretations.20

Administrative constitutionalism can be defined broadly or narrowly. Defined most broadly, it refers to agencies' role in constructing constitutional norms such as adequate due process, the bounds of free speech, or the scope of executive power, whether or not agencies consider themselves to be doing so. More narrowly, it includes only instances in which agencies selfconsciously consider the meaning of the Constitution in designing policies and issuing decisions.21

Broadly defined, it includes all instances in which agencies implement the Constitution, even if they do so merely as a precursor to determination of the constitutional question by Congress or the courts. More narrowly defined, administrative constitutionalism encompasses only those instances in which an agency has the final say or interprets the Constitution in a way that sets it against the courts or Congress.22

However defined, this Article argues that historians' case studies of administrative constitutionalism suggest that administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States, although the scale and scope of administrative constitutionalism has changed significantly over time as the balance of opportunities and constraints has shifted.23 That said, the Article also contends that over the twentieth century, and especially since the New Deal, courts have cast an increasingly long shadow over the administered Constitution. In part, this is because of the well-known expansion of judicial review during this period. But the shift has as much to do with changes in the legal profession, legal theory, and lawyers' roles in agency administration. The result is that administrative constitutionalism may still be the most frequent form of constitutional governance, but it has grown, paradoxically, more suspect even as it has also become far more dependent on and deferential to judicial interpretations.24

The history of administrative constitutionalism offered here is likely to trouble those who seek to restore administrative law to its nineteenth-century foundations (whom I will call "foundationals").25 They are unlikely to find appealing a nineteenth century in which agencies took the lead in deciding constitutional questions, subject to some oversight by Congress and the President, but virtually none by the courts. These critics hold out constitutional law as uniquely important: that law is what powers their arguments that the United States should turn back the clock. And they prefer nineteenth-century agencies because they depict them as exercising little consequential legal power.26 But this history suggests that those agencies had the first and often final word on the Constitution's meaning. Foundationalists also assume that reinstating the nineteenth-century constitutional order would empower courts to more closely scrutinize agency action.27 The history presented here instead suggests that it would all but eliminate judicial review of those actions' constitutionality. Indeed, the burgeoning history of administrative constitutionalism indicates that anyone who wants to ensure that courts review the constitutionality of agency action has to appeal to theories that are rooted in constitutional evolution, not origins, and in twentieth—not nineteenth—century administrative law and judicial practice.

19 See Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 YALE LJ. 1012,1018-19 (2015) [hereinafter Ablavsky, Beyond] (arguing that early American executive branch actors "gave concrete meaning to the Constitution s sparse framework ," thereby establishing "federal authority over Indian affairs"); Kristin A. Collins, Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation^ 123 YALE LJ. 2134, 2141-42 (2014) [hereinafter Collins, Illegitimate Borders] (arguing that administrators played a key role in encoding "nativist policies" into the definition of citizenship); Sam Erman, Citizens of Empire: Puerto Rico, Status, and Constitutional Change, 102 CALIF. L. REV. 1181, 1183 (2014) (arguing that administrators, not only courts, played a key role in shifting "the constitutional order . . . from according U.S. citizenship and robust rights to all nontribal U.S. people and toward acceptance of U.S. colonialism"); Jeremy Kessler, The Administrative Origins of Modern Civil Liberties Law, 114 COLUM. L. REV. 1083, 1085 (2014) (arguing that executive branch officials "took the lead in forging" the modern understanding of civil liberties); Karen M. Tani, Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor, 100 CORNELL L. REV. 825, 828-29 (2015) [hereinafter Tani, Administrative Equal Protection] (arguing that welfare officials developed and implemented a novel interpretation of how equal protection governed income assistance programs during the mid-twentieth century); see generally KAREN M. Tani, States of Dependency: Welfare, Rights, and American Governance, 1935-1972 (2016) [hereinafter TANI, STATES OF DEPENDENCY] (recounting multiple examples of agency officials interpreting and implementing the Constitution).

### 4

#### FTC independence in the US key to *global norms* that support agency independence. Vital for *free trade* and *GLO*.

* United States’ FTC practices are modeled *by several nations* – including South Korea – and *will continue to be modeled* by nations that are still amid transitions towards industrialization;
* Global attentiveness to the United States’ FTC practices *remains ongoing* and - “*to this day*” - are a *central obstacle* to aspired free trade norms;
* The root of the loss of the global public’s confidence in free trade stems from the success of zero-sum strategies. *The root of that* is an interpretation of the FTCA that permits politicized intervention;
* Ambiguity in the United States’ FTCA permit the Act to be exercised *EITHER with a great deal of agency discretion* – *OR* alternatively, *with the perceived influence of external political branches*;
* Current US FTC practices lean away agency independence – and that’s *a central obstacle* to international agencies countering the growth of protectionist mercantilist norms
* More broadly, this hampers *general support for internationalism/GLO*

Nam ‘18

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

ABSTRACT:

The Federal Trade Commission Act of 1914 (“FTC Act”), a model for many other countries that set up their own competition agencies, combines the control afforded by presidential appointment and removal powers over FTC commissioners with an exceedingly discretionary mandate. This Article contends that the FTC Act’s outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States’ original blueprint for unitary executive-stamped antitrust enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. as a role model while developing their competition regimes.6 It is ironic, then, that to this day a central obstacle to the aspired international “culture of competition” can be found in none other than the influence of the U.S.’s own FTC Act.7

American antitrust priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that would reemerge abroad in many later-developing countries.

The deepening global retreat from internationalism *and* free market principles in the present day, with the specter of trade wars looming, is exacerbated by nationalist competition regimes that are derivative of a U.S. model predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

#### Globally, independence of antitrust agencies will prove key – checks spiraling economic nationalisms that’ll crush liberal peace.

Nam ‘18

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National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a creeping loss of public confidence in open markets—coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, as illustrated in this Article—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent liberal peace156 often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order’s intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

#### Extinction – that was 1ac oppenhimer

**5**

**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**

**6**

#### Congress ought to pass a law that mandates an expansion of the Supreme Court from 8 to 14 associate justices if the United States federal government does not increase its prohibitions on anticompetitive petitioning by the private sector. The President ought to nominate, and the Senate ought to confirm, persons to fill any vacancies on the Supreme Court.

#### Key to democracy – they read an impact

Rosenberg 20 --- Paul Rosenberg is a California-based writer/activist, senior editor for Random Lengths News, and a columnist for Al Jazeera English, “"Pack" the Supreme Court? Absolutely 100% yes — it's the only way to save democracy”, PUBLISHED OCTOBER 10, 2020, https://www.salon.com/2020/10/10/pack-the-supreme-court-absolutely-100-yes--its-the-only-way-to-save-democracy/

With the death of Ruth Bader Ginsburg and the nomination of a polar opposite replacement, only one response that makes any sense: Expand the Supreme Court. The only real question is by how much. There are other responses that can do some good — perhaps even more good. But without court expansion, the existing court can, and almost certainly will, strike them down.

Yes, some call it an extreme step. But there's a more extreme step: Simply ignore the court's decisions — as some Republicans argued in the 1850s, in response to the Dred Scott decision. More to the point, this is an extreme situation that demands extreme responses. As Boston College law professor Kent Greenfield tweeted on Sept. 21:

Some #SCOTUS facts:

15 of the last 19 appointments were made by GOP Presidents. (16/20 if #Trump gets another.)

The last year a majority of the justices were Dem appointees: 1969. Meanwhile, the GOP won the popular vote in the presidential election once in 30 years (2004).

It's also been more than 20 years since Republicans represented a majority of voters in the Senate, making the condition of minority rule even more extreme. It's also self-reinforcing: As Greg Sargent notes, a 6-3 conservative majority could strike down a new version of HR 1, the pro-democracy reforms that House Democrats passed in 2019, including wildly popular nonpartisan redistricting commissions.

The same fate awaits virtually everything else Democrats have campaigned on, as The Nation's justice correspondent, Elie Mystal, argued last February in an article bluntly titled, "If We Don't Reform the Supreme Court, Nothing Else Will Matter":

Not a single significant policy or initiative proposed by the candidates for the Democratic presidential nomination is likely to survive a Supreme Court review. Nothing on guns, nothing on climate, nothing on health care — nothing survives the conservative majority on today's court.

And that was seven months before Ginsburg's death. Now, as election law maven Richard L. Hasen puts it, "Trump's New Supreme Court Is Coming for the Next Dozen Elections." This threat to our democracy comes at a time when others around the world are increasingly turning to citizens' assemblies as a way to expand democracy beyond elite-defined partisan bounds, as I discussed last December. At least one new book lays out a plan for introducing direct democracy at the national level, starting with advisory referenda.

This wildly anti-democratic situation — although temporarily normalized by our myopic, dysfunctional elites — actually violates deeply entrenched bipartisan norms, as underscored by University of Washington political scientist Scott Lemieux:

American political elites have generally supported the strong form of judicial review that emerged in the late 19th century because the Supreme Court generally tracked with the constitutional views of the dominant political coalition. A Supreme Court representing an entrenched, unpopular minority faction that refuses to allow the popular majorities from the other party to effectively govern would be neither democratically legitimate nor politically stable.

What's more, Lemieux notes, previous violations of this norm "all led to constitutional crises that ended only when the court itself backed down," including Franklin D. Roosevelt's oft-misremembered confrontation, which put an end to the court striking down New Deal legislation, most notably the Social Security Act. Nor is there any "normal" way out through political victory, Lemieux warns: A 6-3 conservative majority "would be essentially impossible for Democrats to displace through ordinary means, irrespective of the results of future elections."

So what might seem in isolation like an extreme or unwarranted norm-breaking move by Democrats is actually the exact opposite: an act of restoration to the guiding shared norms that have predominated across better than two centuries. Continued violation of these shared norms will only intensify the erosion of trust that brought us Donald Trump in the first place, and which he has greatly intensified with the enthusiastic cooperation of Senate Republicans led by Mitch McConnell.

So expanding the Supreme Court is the only option. As I said earlier, the real question is by how much.

## case

### innovation

**Plan creates a chilling effect for pharma enforcing patent rights --- crushes innovation**

**Mosier 21** --- Mark W. Mosier, Counsel of Record for PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, “BRIEF FOR THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND BIOTECHNOLOGY INNOVATION ORGANIZATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI”, US Supreme Court, April 2021, https://www.supremecourt.gov/DocketPDF/20/20-1293/176010/20210419114711882\_Main%20Document.pdf

Under the Noerr-Pennington doctrine, patent holders are generally immune from antitrust liability for filing lawsuits seeking to enforce their rights. See PRE, 508 U.S. at 56. This immunity is **necessary** to protect litigants’ First Amendment rights to petition the government for redress of their grievances. See id. at 56-57. This Court has recognized a narrow exception to this rule, but that exception applies only where a litigant has initiated “sham litigation.” Id. The decision below warrants this Court’s review because it misapplied the sham-litigation test, and in so doing, substantially broadened that narrow exception in a way that **threatens to encroach on patent holders’ rights** under both the patent laws and the First Amendment.

I. The decision below **will chill innovation in the biopharmaceutical industry**. Biopharmaceutical companies invest billions of dollars annually to develop new life-saving and life-enhancing treatments. These investments make financial sense **only because** the patent laws reward the developer of a new treatment with a period of exclusivity during which it can recoup its substantial investment. **By discouraging patent holders** from enforcing their rights, the court of appeals’ decision **reduces the incentive for biopharmaceutical companies to invest** in developing new treatments, which **will have serious negative consequences** for scientific progress, public health, and the economy.

II. The decision below is incorrect. This Court has **long held** that to constitute a “sham,” litigation must be both objectively baseless and subjectively motivated by bad faith. See PRE, 508 U.S. at 57, 61. Although the court of appeals recognized that subjective bad faith is an element of the test, it deviated from this Court’s clear direction that the two prongs are separate and distinct by treating them as “distinct, but . . . interrelated.” Pet. App. 68a. The court thus rendered the subjective prong meaningless by conflating it with the objective prong. In so doing, the court of appeals drastically expanded the sham litigation exception.

ARGUMENT

I. THE COURT OF APPEALS’ RULING WILL CHILL INNOVATION IN THE BIOPHARMACEUTICAL INDUSTRY

If the decision below were permitted to stand, **innovators would be placed in an untenable position**. Faced with an entity potentially infringing on its patent rights, a patent holder would have to decide whether filing suit to protect its rights **is worth the risk of incurring treble-damage liability** in a subsequent antitrust lawsuit simply because an experienced attorney authorized the suit that triggered the automatic stay provision of the HatchWaxman Act and the lawsuit ultimately proved to be unsuccessful. Given the widely acknowledged uncertainty inherent in the outcomes of patent litigation under the Hatch-Waxman Act, patent holders will be **deterred from filing suit to enforce their patent rights**, undermining a **critical component** of patent protection. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556 (2014) (recognizing that the threat of antitrust liability can **significantly chill patent holders’ exercise of their First Amendment right to petition the government**). This deterrence is also contrary to the legislative compromise embodied in the Hatch-Waxman Act, which balances patent protections for pharmaceutical innovators with the encouragement of generic entry. The consequence of discouraging Hatch-Waxman lawsuits **will be to discourage the substantial investments required to innovate in the biopharmaceutical industry**, with **negative consequences for scientific progress, public health, and the economy.**

A. Robust Patent Protection is **Critical to Innovation** in the Biopharmaceutical Industry The process of developing and bringing to market a new drug is incredibly costly. On average, developing and obtaining FDA approval of a new medicine takes ten to fifteen years and costs $2.6 billion.4 As such, biopharmaceutical companies must devote **enormous resources** to research and development in order to bring a new drug to market. By any measure, the biopharmaceutical industry is one of the most R&D intensive industries in the world. It accounts for 18% of all self-funded research and development spend in the United States, and the United States accounts for approximately half of all global spend on biopharmaceutical R&D.3 The biopharmaceutical industry has the highest percentage of R&D reinvestment of any U.S. industry as a percentage of revenue. In fact, on a per-employee basis, the pharmaceutical industry invests $196,000 in R&D—13 times the overall manufacturing industry average in the United States.6 PhRMA's member companies collectively invest nearly 25% of their total annual domestic sales in research and development.7 And small, emerging companies represented by BIO are contributing significantly to the search for new cures and therapies, conducting 70 percent of clinical trials.8 Most of these innovative companies have no products yet on the market. Given the research-intensive nature of drug development, more than 90 percent of biopharmaceutical companies are not profitable, and must rely on private investment, not sales, to fund research and development.9

Such large investments in inventing and commercializing new drugs are **particularly noteworthy** because there is a very high likelihood that any individual drug will fail to result in a commercially viable product. Pharmaceutical companies may consider tens of thousands of compounds before identifying a handful that might have a potential commercial use.10 Even of those drugs that make it to a Phase I clinical trial, fewer than 12% are ultimately approved by the FDA.11

**Patent protection is thus critical to incentivize the industry** to continue to pursue both research and development of new drugs and improvements to existing therapies because it ensures that a certain amount of financial reward will accrue to the owner of a new or improved drug product that, against the odds, successfully navigates these obstacles. As the Federal Trade Commission (“FTC”)—Respondent in this case—has explained, “[pharmaceutical companies . . . rely on patents to prevent free riding, recoup their R&D investments, and learn about new technological breakthroughs.”12 A former Acting Chairman of the FTC recently surveyed the available empirical evidence and concluded that “[t]he strength of IP rights positively correlates with R&D investment, at least in developed countries,” and “empirical evidence that patents drive innovation in pharmaceuticals is especially strong.”13 Others have noted that “it is likely that innovation would **drop substantially** in the pharmaceutical industry in the absence of effective patent protection.”14

**SQ solves sham litigation**

**Mossoff 18** --- Adam Mossoff et al, Professor of Law Antonin Scalia Law School, George Mason University, “Will Overzealous Regulators Make Your Smartphone Stupid?”, Regulatory Transparency Project, December 10, 2018, https://regproject.org/paper/will-overzealous-regulators-make-smartphone-stupid/

To be sure, there are a few “bad actors” among patent owners—those who have gone beyond simply enforcing patent rights and engaged in fraud, unfair competition, or improper litigation practices. One prominent example, and one of the few actual examples frequently cited in discussions of “patent trolls,” is MPHJ, which sent deceptive letters to thousands of businesses falsely asserting that it owned a valid patent that the companies were allegedly infringing and demanding payment of a royalty. **MPHJ was rightly sanctioned** for its bad behavior, **and that was the end of it.**22

**regulation against trolling backfires --- stifles innovation**

**Mossoff 18** --- Adam Mossoff et al, Professor of Law Antonin Scalia Law School, George Mason University, “Will Overzealous Regulators Make Your Smartphone Stupid?”, Regulatory Transparency Project, December 10, 2018, https://regproject.org/paper/will-overzealous-regulators-make-smartphone-stupid/

Even when patents covering technological standards are not implicated, antitrust regulators have been taking aim at patent licensing more generally. This time, the threat is not “patent hold up,” but so-called “**patent trolls**.” A “patent troll” is a euphemism that has come to embrace virtually any person or company that profits from its patents other than by directly manufacturing a product. This includes companies that license their patented technology to other companies, such as IBM, Nokia, Dolby, 3M and others that follow in the footsteps of Thomas Edison, Nikola Tesla, and Charles Goodyear. Some do not manufacture anything, while others do. Some invented the technology they now own, while others purchased their patents from individual inventors, other companies, or even failing or failed businesses. Indeed, advocates of the patent troll myth have gone so far as to suggest that America’s universities, wellsprings of innovation in both groundbreaking technologies and medical care,18 are patent trolls simply because they invent, they patent, they license, and they sue infringers, but they don’t actually manufacture products in factories.19

In a speech on October 18, 2018, Andrei Iancu, Director of the U.S. Patent and Trademark Office, criticized the “patent troll” rhetoric as both a myth and as a message that **undermines innovation**:

The goal of this narrative is the same as that of stories such as Little Red Riding Hood: **don’t leave the village. Don’t take risks**. Stay in your lane! Because if you do take risks, if you do have the gall to get out of your lane, you may encounter big bad wolves or other scary monsters. And horror of horrors, you may encounter “patent trolls!”

**What an odd message** to deliver in the 21st century. What an odd message to deliver in America in particular, a country of risk-takers, entrepreneurs and inventors. An odd message indeed, especially given the incredible success of the American patent system over time.20

Director Iancu is right. Regardless of their business model or mode of operation, any person or commercial enterprise that licenses its patents serves a **valuable economic function**—they are the “economic intermediaries” that connect owners with buyers, just as car dealerships, stock brokers, eBay, and Amazon do for other goods and services.

There is **nothing wrong with profiting from innovation by licensing patents** to others. As noted, this is a **key feature of a flourishing free market**, it promotes economic efficiencies through specialization, and it has been an economically significant feature of the U.S. patent system from its inception in 1790. The Supreme Court has recognized that many people and organizations, including inventors and universities, have legitimate economic reasons for licensing their patented innovations.21 Patent licensing allows companies to focus on their areas of expertise, whether it be invention, manufacturing, sales, or otherwise; and it allows innovative firms to recoup R&D expenditures to continue their inventive activities.

Yet, according to antitrust regulators, if a company that licenses its patents is forced to sue an infringer, or merely threatens to sue a recalcitrant company that is holding out in negotiations and refusing a license while infringing a patent, this could constitute anti-competitive behavior and thus violate antitrust laws. The concern is a generalized claim that consumers are harmed somehow when a patent owner asserts its rights against the unauthorized use of its property by another company for its own profit. What economic evidence is driving these investigations and threats by antitrust regulators? Just as with the unproven theories and anecdotes about standard-essential patents (SEPs), **there is none**. Even worse, and indicative of the Kafkaesque nature of this regulatory overreach, when manufacturers do the exact same thing in suing to protect their property rights in their patents, this is barely worthy of comment by antitrust regulators. **What is the difference between the two**? One patent owner licenses its property, and the other uses its property to manufacture or sell goods to consumers. **There is no economic study that justifies this different legal treatment by antitrust regulators, nor is there any antitrust law or regulation that explains it either.**

**5G development is not zero-sum and China innovation is commercial**

**ANG 20** --- YUEN YUEN ANG, Associate Professor of Political Science at the University of Michigan, Ann Arbor, “The Myth of the Tech Race”, Project Syndicate, April 28th 2020, https://www.project-syndicate.org/onpoint/us-china-tech-race-unnecessary-by-yuen-yuen-ang-2020-04

Yet for all the Western paranoia over Chinese ambitions, most analysts have missed an important fact: China’s comparative advantage in technology is **different from that of the US**. Whereas China excels in applying technology to improve business models – for example, in e-commerce and fintech – the US remains the unparalleled world leader in basic scientific research, the foundation of advanced technologies. This fundamental difference **challenges the zero-sum mentality of**ten underlying the **Sino-American tech race.**

Back to Basics

In the West, the term “technology” evokes images of super-intelligent, dazzling inventions like flying cars and thinking robots. During the Cold War, the most vivid sign of technological prowess was the Soviet Union’s launch of satellites into space – the so-called Sputnik moment. But in emerging markets, which have lower average income levels and a lack of basic infrastructure, “technology” is regarded not in utopian terms, but as a pragmatic tool.

Consider the ubiquitous example of mobile phones, a relatively simple device that even the poor can afford to buy. With a phone, one can make calls, access information, borrow micro-funds, and hawk merchandise. The diffusion of this modest technology can subsequently spawn waves of startups in novel domains: fintech, ed-tech, health-tech, and so forth. Beyond the fancy labels, these are all examples of entrepreneurs applying off-the-shelf, widely accessible technologies to enhance the delivery of goods and services. By doing so, they facilitate transactions that spur growth across the economy.

Some of China’s largest and most iconic tech titans – for example, Alibaba, Xiaomi, and Meituan – followed this basic trajectory. Contrary to received wisdom in the West, Alibaba was not a “national champion” handpicked by the Chinese government to succeed. As a private company in a novel industry (e-commerce), it actually faced significant resistance from Chinese authorities. For example, in 2014, state banks tried to block the company’s Yu’e Bao system – which allows users to invest money left over from online payments – by imposing limits on fund transfers into online accounts. According to one senior state media analyst at the time, Yu’e Bao was a “blood-sucking vampire” that must be stopped.

Tech startups like Alibaba thrived not because the state propped them up, but because they tailored their services flexibly to Chinese consumer needs. By contrast, Alibaba’s American counterpart, eBay, insisted on a one-size-fits-all business model and eventually lost the market. As my interviews with Chinese private-sector entrepreneurs have found, the government endorses so-called champions only after they succeeded on their own. Their strength comes from creating value through competition, not state protection.

These examples also show why it is important to distinguish between **seminal and applied innovation**. America is strong in both. And it especially dominates in basic research: its universities lead the world across all scientific fields; its corporate giants invest heavily in research and development for advanced products; and both sectors attract the best global talent. Moreover, US academia and business enjoy a symbiotic relationship, as epitomized by Stanford University’s seeding of the technologies that would later define Silicon Valley.

Chinese state planners know that America’s overwhelming strength in basic research has allowed it to dominate the upstream of the technology supply chain, a position that the US government guards fiercely. In an effort to catch up, China intervened with a bevy of top-down policies to support state-selected high-tech sectors. But this top-level battle for world dominance has obscured China’s real competitive edge: **commercialization**.

New Faces of Innovation

Consider the composition of each country’s tech “unicorns” (private startups with a valuation of at least $1 billion). According to a 2018 Credit Suisse report, only the US has produced more unicorns than China. But the largest share of Chinese unicorns (58%) operate in the e-commerce and gaming sectors, whereas US unicorns are more highly concentrated in AI, big data, robotics, and software. Moreover, while China’s overall spending on R&D is quickly catching up to that of the US, its spending on basic research as a share of GDP has increased only slightly, and remained at less than one-quarter of the US level from 2010 to 2017.

Another telling distinction is the bottom-up emergence of what I would describe as “modular manufacturing” in Shenzhen, a city of 13 million people in Guangdong Province. Once a hub for counterfeiting foreign consumer and luxury goods, Shenzhen has morphed into the “Silicon Valley of hardware,” as one documentary calls it. At Huaqiangbei, a massive marketplace of small vendors, shoppers can buy any electronic part imaginable. And, owing to the emergence of such markets, inventors and entrepreneurs from around the world can create prototypes more cheaply and quickly than anywhere else.

The rise of Shenzhen’s hardware ecosystem has had a global impact. Startups in any country can now create their own brands, produce them in small batches in the city, and then sell to niche markets. One example is Wiko, a smartphone company founded and based in France, whose products are made in Shenzhen. Within two years, reports David Li of the think tank Hacked Matter, the startup captured 18% of the French market, making it the third-most popular smartphone in France (after Apple and Samsung).

In other words, the system of modular manufacturing that sprang up in Shenzhen in recent years is upending the traditional model of global mass manufacturing, which was previously dominated by large multinational companies presiding over a passive chain of suppliers. The ability to launch, brand, and produce a new product is quietly being “democratized” at the global level from a single Chinese city. This creative movement emerged with scant attention, let alone support, from grand strategists in Beijing.

Similarly, the realities of bottom-up Chinese innovation rarely reach the halls of power in Washington, nor do they feature much in mainstream Western media. Instead, analysts continue to describe China’s technological ascent in Cold War terms. A recent commentary in Forbes is a case in point: “This is indeed a Sputnik moment for the US, a wake-up call for the US just as it was when the Soviet Union launched its first satellite, the Sputnik I, and beat the USA into space.”

Stepping Back from the Brink

But the China of 2020 is nothing like the Soviet Union of the post-World War II era. Nor is technology a zero-sum game, where only one county can hit a given target first and “win.” A more balanced assessment of Chinese and US strengths and weaknesses would go a long way toward mitigating an unnecessarily acrimonious and costly rivalry.

Leaders on both sides should understand that countries can and do have different comparative advantages in technology. China excels in **commercialization** and **applied innovation** because it has a massive domestic market and few or no established players in emerging industries. These conditions provide fertile ground for decentralized experimentation. Moreover, as is true in many fast-growing emerging economies, the Chinese private sector is driven by “a culture of hyper-competition,” as one tech businessman put it to me. China today is a place where entrepreneurs aspire to make big money fast.

Unparalleled US leadership in basic scientific research, on the other hand, rests on a longstanding institutional foundation that is reinforced by a culture of freedom to pursue original ideas. Moreover, the US tech sector continues to reap the benefits of the government’s deliberate investments in basic science during the post-war era. According to Vannevar Bush, the director of the Office of Scientific Research and Development under President Franklin D. Roosevelt, US science policy during that period was premised on the belief that “basic research is the pacemaker of technological progress,” and that it should be “performed without thought of practical action.”

**Deterrence not key to prevent Taiwan war**

**Lungu 21** --- Andrei Lungu is president of The Romanian Institute for the Study of the Asia-Pacific (RISAP), “Taiwan invasion doesn’t hang in the military balance”, East Asia Forum, Aug 19th 2021, https://www.eastasiaforum.org/2021/08/19/taiwan-invasion-doesnt-hang-in-the-military-balance/

There is growing speculation and alarm about a possible Chinese invasion of Taiwan after Beijing sharpened its rhetoric towards the Taiwanese government and increased its military manoeuvres around the territory. The Biden administration is worried that if Chinese leaders are overconfident in China’s growing power and assume Washington’s decline, they might decide to invade Taiwan.

The US government has taken numerous actions to clearly signal its capacity and commitment to defend Taiwan. Growing diplomatic engagement with Taiwan, increased military manoeuvres, joint statements alongside Japan, South Korea and the G7, as well as developing a common response to a war over Taiwan with Japan and Australia are all part of this new framework.

Although these actions intend to decrease the risk of military conflict by strengthening military deterrence, they **are unlikely** to achieve it. This is because Beijing’s Taiwan calculus — which **has always been more complex** than simply focussing on the conventional military balance — involves three **distinct factors** that have dissuaded a Chinese invasion.

The first is military power. Chinese leaders still doubt whether China could defeat and then conquer Taiwan, let alone successfully fight the United States.

Secondly, there is an understanding that war over Taiwan would portend disastrous consequences for China’s economy, foreign relations and global image. Worse still, a conflict could pose an existential risk to the **C**hinese **C**ommunist **P**arty: a war would mean fighting and killing ‘brothers and sisters’, while defeat would bring echos of 1895. A war would also undermine economic development — a pressing goal that is closely linked to the ‘great rejuvenation of the Chinese nation’.

The third factor is **time**. Chinese leaders wait based on the hope that ‘peaceful reunification’ is still possible and that **time is on their side**, as China’s power is growing. Their historical goal has been to **prevent independence** or a change of the status quo. Waiting still **makes sense**, as China is pursuing its decades-long military modernisation process.

By ignoring these last two factors, Washington risks focussing too much on the assumption that Chinese leaders have become overconfident about the **erosion of military deterrence.** Fear of the United States was **never the sole factor** preventing a Chinese invasion in the first place.

Hong Kong illustrates this thinking well. Without having to contend with the possibility of an opposing military, Beijing remained acutely aware of the economic and diplomatic consequences of sending military or paramilitary troops to directly suppress protests. It instead adopted a slower strategy of tightening control to reduce the political costs of its actions.

Beijing only imposed national security legislation on Hong Kong when the problem had gotten ‘out of hand’ — not as a proactive measure. The Chinese leadership tried to gradually build control over the territory for years, believing time was on its side. It only implemented radical measures when it believed the status quo was changing to its detriment.

Chinese leaders haven’t yet decided that an invasion of Taiwan is unavoidable because they still hope that ‘peaceful reunification’ is achievable, but they worry about Taiwan’s steady drift towards the United States. Beijing sees Washington’s growing ties with Taiwan as undermining the status quo and diminishing the prospects for ‘peaceful reunification’.

**Zero risk of escalatory cyber-attacks --- Defenders advantage nullifies any ROI ---** assumes NC3 and Infrastructure

**Borghard & Saltzman 19** --- Erica D. Borghard, Adjunct Research Scholar in the Saltzman Institute of War and Peace Studies and an Adjunct Associate Professor in the School of International and Public Affairs, and Shawn W. Lonergan, Senior Advisor to the U.S. Cyberspace Solarium Commission, Strategic Studies Quarterly , Vol. 13, No. 3 (FALL 2019), pp. 122-145, https://www.jstor.org/stable/26760131?seq=1#metadata\_info\_tab\_contents

Therefore, the time and resource requirements to gain access and develop specific offensive capabilities may render important escalatory response options **infeasible or impractical** at the desired time. Operational planning and execution must consider that a given capability **may not** be usable or **even exist** at a chosen time of employment.29 As the above discussion illustrates, many of the target sets that would represent strategic (and therefore escalatory) targets, such as a state’s critical infrastructure or nuclear command and control, **demand extensive planning, pre-positioning, and capability development** in advance of employing offensive capabilities. Therefore, the timing of a crisis plays a crucial role in decisions about cyber escalation responses. Specifically, the time required to develop access to hold strategic targets at risk means that, even if a state seeks to escalate against an adversary using cyber means, it may find itself limited by the accesses and capabilities it possesses **at the moment** a crisis occurs. Cyber response options may be limited to **less decisive** or more vulnerable **target sets**, rather than those that are more strategically significant.

Third, these limitations become even more salient when we consider how strategic interactions are likely to play out over time during repeated crisis interactions. Because the virtual domain is changeable in a way that the physical world is not, actions taken by defenders in the context of a crisis can **radically and unpredictably** alter an attacker’s ability to deliver and sustain effects against a target over time.30 Access and capabilities are **neither guaranteed nor indefinite**—they have a shelf life.31 Footholds into a target’s network that were time intensive to develop **can unexpectedly disappear** as vulnerabilities in a network are patched. Exploits may have a short shelf life as revealing information about them enables targets to identify indicators of compromise (IOCs) and use these to prevent further damage from specific malware strains or quarantine malicious traffic using known malware signatures. An example of the latter is the US Cyber Command initiative, beginning in 2018, to share information about adversary malware by uploading samples to VirusTotal.32 Therefore, a target can “transition from vulnerability (to a particular attack) to invulnerability in, **literally, minutes**.”33 Third-party disclosure about software vulnerabilities by governments or private actors can also unintentionally precipitate the loss of access as exposure about vulnerability information enables network defenders to take measures to remedy them.34 For instance, the disclosures that began in 2016 by the group Shadow Brokers of purportedly pilfered US National Security Agency exploits and zero days ostensibly put US government accesses at risk.35 Put simply, a vulnerability upon which an access relies may in theory be only one update or disclosure away from being patched.

### petitions

#### Growth skyrocketing

Clinkard 11/11 (John, 35 years’ experience as an economist in international, national and regional research and analysis with leading financial institutions, “Economic horizon brighter, except for inflation cloud,” Nov 11, 2021, <https://canada.constructconnect.com/canadata/forecaster/economic/2021/11/economic-horizon-brighter-except-for-inflation-cloud)//NRG>

$1.2 trillion Infrastructure Bill adds fuel to already hot fire

The combination of measures to limit an upsurge in cases of the COVID-19 Delta variant, unprecedented supply chain issues, and an acute shortage of skilled and unskilled labour caused the U.S. economy to slow from +6.7% q/q in Q2/21 to +2.0% in Q3. While growth slowed in Q3, inflation ticked higher from +5.3% y/y to +5.4% y/y.

Looking ahead, the recent passage of a $1.2 trillion infrastructure bill materially improves the outlook for capital spending on roads and bridges in the U.S., as well as on broadband internet and on an overhaul of the electrical grid. However, with inflation moving to levels last seen in 2006, we expect the Federal Reserve to begin hiking interest rates sooner than originally intended, thereby putting a damper on consumer spending and housing demand.

Having said this, rising vaccination rates across the US will reduce the drag on growth due to COVID-19 and give a boost to the travel and hospitality industry. Supply chain issues have contributed to a growing backlog of new orders and total private employment is up by 5.3 million jobs since the beginning of 2021. With both the Conference Board’s Help-wanted Online Index and the Job Openings and Labour Turnover (JOLTS) indices at record highs, the outlook for hiring remains positive.

Strong year-to-date job gains, persisting (for now) low-interest rates and a rebound in consumer confidence should cause consumer spending and residential construction to underpin growth heading into 2022. Nevertheless, we expect the impact of a gradual tightening of monetary policy aimed at reining in inflation, persisting shortages of critical materials, and ongoing hiring problems will limit growth to +3.2% to +3.7% next year following an estimated gain of +5.4% in 2021.

**Liberal order is resilient and inevitable**

**DEUDNEY & IKENBERRY 18** --- DANIEL DEUDNEY is Associate Professor of Political Science at Johns Hopkins University., G. JOHN IKENBERRY is Albert G. Milbank Professor of Politics and International Affairs at Princeton University, “Liberal World The Resilient Order”, Foreign Affairs, July/August 2018, https://scholar.princeton.edu/sites/default/files/gji3/files/05\_deudney\_ikenberry.pdf

**THE RESILIENT ORDER**

After World War II, liberal democracies joined together to create an international order that reflected their shared interests. And as is the case with liberal democracy itself, the order that emerged to accompany it **cannot be easily undone**. For one thing, **it is deeply embedded**. Hundreds of millions, if not **billions**, of people have geared their activities and expectations to the order’s institutions and incentives, from farmers to microchip makers. However unappealing aspects of it may be, replacing the liberal order with something significantly different **would be extremely difficult**. Despite the high expectations they generate, revolutionary moments **often fail** to make enduring changes. It is unrealistic today to think that a few years of nationalist demagoguery will dramatically undo liberalism.

Growing interdependence makes the order **especially difficult to overturn**. Ever since its inception in the eighteenth century, liberalism has been **deeply committed** to the progressive improvement of the human condition through scientific discovery and technological advancements. This Enlightenment project began to bear practical fruits on a large scale in the nineteenth century, transforming virtually every aspect of human life. New techniques for production, communication, transportation, and destruction poured forth. The liberal system has been at the forefront not just of stoking those fires of innovation but also of addressing the negative consequences. Adam Smiths case for free trade, for example, was strengthened when it became easier to establish supply chains across global distances. And the age-old case for peace was vastly strengthened when weapons evolved from being simple and limited in their destruction to the city-busting missiles of the nuclear era. Liberal democratic capitalist societies have thrived and expanded because they have been particularly adept at stimulating and exploiting innovation and at coping with their spillover effects and negative externalities. In short, liberal modernity excels at both harvesting the fruits of modem advance and guarding against its dangers.

This dynamic of constant change and ever-increasing interdependence is **only accelerating.** Human progress has caused grave harm to the planet and its atmosphere, yet climate change will also require unprecedented levels of international cooperation. With the rise of bioweapons and cyberwarfare, the capabilities to wreak mass destruction are getting cheaper and ever more accessible, making the international regulation of these technologies a vital national security imperative for all countries. At the same time, global capitalism has drawn more people and countries into cross-border webs of exchange, thus making virtually everyone dependent on the competent management of international finance and trade. In the age of global interdependence, **even a realist must be an internationalist.**

The international order is also likely to persist because its survival **does not depend on** all of its **members being liberal democracies**. The return of isolationism, the rise of illiberal regimes such as China and Russia, and the general recession of liberal democracy in many parts of the world appear to bode ill for the liberal international order. But contrary to the conventional wisdom, **many of its institutions are not uniquely liberal in character**. Rather, **they are Westphalian**, in that they are designed merely to solve problems of sovereign states, whether they be democratic or authoritarian. And many of the key participants in these institutions are anything but liberal or democratic.

Consider the Soviet Unions cooperative efforts during the Cold War. Back then, the liberal world order was primarily an arrangement among liberal democracies in Europe, North America, and East Asia. Even so, the Soviet Union often worked with the democracies to help build international institutions. Moscow’s committed antiliberal stance did not stop it from partnering with Washington to create a raft of arms control agreements. Nor did it stop it from cooperating with Washington through the World Health Organization to spearhead a global campaign to eradicate smallpox, which succeeded in completely eliminating the disease by 1979.

More recently, countries of all stripes have crafted global rules to guard against environmental destruction. The signatories to the Paris climate agreement, for example, include such autocracies as China, Iran, and Russia. Westphalian approaches have also thrived when it comes to governing the commons, such as the ocean, the atmosphere, outer space, and Antarctica. To name just one example, the 1987 Montreal Protocol, which has thwarted the destruction of the ozone layer, has been actively supported by **democracies and dictatorships** alike. Such agreements are not challenges to the sovereignty of the states that create them but collective measures to solve problems they cannot address on their own.

Most institutions in the liberal order do not demand that their backers be liberal democracies; they only require that they be status quo powers and capable of fulfilling their commitments. They do not challenge the Westphalian system; they codify it. The UN, for example, enshrines the principle of state sovereignty and, through the permanent members of the Security Council, the notion of great-power decision-making. **All of this makes the order more durable**. Because **much of international cooperation** has **nothing at all to do with liberalism or democracy**, when politicians who are hostile to all things liberal are in power, **they** can still **retain their international agendas and keep the order alive.** The persistence of Westphalian institutions provides a lasting foundation on which distinctively liberal and democratic institutions can be erected in the future.

Another reason to believe that the liberal order will endure involves the return of ideological rivalry. The last two and a half decades have been profoundly anomalous in that liberalism **has had no credible competitor**. During the rest of its existence, it faced competition that made it stronger. Throughout the nineteenth century, liberal democracies sought to outperform monarchical, hereditary, and aristocratic regimes. During the first half of the twentieth century, autocratic and fascist competitors created strong incentives for the liberal democracies to get their own houses in order and band together. And after World War II, they built the liberal order in part to contain the threat of the Soviet Union and international communism.

The Chinese Communist Party appears increasingly likely to seek to offer an alternative to the components of the existing order that have to do with economic liberalism and human rights. If it ends up competing with the liberal democracies, they will again face pressure to champion their values. As during the Cold War, they will have incentives to undertake domestic reforms and strengthen their international alliances. The collapse of the Soviet Union, although a great milestone in the annals of the advance of liberal democracy, had the ironic effect of eliminating one of its main drivers of solidarity. The bad news of renewed ideological rivalry could be good news for the liberal international order.

CORE MELTDOWN

In challenging the U.S. commitment to NATO and the trading rules of the North American Free Trade Agreement (nafta) and the World Trade Organization, Trump has called into question the United States’ traditional role as the leader of the liberal order. And with the vote to leave the EU, the United Kingdom has launched itself into the uncharted seas of a full withdrawal from Europe’s most prized postwar institution. In an unprecedented move, the Anglo-American core of the liberal order **appears to have fully reversed course.**

Despite what the backers of Trump and Brexit promise, actually effecting a real withdrawal from these long-standing commitments **will be difficult to accomplish**. That’s because the institutions of the liberal international order, although often treated as ephemeral and fragile, **are actually quite resilient**. They did not emerge by accident; they were the product of deeply held interests. Over the decades, the activities and interests of **countless actors**—corporations, civic groups, and government bureaucracies—**have become intricately entangled in these institutions**. Severing those institutional ties sounds simple, but in practice, **it is devilishly complicated.**

The difficulties have already become abundantly dear with Brexit. It is not so easy, it turns out, to undo in one fell swoop a set of institutional arrangements that were developed over five decades and that touch on virtually every aspect of British life and government. Divorcing the EU means scrapping solutions to real problems, problems that haven’t gone away. In Northern Ireland, for example, negotiators in the 1990s found an elegant solution to the long-running conflict there by allowing the region to part of the United Kingdom but insisting that there be no border controls between it and the Republic of Ireland—a bargain that leaving the EU s single market and customs union would undo. If officials do manage to fully implement Brexit, it seems an inescapable conclusion that the United Kingdoms economic output and influence in the world will fall.

Likewise, the initial efforts by the Trump administration to unilaterally alter the terms of trade with China and renegotiate NAFTA with Canada and Mexico have revealed how intertwined these countries’ economies are with the U.S. economy. New international linkages of production and trade have clearly produced losers, but they have also produced many winners who have a vested interest in maintaining the status quo. Farmers and manufacturers, for instance, have reaped massive gains from NAFTA and have lobbied hard for Trump to keep the agreement intact, making it politically difficult for him to pull off an outright withdrawal.

The incentives for Washington to stay in international security institutions are even greater. Abandoning NATO, as candidate Trump suggested the United States should do, would massively disrupt a security order that has provided seven decades of peace on a historically wartorn continent—and doing so at a time when Russia is resurgent would be all the more dangerous. The interests of the United States are so obviously well served by the existing security order that any American administration would be compelled to sustain them. Indeed, in lieu of withdrawing from NATO, Trump, as president, has shifted his focus to the time-honored American tradition of trying to get the Europeans to increase their defense spending to bear more o the burden. Similarly, major pieces of the nuclear arms control architecture from the end of the Cold War are unraveling and expiring. Unless American diplomatic leadership is forthcoming, the world may find itself thrown back into a largely unregulated nuclear arms race.

The Trump administrations initiatives on trade and alliance politics have generated a great deal of anxiety and uncertainty, but their actual effect is **less threatening**—more a revisiting of bargains than a pulling down of the order itself. Setting aside Trumps threats of complete withdrawal and his chaotic and impulsive style, his renegotiations of trade deals and security alliances can be seen as part an ongoing and necessary, if sometimes ugly, equilibration of the arrangements underlying the institutions of the liberal world order.

Moreover, despite Trumps relentless demeaning of the international order, **he has** sometimes **acted in ways that fulfill**, rather than challenge, **the traditional American role in it.** His most remarkable use of force so far has been to bomb Syria for its egregious violations of international norms against the use of chemical weapons on civilians. His policy toward Russia, while convoluted and compromised, has essentially been a continuation of that pursued by the George W. Bush and Obama administrations: sanctioning Russia for its revisionism in eastern Europe and cyberspace. Perhaps most important, Trumps focus on China as a great-power rival will compel him or some future administration to refurbish and expand U.S. alliances rather than withdraw from them. On the issues that matter most, Trumps foreign policy, despite its “America first” rhetoric and chaotic implementation, continues to move along the tracks of the American-built order.

In other areas, of course, Trump really is undermining the liberal order. But as the United States has stepped back, **others have stepped forward to sustain the project**. In a speech before the U.S. Congress in April, French President Emmanuel Macron spoke for many U.S. allies when he called on the international community to “step up our game and build the twenty-first-century world order, based on the perennial principles we established together after World War II.” Many allies are already doing just that. Even though Trump withdrew the United States from the Trans-Pacific Partnership, the trade deal **lives on,** with the 11 other member states implementing their own version of the pact. Similarly, Trumps withdrawal from the Paris agreement has not stopped dozens of other countries from working to implement its ambitious goals. Nor is it preventing many U.S. states, cities, companies, and individuals from undertaking their own efforts. The liberal order may be losing its chief patron, but it rests on much more than leadership from the Oval Office.

It is easy to view developments over the last few years as a rebuke to the theory of liberalism and as a sign of the eclipse of liberal democracies and their international order. But **that would be a mistake**. Although the recent challenges should not be underestimated, it is important to recognize that they are closer to the **rule** than the **exception**. Against the baseline of the 1990s, when the end of the Cold War seemed to signal the permanent triumph of liberal democracy and the “end of history,” the recent setbacks and uncertainties look insurmountable. In the larger sweep of history, however, Brexit, Trump, and the new nationalism **do not seem so unprecedented or perilous**. The liberal democracies have **survived and flourished** in the face of far greater challenges—**the Great Depression**, the Axis powers, and the international communist movement. There is **every reason** to believe they can outlive this one.

#### Democracy resilient – overwhelming public backing supports gains

Wollack 16 ---- Kenneth, president of the National Democratic Institute, former co-editor of the Middle East Policy Survey, former senior fellow at UCLA’s School for Public Affairs, “How Resilient is Democracy?” This text is the transcript from an interview with Alexander Heffner, PBS – The Open Mind, 10/15, <http://www.thirteen.org/openmind/government/how-resilient-is-democracy/5553/>

Well I think we’re seeing a number of phenomena that take place. Um, first of all you have new democracies around the world, that are struggling to deliver for its people. New institutions, political institutions that for the first time have legitimacy among the people, but in order to succeed and sustain their democratic system, they have to deliver on quality of life issues for, for the entire population. And if those institutions don’t deliver in many of these new democracies that have emerged over the last forty years, uh, then you’re gonna see backsliding and people will either go to the streets or vote for a populist demagogue who promises to bring sort of instant solutions to their problems. And then in non-democratic countries, you have what is called authoritarian learning, and that is autocrats today that are smarter than they were before, uh, that are fearful of diffusion of political power, uh, fearful of losing power themselves. Um, and they are using uh, traditional means and new legal means in which to repress the population, prevent the emergence of civil society, and not to speak of opposition political parties. And then you have a situation that you see in a number of countries in the Middle East where you have a sectarian strife and conflict. Uh, but in all of these situations, what you find is democratic resilience. That people around the world basically want the same thing. They want to put food on their table, uh, they want to have jobs and shelter and they want a political voice. And that, those aspirations and those hopes, uh, and those desires as I said are universal, and if you look at public opinion polls around the world, uh, people do want to have democratic systems that allow them to participate in the political life of their country. And that is, we are in the optimism business, and we believe in people and I think that ultimately those efforts, um, will, will succeed. But they need a lot of support, they need backing, um, uh, in order for uh, some very brave and courageous people to, to move the democratic for—uh, process forward in some of the most unlikely places in the world.

# 2NC

**2NC v PDB**

**Plan and perm include *non-FTC actors*.**

**Involvement of external actors *that are political appointees* creates *perceptions* of external influence. That erodes the signal of FTC independence.**

* The article outlines a difference between political appointees subject to *at-will* removal by POTUS (serve at the pleasure of the President – i.e. Solicitor General, AG, DOJ, etc) **VIS-A-VIS** *for-cause* agency Committee members. FTC Commissioners – an example in the article - operate on 7 year terms, spanning Administrations, and can solely be removed for-cause.

**Kovacic ‘15**

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

On March 16, 1915, the Federal Trade Commission (“**FTC**”) opened for business and began what has proven to be a **uniquely compelling experiment** in economic regulation. The FTC was the first law enforcement agency to be designed “from the keel up” as a competition agency. One vital consideration in forming the new institution was to define its relationship **to the political process**. Among other features in the original FTC Act, Congress provided that the agency’s commissioners would have fixed, seven-year terms and that a commissioner could be removed during his or her term only **for cause**.

Through these and other design choices, Congress created what would come to be known **as the world’s first “independent” competition agency**. The **FTC**’s degree of **insulation from** direct **political control** supplied **an influential model** **of institutional design** and contributed to **the acceptance of a norm**, evident in modern commentary about competition law, that **public** enforcement agencies **should be politically independent**. This Essay examines the relationship of competition agencies to the political process. We use the experience of the FTC to address three major issues. First, what does it mean to say that a competition agency is “independent”? Second, how much insulation from political control can a competition agency achieve in practice? Third, how is the pursuit of political independence properly reconciled with demands that a competition agency be accountable for its decisions—an important determinant of legitimacy—and with the need to engage with elected officials to be effective in performing functions such as advocacy?

In addressing these questions, we seek to develop themes we have addressed in earlier work involving the establishment and operations of the FTC. We approach the topic in the spirit of Professor Herbert Hovenkamp, whose work shows how historical research can improve our understanding of a competition system. Professor Hovenkamp’s scholarship has deeply influenced our approach to this field, and we are honored to participate in a symposium that celebrates his extraordinary contributions to competition law and policy.

II. The Relationship of the Competition Agency to the Political Process: Design Tradeoffs

The suggestion that competition agencies **be independent** reflects a desire to enable enforcement officials to make decisions **without** destructive **intervention** by elected officials or by **political appointees who head other** government **departments**. One method of providing the desired independence from these forms of interference is for the law to state that competition agency leaders can be removed by elected officials only for good cause. Political intervention undermines sound policy making when it causes the agency to bend the application of competition law to serve special interests at the expense of the larger society’s well being. As discussed below, because antitrust-relevant behavior (e.g., a merger) can involve large commercial stakes and affect the economic fortunes of individual firms and communities, the decisions of a competition agency can attract close scrutiny by heads of state, legislators, and cabinet officials.

The need for independence arguably varies according to the function that the competition agency is performing. In carrying out some functions, particularly certain law enforcement functions, the agency requires **greater insulation from political pressure**. For other functions, broader involvement by elected officials in setting the agency’s agenda and determining its choice of projects may be appropriate.

The **utmost degree of independence** is warranted when a competition agency **functions as an adjudicative decisionmaker**. Congress gave the FTC authority to use **administrative** adjudication to **develop norms** of business conduct. After the agency initiates a formal prosecution and functions as a trade court, the legitimacy of its decisions **requires** the **highest degree of assurance** that sound technical analysis, **not political intervention**, determined the outcome.

**2NC v PDCP**

**We compete on three phrases:**

* **“Law v. Reg”** – (POGO ev – below - CP expands and enforcement Agency’s Regs/Rules – not external “Law”)
* **“increase prohibitions”** (selectively under-enforced v. more enforcement)
* **“expand scope”** (“agency interp” vs. “a larger legal scope than presently exists on paper”)

**First, Aff severs *“Law”***

* We aren’t prohibiting or expanding anything (below);
* But *if we were*, it’s NOT an expansion of the LAW:

**P.O.G.O. ‘15**

Project On Government Oversight *- Internally quoting Chief Justice Roberts’ Majority Opinion in US Supreme Court’s 7-2 decision in Department of Homeland Security v. MacLean* (2015) - which dealt largely with statutory interpretation. The Project On Government Oversight (POGO). POGO’s investigators are experts in working with whistleblowers and other sources inside the government who come forward with information that we then verify using the Freedom of Information Act, interviews, and other fact-finding strategies. We publish these findings and release them to the media, Members of Congress and their constituents, executive branch agencies and offices, public interest groups, and our supporters. In addition to quoting the Majority Opinion from the Chief Justice, this article was authored by POGO’s Phillip Shaverdian – who is currently a Judicial Law Clerk within the U.S. District Court System and, at the time of the writing, was an intern within and correspondent on behalf of the Project On Government Oversight - “Agency Rules and Regulations Are Not Laws” - FEBRUARY 10, 2015 - #E&F – modified for language that may offend - https://www.pogo.org/analysis/2015/02/agency-rules-and-regulations-are-not-laws/

Agency Rules and Regulations **Are Not Laws**

In January, in one of the most riveting cases of the current session, the Supreme Court ruled **7-2** in favor of Transportation Security Administration (TSA) whistleblower Robert MacLean, holding that **agency rules and reg**ulation**s** **do not equate** to **laws**. **Chief Justice John Roberts wrote the majority opinion for the Court.** And now that we’ve had time to celebrate the victory for MacLean, it’s time to turn our focus to what Department of Homeland Security v. MacLean may mean for whistleblowers in general.

Current federal whistleblower protection law—the Whistleblower Protection Act (**WPA**)—protects individuals against backlash from employers for disclosing information about “any violation of any **law,** **rule** or regulation” or “a substantial and specific danger to public health or safety” by a federal agency. However, in the same statute there exists an exception for disclosures that are “specifically **prohibited** by ***law***.”

The question the Court sought to answer was whether MacLean’s disclosures were “specifically **prohibited** by ***law***.”

The Homeland Security Act of 2002 states that the **TSA’s** “Under Secretary shall prescribe **reg**ulation**s** prohibiting the disclosure of information obtained or developed in carrying out security” if they decide that the disclosure of that information would “be detrimental to the security of transportation.” The resultant **reg**ulation**s** thus **prohibit** the disclosure of “sensitive security information” (**SSI**) without the proper authorization. Among the various types of information that could be designated SSI is “information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.”

The government argued that **MacLean’s** disclosures were “specifically prohibited by law” and that the WPA did not offer protection **for two reasons: 1)** the disclosure was prohibited by specific TSA **regulations** on SSI; **and** **2)** the **H**omeland **S**ecurity **A**ct authorizes the TSA to promulgate the **regulations**.

The Court addressed and subsequently **rejected both arguments**, affirming the judgment in favor of MacLean by the U.S. Court of Appeals for the Federal Circuit.

The Court **rejected the** government’s **argument** that a disclosure that is prohibited **by regulation** **is** also “specifically prohibited **by law,”** as prescribed by federal whistleblower statute.

The Court elaborates that **in the WPA** Congress repeatedly used the phrase “law, rule, or regulation,” but did not use the same phrase in the statutory language at question in this case. Instead, Congress used the word “law” alone, suggesting that it meant to exclude rules and regulations from the specific stipulation. Congress’s omission of “rule, or regulation” **must be** ~~viewed~~ (**considered**) as **deliberate** because of the use of “law” and “law, rule, or regulation” in the same sentence, as well as the frequent use of the latter phrase throughout the statute. These “two aspects of the whistleblower statute make Congress’s choice to use the narrower word “law” seem quite deliberate,” opined the Court.

After creating an exception for disclosures “specifically prohibited by law,” the WPA also creates a second exception for information “specifically required by Executive order to be kept secret.” The second exception is limited to actions taken by the President, and thus suggests that the first exception and the use of “law” is limited to actions by Congress.

The Court also reasons that “If **‘law’** included **agency rules and reg**ulation**s**, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that ‘specifically prohibited’ whistleblowing.” Instead, “Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.” **The Court concluded** that “it is unlikely that Congress meant to include rules and regulations within the word ‘law’” and that **the specificity of the phrase** “specifically **prohibited by law**” was meant to deliberately **exclude rules and reg**ulation**s**.

* **Second is *“Increase prohibition*”;**

**The underlying conduct’s *already prohibited* – albeit in vague terms which beg questions of enforcement and interpretation. That’s Khan – we’re re-including for clarity, but 1NC read all this:**

**NOTE**: All highlighted portions (green and blue) of this card were read in the 1NC. The 1NC card made solvency and competition claims – and, to offer context, we’ve used blue highlighting to outline the parts of the ev that augment our perm/competition claims.

**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 **F**ederal **T**rade **C**ommission **A**ct **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 **F**ederal **T**rade **C**ommission **A**ct 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 A**ct, 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.

**The CP has an agency alter its enforcement discretion related to an existing statutory prohibition. That’s not an increase in prohibitions.**

**Kusserow ‘91**

R.P. Kusserow, Inspector General, Department of Health and Human Services - 42 Code of Federal Regulations - Part 1001, RIN 0991-AA49 – “Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions” - Monday, July 29, 1991 (56 FR 35952) - AGENCY: Office of Inspector General (OIG), HHS. ACTION: Final rule - #E&F - https://oig.hhs.gov/fraud/docs/safeharborregulations/072991.htm

Response: This regulation covers many categories of business arrangements, providing standards to be met within each safe harbor provision. If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of that provision.

**This regulation does not expand the scope of activities that the statute prohibits**. The **statute itself** describes **the scope of illegal activities**. The legality of a **particular** business arrangement must be determined by comparing the **particular facts** to the proscriptions of **the statute.**

The failure to comply with a safe harbor can mean **one of three things**. **First,** as we stated in the preamble to the proposed rule, it may mean that **the arrangement does not fall within the ambit of the statute**. In other words, the arrangement is not intended to induce the referral of business reimbursable under Medicare or Medicaid; so there is no reason to comply with the safe harbor standards, and no risk of prosecution.

**Second,** **at the other end of the spectrum**, **the arrangement could be a clear statutory violation** and also not qualify for safe harbor protection. In that case, assuming the arrangement is obviously abusive, prosecution would be very likely.

**Third,** the arrangement may violate the statute in a less serious manner, although not be in compliance with a safe harbor provision. Here there is no way to predict the degree of risk. Rather, the degree of the risk depends on an evaluation of the many factors which are part of **the decision-making process** regarding case selection for investigation and prosecution. Certainly, in many (**but not** necessarily **all**) instances, prosecutorial discretion would be exercised not to pursue cases where the participants appear to have acted in a genuine good-faith attempt to comply with the terms of a safe harbor, but for reasons beyond their control are not in compliance with the terms of that safe harbor. In other instances, there may not even be an applicable safe harbor, but the arrangement may appear innocuous. But in other instances, we will want to take appropriate action.

We do not believe the Medicare and Medicaid programs would be properly served if we assured protection in all instances of "substantial compliance," "technical violations," or "de minimis" payments. **Unfortunately**, these are vague concepts, **subject to differing interpretations.** In this regulation, we have attempted to provide bright lines, to the extent possible, for safe harbors in order to provide clarity and predictability as to what conduct is immune from government action. Our endorsement of the concepts mentioned above would only serve to blur these lines and produce litigation as to what "substantial," "technical" and "de minimis" really mean. The OIG therefore declines to adopt these concepts.

**Third they sever “expand scope”.**

**A2: Rule of law**

**CPlan solves legal unpredictability. Section 5 predictability is already low – Cplan brings more cases to resolution, turning uncertainty.**

**Rosch ‘10**

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

To be clear, I do not mean to say that the Commission should simply throw its hands up anytime it faces a hard question of law under Section 2 and retreat to Section 5. We do no one a service if that is our practice.35 What I do mean to say, however, is that there may be instances where ordinarily courts might find that a rule of Sherman Act law would not impose liability, but where the particular facts of a case nevertheless suggest that liability should attach because a firm’s conduct is having anticompetitive effects that are not outweighed by a pro-competitive business justification. In these cases, **if we force the case into a Sherman Act framework** we run the risk of either making **bad law** (to bring an unusual case within the ambit of existing precedent) or, alternatively, losing the case even though the firm’s conduct is causing anticompetitive effects because of binding precedent that is ill suited to judge the conduct at hand.36 In my view, the Commission does a **greater service** by declaring the practice to be an “unfair method of competition,” provided that we clearly articulate – be it in a consent decree or a decision – what that unfair method of competition is and why the conduct constitutes an unfair method of competition so that future parties are on notice. Moreover, **the more of these Section 5 cases we** actually **litigate,** the **more clarity** and finality we can get once and for all on the scope of our Section 5 authority. **That certainty** ultimately **has to be better than the endless debating that the antitrust bar is now engaged in**.

**A2: Roll back**

**YES, they’ll be legal *challengers* – NO, they won’t win.**

**AND, when FTC wins in court, the CP de facto establishes the same legal norm as the Aff.**

**Parra ’17**

Daniel Alejandro Castano Parra. Currently is a Teaching Master in Economic Law with emphasis in Banking and Stock Market Law, Specialization in Financial and Stock Market Law and Specialization in Fintech Law at Externado de Colombia University. Wrote this paper as part of obtaining a JD from California, Berkeley – “A Contribution to the Study of Administrative Power in a Philosophical Perspective” - A dissertation submitted in partial satisfaction of the requirements for the degree of Doctor of Juridical Science – Scientiae Juridicae Doctor (JSD) in The School of Law of the University of California, Berkeley – Summer 2017 - #E&F - https://digitalassets.lib.berkeley.edu/etd/ucb/text/CastanoParra\_berkeley\_0028E\_17330.pdf

**CHAPTER II**

**ADMINISTRATIVE REASONING & DISAGREEMENT ABOUT LAW**

"There is need also for a technique of appraising the work of administrative agencies, and of establishing the utility of such scientific **appraisals.** The generalizations, the philosophizing will gradually emerge from **specific studies**. Intensive studies of the administrative law of the States and the Nation **in practice** will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done. Here, as in other branches of public law, only here probably more so, we must travel outside the covers of lawbooks to understand law" - Felix Frankfurter

This Chapter focuses on the administrative power and disagreement about the law. It questions whether the **admin**istrative **power decides** hard **cases and gets away with it**. **My answer** is that it does **under certain circumstances**. I claim that, like the judiciary, legal institutions **endowed with administrative power** decide hard cases and that their administrative decisions sometimes **become final** when **courts endorse**d **them.** I suggest the administrative power decides complex moral and political philosophy conflicts about the planning and allocation of valuable resources in a democratic polity in the form of theoretical disagreement or meta-interpretive disagreement about law and that these **administrative** decisions may elicit **profound change**s **in the polity as a whole**. It is not my purpose, however, to deny that courts ***may*** **strike down** such administrative decisions or that empirical disagreement about the law may also lead to administrative hard cases. It does, **but** this dissertation focuses on hard cases that spring from theoretical or meta-interpretive disagreement about law, how administrative decision-makers decide them, and how such **administrative interpretations of what the law is** become final **when courts endorse them**.

To do so, I will present four real-world hard cases to portray the nature of the disagreement that gave them rise and to describe how the administrative power decides them. This Chapter proceeds as follows. First, based on the working definition of a hard case that I introduced in Chapter One, I will present four real-world hard cases to describe how legal institutions endowed with administrative power decide hard cases and the complex moral and political philosophy quandaries that give them rise.. Second, in light of the literature of jurisprudence, I will describe the empirical, theoretical, and meta-interpretive disagreements that may arise in legal practice**.** Then, drawing on such theoretical description, I will portray how the administrative power not only decides empirical disagreements, but also theoretical and meta-interpretive disagreements about law. On the account that legal institutions endowed with administrative power decide hard cases, I will describe how they decide complex moral and political philosophy quandaries whose solutions sometimes elicit **profound change**s in a polity.

In fact, the four administrative hard cases that I will present suggest that the parties do not disagree about whether the grounds of law have obtained or whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature. I argue that these hard cases reveal complex moral and political philosophy quandaries whose solution may elicit profound changes in the polity. For that reason, the solution the complex controversies that give rise to these cases **requires** **more than a judgment about** whether the **grounds of law** have obtained **in the particular case**. Put it differently, the answer to these disagreements **lies beyond** the decision about whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature and the constitution. It follows, therefore, that the real point of contention is a theoretical disagreement about what counts as grounds of the law or a meta-interpretive disagreement about the different interpretive methodologies that could be used to **construe a legal norm.**

**----mark-----mark----mark---mark**

I must enter two caveats. First, one is prone to be repetitive in describing in great detail four real-world cases drawn from two different legal systems to portray the different disagreements that gave them rise and how the administrative bodies decided them. Thus, most of the facts that I describe in this section will be recapped in the following Chapters with different purposes that I shall explain on due course. Second, the Colombian General Administrative Procedure Act does not require any particular standing to challenge the validity of an administrative rule. Thus, it is difficult to identify the reasons behind the petitions for judicial review of administrative rules insofar as plaintiffs are not obliged to disclose their policy or moral interests behind the litigation, but only to introduce legal arguments in support of their legal claims. Hence, although it is not possible to identify the interests that lead the plaintiff to challenge an administrative rule's validity, I will trace back the policy origins of the administrative decision to the best of my capacity.

Having explained what this Chapter is about, I must now explain what it is not. Although I will describe in detail the underlying facts and legal arguments of each case, I will not assess the wisdom of the policies as to their causes and consequences. Nor will I discuss whether the decisions rendered by legal institutions endowed with administrative power and later endorsed by courts are good or bad policy.

Four Real-World Administrative Hard Cases

I will start off by analyzing in detail four real-world administrative hard cases in light of the working definition of a hard case that I introduced in Chapter One. My aim is twofold. First, I shall put in practice my claim that hard cases spring from complex political and moral philosophy disagreements regardless of their source. Second, I shall show how legal institutions endowed with administrative power solve them. Such administrative decisions later became final when the higher courts of Colombia and the United States endorsed them.

These four examples, two administrative rulemaking procedures, and two administrative adjudications were chosen based on the following criteria: 1. The cases involve statutes and administrative normative provisions regulating competing interests in fields developing at a vertiginous rate; 2. Due to the complexity and the evolving nature of the field, Congress revisits the matter periodically to assess, amend statutes, and restate the law; 3. Although Congress revisits the field periodically to restate the law, vagueness in the statutes prevails as to certain questions that may arise in the given statutory schemes; 4. Legal institutions endowed with administrative power are called upon to resolve such questions relying on their experience and expertise; 5. To do so, administrative authorities engage in rulemaking, adjudicatory, and enforcement proceedings; 6. Courts review such administrative actions upon petition for judicial review; 7. Courts uphold such administrative actions by deferring to an agency's interpretation of the statutes they administer; 8. Congress revisits the matter and decides to endorse or override administrative interpretations of what the law is.

I call them administrative hard cases because, regardless of legal traditions, constitutional schemes, and institutional arrangements, administrative agencies where called upon to solve the controversies and their underlying **moral and political philosophy** quandaries, which entailed, **in turn**, **significant changes in** the **polities as a whole**. The Higher Courts of the United States of America and Colombia deferred to the administrative interpretations and decisions without any further inquiry into the substance of the questions at issue. The first objection that an administrative law expert would make to this approach is that these cases cannot be labeled as "hard" under the argument that they do not fall under the working definition of a "hard case" that I have described in Chapter One insofar as courts decided them in a relatively uncontroversial fashion. This objection does not hold true because, though they are easy cases for the courts to decide, they were hard for the administrative bodies to resolve. This Chapter focuses on the administrative debates.

**No rollback of Administrative Constitutionalism – too much Administrative & Legal momentum stemming from the New Deal.**

**Rodriguez ‘21**

et al; internally quoting Gillian E. Metzger - Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School. Daniel B. Rodriguez is a Professor at Northwestern University Pritzker School of Law - “Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era” - BYU Law Review - Volume 46 Issue 1 – Spring - Feb-15-2021 - #E&F – continues to footnote #2 . No text omitted – but does not include the table of contents – modified for language that may offend - Available at: https://digitalcommons.law.byu.edu/lawreview/vol46/iss111

Administrative constitutionalism in the United States has been characterized by **tension** and **accommodation**. The tension reflects the unsettled nature of our constitutional scheme, especially with regard to separation of powers, and also the concern with **agency discretion** and performance. **Still** and all, we have **accommodated administrative constitutionalism** in fundamental ways, through a constitutional jurisprudence that, **in the main,** accepts broad delegations of regulatory power to the bureaucracy and an administrative law that oversees agency actions under procedural and substantive guidelines. **This was not always the case**. In this Article , part one of a larger project, we revisit the critical New Deal period to look at the strategies the Congress and the Supreme Court used to resolve controversies over the emerging administrative state. We see the political and legal accommodation as a product of a (mostly) coherent interbranch dialogue, iterative and fueled by strategy. Having surmounted some **important roadblocks** in the first New Deal, this effort ultimately resulted in a scheme that enabled the federal government to accomplish their three critical objectives: to deploy national power to solve new economic problems, to create delegations appropriate to modern needs, and to craft novel administrative instruments to carry out legislative aims aims — all of which required a due amount of legal accommodation, given extant legal doctrine and the interests of the courts.

The long-standing issue of how the modern administrative state emerged from the Sturm und Drang of politics on the one hand and the complex architecture of traditional legal doctrine on the other remains a central question for public law scholarship.1 Many of our leading legal historians have turned their great talents to this question.**2** Standard wisdom notwithstanding, we revisit this perennial topic in part because no consensus exists as to how to answer this question.3

**2**. In addition to sources cited in supra note 1, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995). Moreover, the primary and secondary questions in this vein appear with more or less prominence in books and articles that focus on contemporary legal doctrine. For example, Gillian Metzger’s recent Harvard Foreword recurs to the New Deal period to articulate anew the case for a **well-fortified** **consensus** ~~view~~ (perspective) of the **durability of administrative constitutionalism.** Gillian E. Metzger, 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1 (2017). Calling the administrative state “constitutionally obligatory,” she notes that these legislative delegations of power to agencies “are here to stay.” Id. at 72. To be sure, the modern literature does not want for **full-throated** critiques of the administrative state, looking with particular ire at the world wrought by the New Deal’s accommodation to broad administrative power. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); D.A. Candeub, Tyranny and Administrative Law, 59 ARIZ. L. REV. 49 (2017); Richard A. Epstein, The Perilous Position of the Rule of Law and the Administrative State, 36 HARV. J.L. & PUB. POL’Y 5 (2013). However, **the constitutional objections** have largely been resolved in **favor of administrative constitutionalism**, and there is little reason to believe that **even the most vigorous contemporary attacks** on the “dark state” will unwind this situation. See Adrian Vermeule, Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State, 130 HARV. L. REV. 2463, 2465 n.3 (2017) (comparing administrative state skepticism to “believing in UFOs or watching dystopian movies”); see also EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005); Cass R. Sunstein & Adrian Vermeule, The Morality of Administrative Law, 131 HARV. L. REV. 1924 (2018).

**A -- Prefer comparative ev -**

* The values of the Aff’s precedent advantage are better solved through agencies – NOT by ideological courts.
* Cites the example of pregnancy discrimination – where the court got downstream assessment wrong… and agencies did not;
* Broadens that example to argue that agency expertise allows them to consider the downstream advs and disads – meaning they better balance all competing Constitutional issues.

**Metzger ‘13**

Gillian E. Metzger - Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School. “Administrative Constitutionalism”- Texas Law Review – Vol 91 - #E&F – modified for language that may offend - https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1744&context=faculty\_scholarship

Finally, administrative constitutionalism in its judicial guise is also subject to criticism. On the one hand, judicial development of administrative law doctrines represents a form of federal common law, one largely untethered from statutory text and not constitutionally required, albeit responsive to underlying constitutional values.134 It therefore ~~runs into~~ (encounters) criticism as unauthorized judicial lawmaking, criticism lodged at federal common law generally.135 A similar complaint could be raised against judicial use of ordinary administrative law to encourage greater administrative constitutional engagement, on the grounds that doing so represents an unwarranted intrusion on the executive branch. Yet such judicial encouragement of administrative constitutionalism could also be attacked from the opposite angle, on the grounds that the courts are foregoing their institutional responsibility to establish and enforce constitutional limits on government.136

B. Administrative Constitutionalism's Virtues

Such is **the central** normative **critique** of administrative constitutionalism. **But is it persuasive?** My own view is that administrative constitutionalism is more likely to advance congressional purposes than undercut them, and the same is true about its effect on constitutional structure and values. In the end, this question of administrative constitutionalism's effects **is an empirical one**, which is why the increasing study of specific instances of administrative constitutionalism is particularly valuable. My focus here, however, is on offering a defense of administrative constitutionalism largely based on its hypothetical effects, as well as its concordance with constitutional principle and structure.

One initial point worth emphasizing is that **agencies' virtues and vices as constitutional interpreters need to be assessed in** **comparative perspective**, more specifically, in **comparison to courts**. The real question is not simply whether agencies will pursue constitutional concerns at the expense of statutory goals or congressional constitutional choices, but rather whether agencies will do so **more than courts** will. Equally important, agencies' performance should not be assessed in isolation because agencies do not act in isolation; instead, they operate in a web of "control relationships"137 that includes oversight by Congress, the President, and the courts. Courts also **do not operate alone**, being subject both to political and agency input in specific cases and **political and popular influence** more indirectly. But these relationships are more attenuated, and courts act more autonomously compared to agencies. At a systemic level, therefore, the question is what overall mix of administrative, judicial, and other forms of constitutionalism is the right one.1

**Framed in comparative perspective**, administrative agencies have several advantages. To begin with, agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate.140 As a result, they are likely to be better at integrating constitutional concerns with the least disruption to these schemes and regulatory priorities. As I have noted elsewhere, "[c]ourts may have greater understanding and appreciation of constitutional values and principles **in general**, but they are less competent [at] balancing constitutional and policy concerns at a more granular level."141 Moreover, this same expertise means that agencies have a better ~~grasp~~ (understanding) of the effect of certain actions, **and thus of their constitutional significance**, than courts do—and greater ability to investigate and assess the factual bases that underlie constitutional claims. The history of the response to pregnancy discrimination by lawyers at the **E**qual **E**mployment **O**pportunity **C**ommission and **the Supreme Court** is a case **in point**. As Eskridge and Ferejohn detail, the EEOC lawyers' appreciation of the impact of pregnancy discrimination on women's careers, as well as their understanding of Title VII as aimed at protecting women's employment and of pregnancy as inseparable from sex for equal protection purposes, led to the inclusion of pregnancy discrimination as presumptively sex discrimination in the EEOC's guidelines.143 By contrast, the Court famously ~~viewed~~ (considered) pregnancy discrimination as simply a distinction drawn between pregnant and nonpregnant persons and **not sex discrimination** in violation of equal protection or Title VII144—a ~~view~~ (perspective) that Congress expressly rejected shortly thereafter by enacting the Pregnancy Discrimination Act.145

The pregnancy discrimination saga is useful in another important respect, in that it resists the assumption that agencies are deviating from their role as Congress's faithful agents in taking constitutional concerns and values into account. No doubt, there are occasions where injection of particular constitutional concerns may be hard to square with a given statutory regime. But it also seems plausible that in many contexts Congress would be willing to trade more vigorous enforcement for greater administrative attention to constitutional concerns, especially if the agency believes judicial trimming or invalidation of the statute on constitutional grounds might otherwise occur. This is, in fact, an assumption often invoked to justify judicial application of the constitutional avoidance canon.146 Some scholars disagree, arguing that "Congress would very likely prefer the Executive Branch to enforce its legislation according to its best understanding of Congress's intent, and then to let the courts sort out the constitutional issues as needed."147 But even this more skeptical approach would still leave room for administrative constitutionalism if the agency believed that Congress did in fact intend it to take the relevant constitutional concerns at stake seriously. And the fact that agencies are often deeply engaged in development and enactment of legislation may give them greater knowledge of Congress's approach to the constitutional matters involved.148

Equally important, administrative constitutionalism accords with, and indeed **fosters**, our **constitutional structure**. The reality is that most governance **today** occurs at the administrative level. Agencies often operate under broad delegations of authority that grant them substantial policymaking and enforcement discretion.149 Despite ongoing claims that this arrangement is unconstitutional, it has become **a hard-and-fast feature** of the nation's constitutional landscape.150 Rather than representing yet another manifestation of this illegitimate transfer of authority to unaccountable administrative hands, administrative constitutionalism ~~stands~~ (represents) as a **necessary corollary** of the reality of administrative government:

As those primarily responsible for setting governmental policy, agencies should have an obligation to take constitutional norms and requirements seriously in their decisionmaking. Such an obligation can be inferred simply from the structure of our constitutional order, under which the Constitution governs all exercises of governmental authority and all government officials have an independent duty to support it. It could also be seen as a condition of delegation.... [I]f Congress has an independent .. . obligation to take constitutional norms and values into account, . .. then the constitutional price of delegation should be that congressional delegates face this obligation too.

**Put simply**, in an administrative world administrative agencies **must become a locus for independent constitutional enforcement** **to do justice** to the principle of constitutionally constrained government.

**B – *partisanship*, *tenure*, *backgrounds,* and *speed*.**

**Ross ‘15**

BERTRALL L. ROSS II - Assistant Professor of Law, University of California, Berkeley School of Law – “EMBRACING ADMINISTRATIVE CONSTITUTIONALISM” - BOSTON UNIVERSITY LAW REVIEW - Vol. 95 - #E&F – modified for language that may offend - https://www.bu.edu/bulawreview/files/2015/03/ROSS.pdf

Different institutions have different capacities to use the modes of constitutional analysis to adapt constitutional meaning. **Judicial constitutionalism** has frequently adapted the Constitution to changing societal contexts by adjusting constitutional principles. Courts adjust constitutional principles by broadening or narrowing them, or shifting them entirely to accord with different points on the textual interpretive spectrum. But **there are limits to this court-centered form of adaptation**. The combination of the **limited political backgrounds of justices,** their **long tenures on the bench**, and **partisan** judicial entrenchment results in justices who are often considerably removed from changes in societal contexts.23 In addition, broader public dialogue about constitutional principles in changing societal contexts usually does not engage important questions about the constitutional applications that often shape the principles.24 This can produce constitutional principles that **bear little resemblance** to that which the People **initially agreed** upon and continue **to promote**.

**In contrast to courts**, agencies update constitutional meaning primarily by shifting their applications of constitutional principles. Agencies are able to update constitutional applications **more speedily than courts,** and they are more connected to public sentiment and evolving societal settings. Often, agencies’ constitutional applications diverge from the Court’s. When these two sets of constitutional applications co-exist, a process of constitutional experimentation can occur. The People can compare the operative effects of the different constitutional applications and evaluate them against the relevant constitutional principle. Constitutional adaptation can then occur through the combination of popular engagement and informed dialogue about what applications best advance constitutional principles in a particular societal context, followed by popular pressure on courts and agencies to adopt these applications.

**And – post-dating distinction**

**Aff Rollback args don’t assume the FTC’s recent recission of 2015 guidance *OR* our Cplan plank that sets a clear interpretation.**

**Salop ‘21**

et al; Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center “A New Section 5 Policy Statement Can Help the FTC Defend Competition” – Public Knowledge – July 19th - #E&F - https://publicknowledge.medium.com/a-new-section-5-policy-statement-can-help-the-ftc-defend-competition-a76451eacb39

We generally agree with the **F**ederal **T**rade **C**ommission’s decision to rescind its 2015 Section 5 Policy Statement. Just as the Department of Justice and Federal Trade Commission Merger Guidelines are regularly updated on the basis of agency experience, legal and economic developments, so should this type of policy statement. Rescinding the old statement is particularly relevant in light of the growing recognition of the hurdles preventing effective antitrust enforcement.

Calls for reform have not come solely from Neo-Brandeisian commentators (including both FTC Chair, Lina Khan, and Tim Wu, now a member of the National Economic Council). The need for reform and a varied set of proposals has also been expressed by economics-oriented commentators, including this group of former Justice Department enforcers, Jonathan Baker and Herbert Hovenkamp, among others. Chair Khan in her statement suggested that the Commission would next consider replacing the Policy Statement with a new statement explaining **how they plan to use Section 5** to increase competition. We think this would **be a valuable way to** show parties and courts what is coming. This article provides several suggestions that would be useful to consider and possibly include in the revised Section 5 Policy Statement. It should not be taken as an exhaustive list; there certainly may be other approaches to a revised statement that could also be effective.

A revised Policy Statement should make it clear that Section 5 is not identical to the Sherman and Clayton Act and that conduct can be challenged as an **unfair** method of **competition** under Section 5 even if it would not violate these other antitrust laws. In fact, even the original 2015 Policy Statement explicitly made this point. But the distinction between Section 5 and these other statutes is often ignored or suppressed by commentators who object to more vigorous antitrust enforcement by the FTC. Eventually, the FTC’s cases and rules under Section 5 will likely face the scrutiny of the courts. At that time, it may be **particularly helpful** to have **a clear** Policy **Statement of how the FTC is** **interpreting** Section 5. This can help maximize the impact the FTC can have, while assuaging concerns of detractors who say there is no limiting principle.

## Case

**5G development is not zero-sum and China innovation is commercial**

**ANG 20** --- YUEN YUEN ANG, Associate Professor of Political Science at the University of Michigan, Ann Arbor, “The Myth of the Tech Race”, Project Syndicate, April 28th 2020, https://www.project-syndicate.org/onpoint/us-china-tech-race-unnecessary-by-yuen-yuen-ang-2020-04

Yet for all the Western paranoia over Chinese ambitions, most analysts have missed an important fact: China’s comparative advantage in technology is **different from that of the US**. Whereas China excels in applying technology to improve business models – for example, in e-commerce and fintech – the US remains the unparalleled world leader in basic scientific research, the foundation of advanced technologies. This fundamental difference **challenges the zero-sum mentality of**ten underlying the **Sino-American tech race.**

Back to Basics

In the West, the term “technology” evokes images of super-intelligent, dazzling inventions like flying cars and thinking robots. During the Cold War, the most vivid sign of technological prowess was the Soviet Union’s launch of satellites into space – the so-called Sputnik moment. But in emerging markets, which have lower average income levels and a lack of basic infrastructure, “technology” is regarded not in utopian terms, but as a pragmatic tool.

Consider the ubiquitous example of mobile phones, a relatively simple device that even the poor can afford to buy. With a phone, one can make calls, access information, borrow micro-funds, and hawk merchandise. The diffusion of this modest technology can subsequently spawn waves of startups in novel domains: fintech, ed-tech, health-tech, and so forth. Beyond the fancy labels, these are all examples of entrepreneurs applying off-the-shelf, widely accessible technologies to enhance the delivery of goods and services. By doing so, they facilitate transactions that spur growth across the economy.

Some of China’s largest and most iconic tech titans – for example, Alibaba, Xiaomi, and Meituan – followed this basic trajectory. Contrary to received wisdom in the West, Alibaba was not a “national champion” handpicked by the Chinese government to succeed. As a private company in a novel industry (e-commerce), it actually faced significant resistance from Chinese authorities. For example, in 2014, state banks tried to block the company’s Yu’e Bao system – which allows users to invest money left over from online payments – by imposing limits on fund transfers into online accounts. According to one senior state media analyst at the time, Yu’e Bao was a “blood-sucking vampire” that must be stopped.

Tech startups like Alibaba thrived not because the state propped them up, but because they tailored their services flexibly to Chinese consumer needs. By contrast, Alibaba’s American counterpart, eBay, insisted on a one-size-fits-all business model and eventually lost the market. As my interviews with Chinese private-sector entrepreneurs have found, the government endorses so-called champions only after they succeeded on their own. Their strength comes from creating value through competition, not state protection.

These examples also show why it is important to distinguish between **seminal and applied innovation**. America is strong in both. And it especially dominates in basic research: its universities lead the world across all scientific fields; its corporate giants invest heavily in research and development for advanced products; and both sectors attract the best global talent. Moreover, US academia and business enjoy a symbiotic relationship, as epitomized by Stanford University’s seeding of the technologies that would later define Silicon Valley.

Chinese state planners know that America’s overwhelming strength in basic research has allowed it to dominate the upstream of the technology supply chain, a position that the US government guards fiercely. In an effort to catch up, China intervened with a bevy of top-down policies to support state-selected high-tech sectors. But this top-level battle for world dominance has obscured China’s real competitive edge: **commercialization**.

New Faces of Innovation

Consider the composition of each country’s tech “unicorns” (private startups with a valuation of at least $1 billion). According to a 2018 Credit Suisse report, only the US has produced more unicorns than China. But the largest share of Chinese unicorns (58%) operate in the e-commerce and gaming sectors, whereas US unicorns are more highly concentrated in AI, big data, robotics, and software. Moreover, while China’s overall spending on R&D is quickly catching up to that of the US, its spending on basic research as a share of GDP has increased only slightly, and remained at less than one-quarter of the US level from 2010 to 2017.

Another telling distinction is the bottom-up emergence of what I would describe as “modular manufacturing” in Shenzhen, a city of 13 million people in Guangdong Province. Once a hub for counterfeiting foreign consumer and luxury goods, Shenzhen has morphed into the “Silicon Valley of hardware,” as one documentary calls it. At Huaqiangbei, a massive marketplace of small vendors, shoppers can buy any electronic part imaginable. And, owing to the emergence of such markets, inventors and entrepreneurs from around the world can create prototypes more cheaply and quickly than anywhere else.

The rise of Shenzhen’s hardware ecosystem has had a global impact. Startups in any country can now create their own brands, produce them in small batches in the city, and then sell to niche markets. One example is Wiko, a smartphone company founded and based in France, whose products are made in Shenzhen. Within two years, reports David Li of the think tank Hacked Matter, the startup captured 18% of the French market, making it the third-most popular smartphone in France (after Apple and Samsung).

In other words, the system of modular manufacturing that sprang up in Shenzhen in recent years is upending the traditional model of global mass manufacturing, which was previously dominated by large multinational companies presiding over a passive chain of suppliers. The ability to launch, brand, and produce a new product is quietly being “democratized” at the global level from a single Chinese city. This creative movement emerged with scant attention, let alone support, from grand strategists in Beijing.

Similarly, the realities of bottom-up Chinese innovation rarely reach the halls of power in Washington, nor do they feature much in mainstream Western media. Instead, analysts continue to describe China’s technological ascent in Cold War terms. A recent commentary in Forbes is a case in point: “This is indeed a Sputnik moment for the US, a wake-up call for the US just as it was when the Soviet Union launched its first satellite, the Sputnik I, and beat the USA into space.”

Stepping Back from the Brink

But the China of 2020 is nothing like the Soviet Union of the post-World War II era. Nor is technology a zero-sum game, where only one county can hit a given target first and “win.” A more balanced assessment of Chinese and US strengths and weaknesses would go a long way toward mitigating an unnecessarily acrimonious and costly rivalry.

Leaders on both sides should understand that countries can and do have different comparative advantages in technology. China excels in **commercialization** and **applied innovation** because it has a massive domestic market and few or no established players in emerging industries. These conditions provide fertile ground for decentralized experimentation. Moreover, as is true in many fast-growing emerging economies, the Chinese private sector is driven by “a culture of hyper-competition,” as one tech businessman put it to me. China today is a place where entrepreneurs aspire to make big money fast.

Unparalleled US leadership in basic scientific research, on the other hand, rests on a longstanding institutional foundation that is reinforced by a culture of freedom to pursue original ideas. Moreover, the US tech sector continues to reap the benefits of the government’s deliberate investments in basic science during the post-war era. According to Vannevar Bush, the director of the Office of Scientific Research and Development under President Franklin D. Roosevelt, US science policy during that period was premised on the belief that “basic research is the pacemaker of technological progress,” and that it should be “performed without thought of practical action.”

**China 5G inevitable but not zero-sum**

**Tyson 18** --- Laura Tyson, former chair of the US President's Council of Economic Advisers, is Professor of the Graduate School at the Haas School of Business and Chair of the Blum Center Board of Trustees at the University of California, Berkeley, “Avoiding the Sino-American Technology Trap”, Jun 18, 2018, Project Syndicate, https://www.project-syndicate.org/commentary/china-trump-tariffs-technology-competition-by-laura-tyson-2018-06

The PCAST report acknowledges that the US cannot **stop China** from pursuing industrial policies to build its advanced technology industries. After all, in the nineteenth century, many countries, including the US, used such policies to build their industrial bases. And, as the threat of recent (now reversed) US sanctions on the Chinese telecoms firm ZTE confirms, China cannot depend on a reliable supply of critical inputs from the US; it must depend on its own capabilities.

Moreover, as the PCAST report notes, Chinese subsidies for science and technology industries are not zero-sum; they can benefit US consumers through innovation, lower costs, and lower prices. The challenge for US policy is to ensure that Chinese policies comply with WTO rules, including the requirement to notify other countries of subsidy programs and the prohibition of zero-sum tactics like IP theft, forced technology transfer, and discriminatory procurement practices.

Finally, the PCAST report underscores the need for the US to respond to China’s challenge in semiconductors with an industrial policy of its own. Such a policy should include lower business taxes, more funding for basic research and development, higher investment in talent development, and federal support for a series of “moonshot” programs in areas like biodefense systems, threat detection networks, and a distributed electric grid. Ultimately, whether the US semiconductor industry withstands the challenge that China poses will depend **not on** America’s success in curbing China’s progress, but rather on its ability to **sustain and support innovation by US companies.**

## 1NR

**cp**

**Epa**

**Not that bad**

**Funk 19** (BY CARY FUNK AND MEG HEFFERON, Pew, “U.S. Public Views on Climate and Energy,” 11/25/19, https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/)//NRG

**Majorities of Americans say the federal government is doing too little** for key aspects of the environment, from protecting water or air quality to reducing the effects of climate change. And most believe the United States should focus on developing alternative sources of energy over expansion of fossil fuel sources, according to a new Pew Research Center survey.

A **majority** of U.S. adults say they **are taking** at least some specific **action in their daily lives** to protect the environment, though Democrats and Republicans remain at ideological odds over the causes of climate change and the effects of policies to address it, according to the survey of 3,627 U.S. adults conducted Oct. 1 to Oct. 13, 2019, using the Center’s American Trends Panel.

**Innovation**

**Patchwork protections are sufficiently pro-competitive – no impact to split**

**BURTON 18** --- MELINDA BURTON associate with Faruki PLL, a complex commercial and business litigation firm, “Surprising or Not: Noerr-Pennington Doctrine Protects Novartis from Two Class Action Antitrust Lawsuits”, SEPTEMBER 24, 2018, https://www.ficlaw.com/blog/business-litigation/archives/surprising-or-not-noerr-pennington-doctrine-protects-novartis-from-two-class-action-antitrust-lawsuits

A defendant accused of violating the antitrust laws has a **powerful, well-established defense**, if it can prove it, of immunity based on the Noerr-Pennington doctrine. This doctrine provides a party from immunity from antitrust liability when it petitions the government for redress under the First Amendment of the United States Constitution. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669, 85 S. Ct. 1585 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523 (1961). Petitioning the government for redress **includes enforcing** one's **intellectual property rights in court.** However, embarking on sham litigation to enforce those intellectual property rights does not count. Nor does the defense include enforcing a patent that was obtained by fraud on the Patent Office. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78, 86 S. Ct. 347, 350-51 (1965). The First Circuit Court of Appeals recently dealt with all of these issues in United Food & Commercial Workers Union & Employers Midwest Health Benefits Fund v. Novartis Pharms. Corp., Case Nos. 17-1714, 17-776.

On August 21, 2018, the First Circuit Court of Appeals issued its Decision affirming the dismissal of two putative class action lawsuits filed against drug maker Novartis Pharmaceutical Company ("Novartis") that alleged antitrust violations arising out of Novartis' allegedly obtaining a patent via fraud and then seeking to enforce that patent through allegedly "sham" patent infringement litigation against manufacturers trying to enter the market to sell a generic version of one of Novartis' drugs. The District Court below granted Novartis' motion to dismiss holding that the Noerr-Pennington doctrine provided Novartis immunity from antitrust liability because the plaintiffs failed to plausibly allege either of the two exceptions to that doctrine -- obtaining a patent through a fraud in the Patent Office or engaging in "sham" litigation to enforce a patent for anti-competitive purposes. Decision, p. 4.

**Petition**

**Democracy resilient –** overwhelming public backing supports gains

**Wollack 16** ---- Kenneth, president of the National Democratic Institute, former co-editor of the Middle East Policy Survey, former senior fellow at UCLA’s School for Public Affairs, “How Resilient is Democracy?” This text is the transcript from an interview with Alexander Heffner, PBS – The Open Mind, 10/15, <http://www.thirteen.org/openmind/government/how-resilient-is-democracy/5553/>

Well I think we’re seeing a number of phenomena that take place. Um, first of all you have new democracies around the world, that are struggling to deliver for its people. New institutions, political institutions that for the first time have legitimacy among the people, but in order to succeed and sustain their democratic system, they have to deliver on quality of life issues for, for the entire population. And if those institutions don’t deliver in many of these new democracies that have emerged over the last forty years, uh, then you’re gonna see backsliding and people will either go to the streets or vote for a populist demagogue who promises to bring sort of instant solutions to their problems. And then in non-democratic countries, you have what is called authoritarian learning, and that is autocrats today that are smarter than they were before, uh, that are fearful of diffusion of political power, uh, fearful of losing power themselves. Um, and they are using uh, traditional means and new legal means in which to repress the population, prevent the emergence of civil society, and not to speak of opposition political parties. And then you have a situation that you see in a number of countries in the Middle East where you have a sectarian strife and conflict. Uh, **but** in all of these situations, what you find is **democratic resilience**. That people around the world basically want the same thing. They want to put food on their table, uh, they want to have jobs and shelter and they want **a political voice**. And that, those aspirations and those hopes, uh, and those desires as I said are universal, and if you look at public opinion polls **around the world**, uh, people **do want to have democratic systems** that allow them to participate in the political life of their country. And that is, we are in the **optimism business**, and we believe in people and I think that ultimately those efforts, um, will, **will succeed**. But they need a lot of support, they need backing, um, uh, in order for uh, some very brave and courageous people to, to move the democratic for—uh, process forward in some of the most unlikely places in the world.

**OV – 2NC-1NR**

**( ) *Prolif* independently cause extinction**

* Prolif = probable scenario for extinction bc of *miscalc*, *user error*, or *unauthorized use*.

**Thakur ‘15**

Ramesh Thakur, Director of the Centre for Nuclear Non-Proliferation and Disarmament in the Crawford School of Public Policy, The Australian National University. 2015. “Nuclear Weapons and International Security.” Routledge

The world faces two **existential threats:** **climate** change and **nuclear Armageddon**. Those who reject the first are derided as denialists; those dismissive of the second are praised as realists. Nuclear weapons may or may not have kept the peace among various groups of rival states; they could be **catastrophic** for the world if **ever used by both sides in a war between nuclear-armed rivals**; and the prospects for their use have **grown** since the end of the Cold War. Even a **limited regional** nuclear war in which India and Pakistan used 50 Hiroshima-size (15kt) bombs each could lead to a **famine** that kills up to a **billion people.** 1 Having learnt to live with nuclear weapons for 70 years (1945–2015), we have become desensitized to the gravity and immediacy of the threat. The **tyranny of complacency** could yet exact a **fearful price with nuclear Armageddon**. The nuclear peace has held so far owing as much to good **luck** as sound stewardship. Deterrence stability depends on rational **decision**-maker**s** being always in office on all sides: a **dubious** and **not very**. **reassuring precondition** It depends equally critically on there being no **rogue launch**, **human error** or system **malfunction**: an impossibly high bar. For nuclear peace to hold, deterrence and fail-safe **mech**anism**s** must work **every single time**. For nuclear Armageddon, deterrence or fail-safe mechanisms need to break down **only once**. This is not a comforting equation. It also explains why, unlike most situations where risk can be mitigated after disaster strikes, with nuclear weapons all risks must be mitigated before any disaster. 2 As more states acquire nuclear weapons, the risks **multiply exponentially** with the requirements for rationality in **all decision-makers**; robust **c**ommand-**and**-**c**ontrol systems in **all states**; **100 percent reliable fail-safe mechanisms** and procedures against accidental and unauthorized launch of nuclear weapons; and **totally unbreachable security** measures against terrorists acquiring nuclear weapons by being able to penetrate one or more of the growing nuclear facilities or access some of the wider spread of nuclear material and technology.

**( ) geoengineering overcompensates – fails and causes extinction.**

**Baum ‘13**

Et al; Dr. Seth Baum is an American researcher involved in the field of risk research. He is the executive director of the Global Catastrophic Risk Institute (GCRI), a think tank focused on existential risk. He is also affiliated with the Blue Marble Space Institute of Science and the Columbia University Center for Research on Environmental Decisions. He holds a PhD in Geography and authored his dissertation on climate change policy: “Double catastrophe: intermittent stratospheric geoengineering induced by societal collapse” - Source: Environment Systems & Decisions - vol.33, no.1 pp. 168-180 - #E&F – available via: https://pubag.nal.usda.gov/catalog/122717

Perceived failure to reduce greenhouse gas emissions has prompted interest in avoiding the harms of climate change via geoengineering, that is, **the intentional manipulation of Earth system processes**. Perhaps the most promising geoengineering technique is **stratospheric aerosol injection** (**SAI**), which reflects incoming solar radiation, thereby lowering surface temperatures. This paper analyzes a scenario in which SAI brings great harm on its own. The scenario is based on the issue of SAI intermittency, in which aerosol injection is halted, sending temperatures rapidly back toward where they would have been without SAI. The rapid temperature increase could be quite damaging, which in turn creates a strong incentive to avoid intermittency. In the scenario, a catastrophic societal collapse eliminates society’s ability to continue SAI, **despite the incentive**. The collapse could be caused by a pandemic, nuclear war, or other global catastrophe. The ensuing intermittency hits a population that is already vulnerable from the initial collapse, making for a **double catastrophe**. While the outcomes of the double catastrophe are difficult to predict, **plausible** worst-case scenarios include **human extinction.** The decision to implement SAI is found to depend on whether global catastrophe is more likely from double catastrophe or from climate change alone. The SAI double catastrophe scenario also strengthens arguments for greenhouse gas emissions reductions and against SAI, as well as for building communities that could be self-sufficient during global catastrophes. Finally, the paper demonstrates the value of integrative, systems-based global catastrophic risk analysis.

**Thumper**

**Non-compete rule**

**Kerkhoff 11/1** “FTC tempts legal fate with power grab” JOHN KERKHOFF, OPINION CONTRIBUTOR — 11/01/21, https://thehill.com/opinion/judiciary/579130-ftc-tempts-legal-fate-with-power-grab?rl=1

Yet, the agency’s latest gambit may be its **most ambitious** to date: The FTC plans to limit (or ban) non-compete and exclusionary contract clauses.

On what authority? That’s unclear. The agency will rely on Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition.” The FTC has traditionally enforced Section 5 on a case-by-case basis through in-house adjudication. It’s never been used to issue rules like the current proposals — for good reason.

Legal precedent and principles pose potentially **insurmountable hurdles** for the FTC. After all, agencies can issue substantive rules only when Congress has conferred the power to do so. And on that score, scant evidence supports such authority. Commissioners point to an obscure provision buried in a section of the FTC Act addressing procedural issues, which says the agency can “make rules and regulations for the purpose of carrying out the provisions of this subchapter.” True, the D.C. Circuit ruled 40 years ago that the language gives the FTC substantive rulemaking power. But today many scholars think the statute extends only to internal procedural processes, not legally binding rules. Indeed, one scholar has called the D.C. Circuit decision “laughable.” (See page 296.)

Yet, that’s the sole source of legal support that Khan could muster in a law review article last year arguing for Section 5 rulemaking. She never grappled with longstanding federalism principles that require Congress to be crystal clear in giving an agency power over subjects usually left to states. As the Supreme Court explained in its August opinion striking down the Centers for Disease Control and Prevention’s (CDC) eviction moratorium, Congress must use “exceedingly clear language” to allow an agency to “intrude into an area that is the particular domain of state law.” Contract law is just so, and it’s hard to see how “unfair methods of competition” provide such clarity.

**What’s more, the Supreme Court has held that nearly identical phrasing in the National Industrial Recovery Act — allowing the executive branch to issue “codes of fair competition” — unconstitutionally transferred the legislative power from Congress to the president, violating the so-called “nondelegation doctrine.” That sounds a lot like Section 5. And, in fact, the court distinguished the FTC Act precisely because FTC enforcement occurred through adjudication, not rules. Rulemaking today could thus revive the long-dormant nondelegation doctrine. That scenario is no fantasy. The high court has recently invited such challenges.**

**Yes, reversible – 2NC/1NR**

**Yes, US modeling’s reversible on this issue:**

**( ) Nations DID model, but that emulation’s STILL OCCURING and attentive to US posture.**

**Nam ‘18**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – This is footnote #26 of the article – and it includes an excerpt from William J. Kolasky, former Deputy Assistant AG. of the Dept’ of Justice - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

26. Many of the ***emergent*** antitrust laws worldwide in recent decades have been modeled after their predecessors in the U.S. and the EU. See, e.g., Kolasky:

Let me turn finally to the new International Competition Network (or ICN). The last decade has seen market principles, deregulation and respect for competitive forces broadly embraced around the world. **Over 90 countries**—accounting for nearly 80 percent of world production (19)—have enacted antitrust laws, and at least 60 have antitrust merger notification regimes. Many of these laws are modeled after the U.S. or EU antitrust laws. **Now the real work begins**. Having convinced **much of the world to structure their** national economies around competition and free markets, we must ensure that antitrust works effectively and efficiently **to deliver what it promises**.

**( ) Pre-empt – the un-underlined parts say “US or EU” – but there’s no flaws with the EU model AND the 1NC Nam ev is too strong on US key.**

**( ) Plus, 1NC Nam is strong on this – here are lines:**

* Says*“to this day”*a central obstacle is the FTC model;
* The author uses the *present tense* when saying “global retreat from internationalism… in the present day … is exacerbated by nationalist competition regimes”

**Doesn’t matter if there’s some lock-in – Nam proves that presently-developing economies are looking at the FTC model – meaning the process is ongoing,**

**We control the vital internal link to agency independence. Freedom from external officials that can be dismissed *by the will of POTUS* is key.**

**Bannan ‘21**

et al; Christine Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy. Prior to joining OTI, she worked as consumer protection counsel at the Electronic Privacy Information Center, where she advocated for stronger privacy regulations before federal agencies and Congress. She is an Internet Law and Policy Foundry Fellow and a Certified Information Privacy Professional (CIPP/US). Bannan earned her J.D. from Notre Dame Law School - “Does Data Privacy Need its Own Agency?”- Last updated on June 9th, 2021 - #E&F - https://www.newamerica.org/oti/reports/does-data-privacy-need-its-own-agency/introduction

Agency independence **depends** on the extent to which the executive branch can direct the work of the agency.110 While there is no one specific feature of independence common to all independent executive agencies, there are agency design choices that make an agency more independent or less independent.111 A **central** determinant of agency independence is the extent to which the president can remove the leadership personnel: **at will,** **meaning for any reason**, or **for cause**, **meaning only for** “inefficiency, neglect of duty, or **malfeasance in office.”**112

Two Supreme Court cases challenging the independence of the FTC and CFPB have made it clear that there are two constitutionally permissible administrative agency models: either an agency is led **by a single director** serving **at the will** and direction **of the president** or an agency is led by **a multi-member body** that can only be removed **for cause.** The 1935 case Humphrey’s Executor v. United States held that the FTC structure was constitutional because “Congress could create expert agencies led by a group of principal officers removable by the President only for good cause.”113 The 2020 case Seila Law v. Consumer Financial Protection Bureau held that the CFPB structure was unconstitutional because an independent administrative agency cannot be led by a single director, therefore any agency with a single director must be removable at will by the president.114

**link**

**Aff links and is mutually exclusive – FTC can’t initiate Constitutional challenges. This ensures that – in the enforcement phase – the FTC would never be in the drivers seat relative to other actors.**

**Crane 19**

Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, 60 Wm. & Mary L. Rev. 1175, 2019, Lexis

D. Interactions Between Constitutional and Antitrust Levers

The final category for comparing the constitutional and antitrust tools as instruments for challenging anticompetitive state and local [\*1211] regulations concerns the potential interaction between the two doctrines. Procedurally and institutionally, the two theories would need to run in parallel--they **could not be brought simultaneously** in the same case. The FTC **cannot bring constitutional challenges**, and **no one other than the FTC** can bring a case under Section 5 of the FTC Act. 177 **Therefore,** to speak about the two theories as either substitutes or complements is not to imagine that they ever **could be asserted** in the same case or by the same set of actors. Rather, it is to observe that advocates of enhanced scrutiny of anticompetitive state and local regulations have **choices** about how and where to push for heightened review.

**The Perm is more than mutually exclusive – it’s the worst of both world. It whittles down the Constitutional protection in the enforcement phase AND it does not boost FTC independence.**

**Crane 19**

Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, 60 Wm. & Mary L. Rev. 1175, 2019, Lexis

Someone strongly committed to a systematic challenge of anticompetitive regulations might advocate for a **simultaneous charge on both fronts**--reinvigorating equal protection, substantive due process, and perhaps negative Commerce Clause review, even while also curbing the Parker doctrine and empowering the FTC to undertake more trenchant review. However, **even if** such an approach were **desirable in principle**, there is reason to believe that **it would be politically, institutionally, and doctrinally challenging** to ramp up both tools at once. As is often the case when expanding potency of legal doctrines or institutions runs into background concerns about overreaching--here Lochner--courts and other agencies of government have a tendency to **justify timidity** by observing that the problem in question could be **better addressed by another institution** or legal doctrine. 178 Thus, presented with the possibility of reinvigorating constitutional restraints on competitively parochial regulations, the courts might demur on the grounds that, if there is a serious problem, then it can be addressed by an administrative institution such as the FTC, thereby avoiding the specter of Lochner. Conversely, if urged to whittle down Parker immunity in an FTC case, the reviewing courts might also demur, observing that any sufficiently serious problem might be addressed under constitutional principles.

**Perm links - Section 5 + other actors allows private causes of action**

**Creighton ‘9**

et al; Susan A. Creighton and Thomas G. Krattenmak - Susan A. Creighton was Director, Bureau of Competition, Federal Trade Commission from 2003–2005, and is a Partner at Wilson Sonsini Goodrich & Rosati. Thomas G. Krattenmaker was an attorney in the Bureau of Competition from 2003–2007, and is Of Counsel with Wilson Sonsini Goodrich & Rosati. This article is based on the authors’ presentation at the FTC Workshop on Section 5 as a Competition Statute, Oct. 17, 2008 - “Appropriate Role(s) for Section 5” - The Antitrust Source, February 2009 - #E&F - https://www.wsgr.com/a/web/26/creighton0209.pdf

Similarly, the state action doctrine24 reflects the very sound principle that the antitrust laws should not be read to impose on the states the laissez-faire regime of Lochner v. New York.25 If states want to displace competition and actively supervise the resulting regulated markets, then the Sherman Act will not be read to forbid that, just as the demise of Lochner means that the due process clause no longer stands as a barrier to states opting for regulation over competition. Again, **however**, we wonder whether **Section 5** must have a reach in this area that is precisely coterminous with that of **Section 1**. For example, what about the state supervision that is in practice— for want of a better word—a sham? In truth, this is what the FTC confronted in the Kentucky Movers case.26 What if the Commission examined the application, on very specific facts and on a case-by-case basis, of states' certificate of need statutes?27 Why could the FTC not be permitted to void a specific application of such a statute in order to protect against what turned out to be, upon inspection, nothing more than a raw extension of market power? Particularly where the remedy is a simple cease and desist order, such a case seems to us potentially compelling. Further, providing the FTC—**and only the FTC**—with **authority** to examine with greater care the justification for a state's decision to **displace competition** as a disciplinary force, and the effects on consumer welfare of that displacement, should avoid fears of **permitting anyone** aggrieved by a regulatory regime **anywhere** in the economy to challenge that regime as a violation of the Sherman Act.

## Case Cards