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Debt Ceiling DA

**Biden’s PC is key to swing 10 Reps to pass debt ceiling in the CR**

**Everett et al 9-16**-21 (John Burgess Everett, co-congressional bureau chief for POLITICO, specializing in the Senate, BA journalism, University of Maryland College Park; and Laura Barrón-López, White House Correspondent for POLITICO, formerly covered Democrats for the Washington Examiner, Congress for HuffPost, and energy and environment policy for The Hill, BA political science, California State University, Fullerton; “Dems call in big gun as they face huge Hill tests,” POLITICO, 9-16-2021, https://www.politico.com/news/2021/09/16/biden-influence-capitol-democrats-511952)

The next few months will push President Joe **Biden** to wield **every drop of his influence** over Congress.

Democrats are plunging into messy internal debates over **social programs** from child care to drug pricing as they try to beat back GOP resistance on **voting rights** while steering the United States away from **economic catastrophe**. And in order to avert a government shutdown, avoid a **debt default** and fight ballot access restrictions passed in some GOP states, Democratic lawmakers are urging Biden to get more directly involved.

Senate Majority Whip Dick Durbin said that Biden, “more than anyone,” maintains sway over his caucus’s 50 members: “There is **no comparable political force** to a president, and specifically Joe **Biden at this moment**.”

**Biden** appears to be **answering the call**. The president is getting **increasingly involved** in Congress’ chaotic fall session as he battles **sagging approval ratings**, heightened concerns around the **pandemic** and some internal criticism over his withdrawal from **Afghanistan**.

Rebounding as the midterms draw nearer will depend on whether his big social spending ambitions are realized and if his party can dodge a government shutdown and credit default. But even if he has success on those fronts, he still needs to maintain momentum on Democrats’ elections legislation, which Republicans look certain to torpedo.

“I have full faith and confidence in Joe Biden in all of this,” said House Majority Whip Jim Clyburn, who's pressed Biden to endorse a filibuster carve out for voting rights legislation. “He is working this … and that’s how it should be.”

Biden met with two key Democratic holdouts on his domestic spending agenda on Wednesday, part of a sustained push to keep Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) on board with his legislative program. Biden’s met with Sinema four times this year, in addition to telephone calls made between the two, and has spoken to Manchin a similar number of times.

“Now is the time” for Biden to jump full-force into the reconciliation conversation, said Sen. Tim Kaine (D-Va.). And the White House made clear that Biden is diving into the series of tricky issues.

Andrew Bates, a spokesperson for Biden, said that Biden and his administration "are in frequent touch with Congress about each key priority: protecting the sacred right to vote, ensuring our economy delivers for the middle class and not just those at the top, and preventing needless damage to the recovery from the second-worst economic downturn in American history.”

To help corral all 50 Senate Democrats for the social spending bill, the president and his party need to create an “echo chamber” around its substance, said Celinda Lake, a pollster on Biden’s campaign. But that won't be easy. Manchin has told colleagues he’s worried about whether the bill’s safety net, climate action and tax reforms will be popular in his state, according to one Senate Democrat. He's also said he won't support a measure at the current spending level: $3.5 trillion.

If Biden can hammer home the popular aspects of the spending plan, it may help assuage Manchin and improve his whip count in Congress. Underscoring the degree to which he's become the face of the multi-trillion dollar reconciliation bill, a Democratic aide said the party is increasingly seeking to frame it as Biden’s agenda, not that of Sen. Bernie Sanders (I-Vt.) or any single Democrat.

“People think they like the reconciliation package, but they really don't know what's in it,” said Lake, who added that her polling shows popularity for the measure, particularly among women and seniors.

The coming months will also **challenge Biden’s relationship with Rep**ublicans, who are **threatening to block** a **debt limit** hike after many of them supported a suspension or increase three times under former President Donald Trump. Biden campaigned as a Democrat who could work with Republicans, and he succeeded this summer by rounding up 19 Senate GOP votes for a $550 billion infrastructure bill.

Yet he’s running into a brick wall in convincing Senate Minority Leader Mitch McConnell to provide at least **10 GOP votes** to lift the nation's borrowing limit. Republicans say Biden’s dip in the polls isn’t driving their strategy on the debt ceiling. But it’s not helping either.

“I don’t think anything in the last month has increased the likelihood that he can now create an atmosphere of: Let’s work together,” said Sen. Roy Blunt (R-Mo.), who voted for the infrastructure bill and debt ceiling increases under Trump.

The White House is, **so far**, sticking by its plan to try and call McConnell’s bluff. Aides in the West Wing consider **attaching** a **debt ceiling** suspension or increase to a government **funding** measure the best way to **pressure Rep**ublicans on the routine step required by law. **Should that approach fail**, they may be **forced to separate** the two fiscal measures to avert a shutdown.

On the **debt limit**, congressional **Democrats are in lockstep** with the administration's strategy. But they're looking for Biden to exhibit more of his arm-twisting and back-slapping skills on their social spending plan and their bid to shore up voting rights protections.

**Biden** “knows better than anyone the **power of the** United States [**presidency**] in **persuading** and sometimes **cajoling** the key members of Congress, when push comes to shove,” said Sen. Richard Blumenthal (D-Conn.).

**Plan necessarily drains PC – trading off with unrelated agenda items.**

**Carstensen ‘21**

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14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited **at best.** In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would **have to** **trade off other goals**, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect **to give up stricter competition rules** in order to achieve **other legislative priorities.**

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this **requires** a willingness to take major enforcement risks, **to invest significant political capital** in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

**Collapses global finance**

**Hanlon 9-13**-21 (Seth Hanlon, senior fellow for Economic Policy at the Center for American Progress, former special assistant to the president for economic policy at the White House National Economic Council, where he coordinated the Obama administration’s tax policy, JD Yale Law School, BA Harvard University, “Congressional Republicans Must Not Play Political Games With the Debt Limit,” Center for American Progress, 9-13-2021, https://www.americanprogress.org/issues/economy/news/2021/09/13/503720/congressional-republicans-must-not-play-political-games-debt-limit/)

**Ten years ago**, the Republican leaders of the U.S. House of Representatives **risked** an **unthinkable economic catastrophe** in a reckless attempt to gain leverage in budget negotiations. They threatened to block an increase in the U.S. debt limit—a routine and necessary step that enables the government to make ongoing payments required by law without defaulting. The **crisis was averted**, **but** the episode **caused significant harm** to the economy.

The debt limit needs to be raised again this fall, most likely in October. But in recent weeks, 106 Republican House members and 46 Republican senators, including Senate Minority Leader Mitch McConnell (R-KY), have said they will not vote for a debt limit increase. They claim that President Joe Biden and the congressional majority bear sole responsibility for taking the necessary action to avoid default. These members of Congress’ position is deeply hypocritical: As this column explains and Figure 1 helps illustrate, many of their own actions and policies have made the debt limit increase necessary. Their position is also terribly irresponsible because failing to raise the debt limit would cause catastrophic harm to the entire country.

Figure 1

[FIGURE 1 OMITTED]

Raising the debt limit is needed to preserve the full faith and credit of the United States

One of the **bedrocks** of the **U.S. and world economy** is the full faith and **credit of the U**nited **S**tates**:** the **secure expectation** that the U.S. government **will pay** its obligations **in full** and **on time**. The United States’ **rock-solid credit allows financial markets to function** and the country to pay low interest, or even negative real interest, to bondholders based on the certainty that they will be paid interest and principal on time. It also gives Americans, such as Social Security beneficiaries, veterans, military and federal civilian employees, beneficiaries of federal programs, and countless others, the security of knowing that they will receive the payments they rely on and are entitled to.

The United States has never defaulted on its obligations. The closest thing was a minor technical snafu in 1979 that was quickly fixed.

From time to time, Congress must raise the debt limit to prevent the country from defaulting. The debt limit is a 104-year-old provision that places a dollar cap on the total amount of outstanding debt that the Treasury Department can have to finance the government’s ongoing legal obligations. The debt limit is an unnecessary historical relic; almost no other comparable countries have one. The actual public debt is determined not by the debt limit but by the substantive spending and revenue laws that Congress passes.

In practice, the debt limit serves little function other than to potentially enable factions in Congress to force the United States to default on obligations it has already incurred—if they are reckless enough to do so.

The debt limit debacle of **2011 must not be repeated**

Before 2011, parties in Congress never seriously threatened to force the United States into default to extract concessions. But then, the House Republicans’ reckless gambit brought the country to the brink of disaster. Even though the United States narrowly avoided default, the episode raised costs of borrowing for the government, private businesses, and homebuyers, and it slowed the already struggling economic recovery by undermining consumer and business confidence.

No good came out of the 2011 crisis. The resulting agreement produced an ill-conceived budget “sequester” that further slowed the economic recovery and resulted in chronic underfunding of key priorities.

Since 2011, every time the debt limit has needed to be raised, Congress has raised or suspended it without incident and on a bipartisan basis. Congress did so on a bipartisan basis seven times since that year: in 2013 (twice), 2014, 2015, 2017, 2018, and 2019.\* Then-President Barack Obama took the position after 2011 that he would never again negotiate over the debt limit. Similarly, the Trump administration repeatedly urged Congress to pass “clean” debt limit increases—that is, debt limit increases without conditions.

A majority of Senate Republicans, including then-Majority Leader McConnell, supported suspending the debt limit all three times it was needed under Trump.\* The most recent time, in 2019, McConnell explained:

[The debt limit suspension] ensures our federal government will not approach any kind of short-term debt crisis in the coming weeks or months. It secures our nation’s full-faith and credit and ensures that Congress will not throw this kind of unnecessary wrench into the gears of our job growth and thriving economy.

Raising the debt limit is just as imperative now as it was in 2019. The only difference in 2021 is that a Democrat sits in the White House.

A U.S. default would be catastrophic

When the United States reaches the debt limit, the Treasury Department cannot issue additional debt and therefore risks running out of cash. With the debt at the limit, the Treasury is now buying time through previously used accounting moves known as “**extraordinary measures**.” Unfortunately, those measures will probably **only last into October**, according to Treasury Secretary Janet Yellen. At that point, the government will not be able to meet its ongoing legal obligations. It would default. And while no one knows precisely what that could mean, the consequences could entail:

* Social Security checks stopping, putting the livelihoods of millions at risk
* The military and federal workers not receiving their paychecks
* Providers such as hospitals and doctors not being paid for services provided under Medicare and Medicaid
* People filing taxes on extension this fall not getting the refunds they are owed, and monthly child tax credit payments ceasing
* Countless families and businesses being thrown into turmoil as they are stiffed on many other kinds of payments
* Critical government services shutting down

In addition, a U.S. **default would cause chaos in global financial markets**. Treasury bonds set the benchmark for the risk-free interest rate—and if the government suddenly defaults on the payments on those bonds, the financial system would be fundamentally uprooted. The **financial system** could **melt down even worse than** it did in **2008**, **drying up credit** and **grinding commerce to a halt**.

As Treasury Secretary Yellen told Congress in June:

Failing to increase the debt limit would have **absolutely catastrophic economic consequences**. It would be utterly unprecedented in American history for the United States government to default on its legal obligations. I believe it would precipitate a financial crisis. It would threaten the jobs and savings of Americans, and at a time when we are still recovering from the **COVID pandemic**.

Mark Zandi, chief economist at Moody’s Analytics, said: “It would be **financial Armageddon**. It’s complete craziness to even contemplate the idea of not paying our debt on time.” And JPMorgan Chase CEO Jamie Dimon said that a U.S. default “could cause an **immediate, literally cascading catastrophe of unbelievable proportions** and damage America for 100 years.” The American Enterprise Institute’s Michael Strain emphasized, “**Even edging close** to defaulting is **dangerous**,” and with **as much as a temporary default**, the “unthinkable might happen.”

**Cascades to multiple intersecting existential risks** – including nuclear wars, environmental destruction, and critical infrastructure – **AND turns case** – including implementation and enforcement capacity, alliances and authoritarianism

--VUCA = volatility, uncertainty, complexity, and ambiguity

--JIT = just in time

**Maavak 21** (Mathew Maavak, consultant at Risk Foresight, specializing in Strategic Foresight, Contingency Planning, Perception/Crisis Management, Energy and Resource Geopolitics, Defense and Security Analysis, PhD policy studies, Universiti Teknologi Malaysia, MA International Communication, University of Leeds, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?” Salus Journal, 9(1), 2021, https://salusjournal.com/wp-content/uploads/2021/04/Maavak\_Salus\_Journal\_Volume\_9\_Number\_1\_2021\_pp\_2\_17.pdf)

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a **global financial crash** of a **previously unprecedented scale** is highly probable” by the mid-2020s. This will lead to a **trickle-down meltdown**, **impacting all areas** of human activity

[FIGURE 1 OMITTED]

Figure 1: Systemic Emergence of Global Risks

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

**Economic stressors**, in transcendent VUCA fashion, may also induce **radical geopolitical realignments**. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with **two global Titanics** – the **U**nited **S**tates and **China** – **set on a collision course** with a **quadrillions-denominated iceberg** in the middle, and a **viral outbreak** on its tip, the **seismic ripples will be felt far, wide and for a considerable period**.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current **global economic system** will be weakened by **rising nationalism** and **autarkic demands**. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, **COVID**-19 is **not the root cause** of the current global economic turmoil; it is merely **an accelerant** to a burning house of cards that was **left smouldering since** the **2008** Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

**What happens to the environment when our economies implode?** Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? **Economic stressors**, workforce demoralization and rampant profiteering – **rather than** manmade **climate change** – arguably pose the **biggest threats to the environment**. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), **Chernobyl** (1986), **Deepwater Horizon** (2010) or **Flint** water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the **Fukushima** nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

**Environmental disasters** are **more attributable** to Black Swan events, **systems breakdowns** and corporate greed rather than to mundane human activity.

Our **JIT** world **aggravates** the **cascading** potential of **risks** (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal **boon for organized crime** elements. Throughout 1980s, the Calabria-based ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. **Immiserated societies**, in stark **defiance of climate change diktats**, may resort to **dirty coal plants** and **wood stoves** for survival. **Interlinked ecosystems**, particularly **water resources**, may be **hijacked by nationalist s**entiments. The **environmental fallouts** of **critical infrastructure** (CI) **breakdowns** loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The **primary catalyst behind WWII** was the **Great Depression**. Since history often repeats itself, **expect familiar bogeymen to reappear** in societies **roiling with impoverishment** and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary **geopolitical risks** include a possible **Iran-Israel war**; **US-China military confrontation** over **Taiwan** or the **S**outh **C**hina **S**ea; **No**rth **Ko**rean **prolif**eration of **nuclear** and **missile tech**nologies; an **India-Pakistan** **nuclear war**; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a **nuclear confrontation** between **NATO and Russia**. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction-adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

Geopolitics will still be dictated by major powers. However, how will the vast majority of nations fare during this VUCA decade? Many “emerging nations” have produced neither the intelligentsia nor industries required to be future-resilient. Raw materials and cheap labour cannot sustain anaemic societies in a volatile world. Advances in material sciences and robotic automation as well as technological “ephemeralization” (Fuller, 1938; Heylighen, 2002) may shift manufacturing back to the Developed World.

In an attempt to mask the looming redundancy of these nations, untold billions have been wasted on vanity studies, conferences and technological initiatives drawn up by an army of neoliberal experts and native proxies. Risks were rarely part of the planning calculus. National and regional blueprints ranging from Malaysia’s Vision 2020, Saudi Vision 2030, ASEAN 2025 to Africa 2030, amongst others, will fail just as their innumerable precursors did.

The author defines a redundant nation as one which persistently lacks a comprehensive brain bank and an adaptive governance structure in order to be future-resilient. Redundant nations are preludes to failed states. They will lack native ideations and coherent policies that are critically needed in a VUCA decade. While policies intended to “promote growth in developing countries” had traditionally acted “as agents for conflict prevention” (Humphreys, 2003), the trade-off was often bureaucratic overgrowth, corruption, ethnoreligious discrimination and resource wastages.

Attempts to re-use these nations as geopolitical proxies a la the Cold War may prove too costly for potential sponsors. The Fat Leonard scandal (Whitlock, 2016) in Southeast Asia – which entrapped senior US naval officers in a web of sleaze – may be a harbinger of similar breaches on friendly territory, particularly as China’s Belt and Road Initiative (BRI) challenges US geopolitical hegemony worldwide. The BRI however snakes through many potentially redundant nations and may expose China to a “death by a thousand cuts” via geo-economic extortion. Beijing’s recent attempts to portray itself as a humanitarian superpower has somewhat backfired after numerous defects were discovered in its “medical aid” exports (Kern, 2020).

Ultimately, one should not underestimate the possibility, however remote, of national boundaries being redrawn before the Great Reset period is over. The global map was different only 100 years back. The once-mighty Soviet Union no longer exists while its former nemesis, the United States, faces social clefts of ominous proportions. Alarming parallels are now being drawn between the inauguration of President Abraham Lincoln on March 4, 1861 – which led to the US civil war – and the swearing in of Joe Biden as 46th President of United States on Jan 20 2021 (Waxman, 2021). How will a **weakened U**nited **S**tates affect **NATO** and the **larger** **Western-led** **global alliance**?

SOCIETAL

The WEF (2017) had pencilled “global social instability” as the biggest threat facing our collective future. A similar outcome was gamed out in a 2007 study by the Development, Concepts and Doctrine Centre at the United Kingdom Ministry of Defence (DCDC, 2007).

According to Peter Turchin (2016), a professor of Evolutionary Biology at the University of Connecticut, the **U**nited **S**tates may experience “a period of **heightened** social and political instability during the 2020s” – marked by **governmental dysfunction**, societal **gridlock** and **rampant political polarization**. To blame this phenomenon on the presidency of Donald J. Trump is to wilfully ignore the gradual build-up of various fissiparous forces over decades.

The social media plays a force multiplier role here. While risks metastasize at the bedrock levels of society, policymakers are constantly distracted from the task of governance by a daily barrage of recriminations, fake news and social media agitprops. As a result, longterm policy imperatives are routinely sacrificed for immediate political gains. The importunate presidential impeachment sagas and electoral fraud accusations in the United States are reflective of wider social fissures, state fragilities and policy paralyses worldwide.

There is nothing new in this panem et circenses (bread and circuses) phenomenon. Juvenal had noted a similar trend during Rome’s imperial decline circa 100 A.D. Recently, despite clear signals that the world was facing an economic catastrophe, the United Nations seemed more focused on the discovery of gender bias in virtual assistant software like Siri and Alexa (UNESCO, 2019). How will this revelation benefit the bottom 99% of humanity in dire economic conditions; one where the victims will be preponderantly women and children?

Just like in Imperial Rome, bread and circuses are symptomatic of an economic system that relentlessly benefits the elite. The mountain is ignored and the molehill is prioritized through controlled public narratives. The issue of “stolen childhoods”, for example, is now couched in terms of climate change rather than on sexual exploitation. Few take note that nearly “100,000 children – girls and boys – are bought and sold for sex in the U.S. every year, with as many as 300,000 children in danger of being trafficked each year.” Child rape, as John Whitehead (2020) further notes, has become “Big Business in America.” Not surprisingly, human trafficking has emerged as a $150 billion global industry (Niethammer, 2020).

Such shocking human rights failures do not figure prominently in the calculus of various “social justice” movements. The Top 1% needs their “useful idiots” – a phrase misattributed to Lenin – to generate a constant supply of distractions. Activist-billionaire George Soros, for example, is pumping $1 billion into a global university network to “fight climate change” and “dictators” which curiously include elected leaders such as former US President Donald J. Trump and India’s Prime Minister Narendra Modi. These “academically excellent but politically endangered scholars” (Open Society, 2020), as Soros calls them, may turn out to be the very disruptors who will “undermine scientific progress” in the West – just as Turchin (2016) predicted in his seminal study. Soros’ pledge was coincidentally made when COVID19 began to decimate the global economy and healthcare systems. Elite philanthropy is now an avenue for global subversion. An assortment of scholars, government officials and NGOs are already channelling the agendas of their well-pocketed patrons, backed by Big Tech’s control of the mainstream and social media (Maavak, 2020c). Their narratives are reminiscent of giddy sophistries which fuelled a variety of communist and anarchist movements during the build-up to WWII.

Under these circumstances, some nations may eventually seal their borders and initiate **authoritarian measures** in order to **maintain internal stability**. This is no longer an unthinkable proposition as dissatisfaction with democracy has peaked worldwide (Foa et al, 2020). Measures **perfected by COVID-19 lockdowns** may have inadvertently served as a test run in this regard.

**T – core**

**The core antitrust laws are The Sherman Act, the Clayton Act, and the Federal Trade Commission Act.**

Thomas **Horton 10**. Professor of Law and Heidepriem Trial Advocacy Fellow, University of South Dakota School of Law. “Rediscovering Antitrust's Lost Values.” The University of New Hampshire Law Review. https://scholars.unh.edu/cgi/viewcontent.cgi?article=1305&context=unh\_lr

Part II of this Article discusses Congress’s historical balancing and blending of fundamental political, social, moral, and economic values to create a constitutional-like set of flexible laws that can be adapted to unforeseen and changing economic and political circumstances.22 Part II.A. briefly reviews some of the extensive scholarship addressing Congress’s balancing of values and objectives in its core antitrust laws including the Sherman, Clayton, and FTC Acts. Parts II.B. and C. explore the less-studied balancing of political, social, moral, and economic values and objectives in more recent antitrust legislation.23 Part II.B. specifically examines the legislative debates undergirding the passage of the HSR Act. 24 Part II.C. then turns to the debates and discourse that led to the passage of the NCRA in 1984 and the subsequent National Cooperative Production Amendments of 1993 and 2004. 25

**Violation---their advocate is about clarifying the Foreign Trade Antitrust Improvements Act.**

**Ryu ‘16** [Jae Hyung; Fall 2016; J.D. Candidate (2017), Washington University School of Law, St. Louis, Missouri; Wake Forest Journal of Business and Intellectual Property Law; “Deterring Foreign Component Cartels in the Age of Globalized Supply Chains,” vol. 17, no. 1, https://heinonline.org/hol-cgi-bin/get\_pdf.cgi?handle=hein.journals/wakfinp17&section=6]

Suppose an international cartel fixed the price of a product manufactured abroad and imported into the United States. The cartel would be liable under the Sherman Antitrust Act of 1890 1 (the “Sherman Act”) for interfering with free competition in the United States and harming the American economy, though the cartel activity occurred outside the United States.2 Now, suppose that the price-fixed product was a component (e.g., liquid crystal displays (“LCD”)3 or capacitors 4 ). These price-fixed components are incorporated into finished products (e.g., phones5 and televisions6 ), consequently raising the prices of the finished products.7 When those finished products with the hiked prices are imported into the United States, should the component cartel be similarly liable under the Sherman Act for interfering with free competition and hurting the American economy? Because the adverse economic effect is felt just the same, this Article argues in the affirmative and proposes a new paradigm to treat the importation of finished products incorporating price-fixed components under the “import inclusion”8 provision of the Foreign Trade Antitrust Improvements Act (the “FTAIA”). This Article further **charges Congress to amend and clarify the FTAIA** for the first time since the statute’s enactment, and to delineate the contours of conduct involving import trade or commerce in the context of the FTAIA. Additionally, this Article argues that the Supreme Court should revisit the indirect purchaser doctrine9 in Illinois Brick Co. v. Illinois10 that limited the private suit antitrust enforcement mechanism against foreign component cartels in order to update the application of the U.S. antitrust statutes in today’s age of globalized supply chains.

**It’s a voter for limits and ground --- additional business practices explode the research burden**

**CP – Section 5 (Generic)**

***Next off – Section 5:***

**Text:**

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 conduct that violates a comity balancing test. The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

**The cplan solves. It also competes – the FTC interprets current authority, instead of 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 **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.

**Our planks about *policy 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 **u**nfair **m**ethods of **c**ompetition, 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.

**P – Vagueness**

**Vagueness –**

**The plan’s generic wording is manipulated in implementation – magnified by the fact they didn’t spec an agent – wrecks solvency**

**Baer 20** [Bill Baer former visiting fellow in governance studies at The Brookings Institution and assistant attorney general of the Antitrust Division and as the acting associate attorney general of the U.S. Department of Justice, 11-19-2020 <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true>]

Meaningful antitrust reform should be a priority of the next administration and the 117th U.S. Congress. The challenge of drafting legislation is substantial. On the one hand, the legislation must be written for a judiciary that is both increasingly hostile to antitrust claims in general and increasingly textualist in its statutory interpretation. On the other hand, in the context of the antitrust laws, courts have often “abandoned statutory textualism” to interpret the laws “in favor of big business,”15 explains Daniel Crane, the Fredrick Paul Furth Sr. professor of law at the University of Michigan Law School. If given discretion to interpret new legislation, the current judiciary is likely to fall back on the same **skepticism** of antitrust enforcement that it has advanced over the past 40 years.

Despite those concerns, legislation remains the best option to revitalizing antitrust enforcement. In drafting legislation, Congress can learn from the past. One case in point: The legislative history of the Celler-Kefauver bill, not its text, reveals the bill’s intent, which courts increasingly ignore.16 Congress can reduce that risk by **being explicit** in the text when vacating or rejecting existing precedent and when identifying relevant factors, such as the importance of protecting both actual and potential competition. Congress should identify in statute the elements sufficient to establish an antitrust violation **as precisely as possible**.

**Voting issue---**

**Aff conditionality destroys ground. 2AC clarifications dodge DA links and counterplan competition.**

**It’s also not topical – prohibitions are specific**

**Axtell 3** --- Katie Axtell, J.D. Candidate 2004, Seattle University School of Law, “Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in Locke v. Davey”, Seattle University Law Review , 2003, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1783&context=sulr

Government actions that constitute a prohibition under the First Amendment can be illustrated by analyzing state-instituted **barriers**, as interpreted by the Supreme Court in two seminal free exercise cases, Smith and Sherbert."s First, the classic setting of government prohibition of a religious observer's belief or practice is where an enacted law **specifically outlaws** a **particular practice**. In Smith, for example, state law prohibited the plaintiffs from ingesting peyote, a hallucinogenic drug from the stem of the peyote cactus.8 9 Possession of peyote is a Class B felony under Oregon law.9 " However, members of the Native American Church use peyote for sacramental purposes in a Saturday all-night ritual of prayers and songs.9 The act of eating, smoking, or drinking peyote "brings peace and healing, resists alcoholism, and gives visions of the Peyote Spirit who is regarded either as Jesus or an Indian equivalent."92 By outlawing the use of peyote, Oregon placed an affirmative barrier between the members of the Native American Church and their sacramental ingestion of peyote, which is a central tenet of their religious practice.

**DA – error rates**

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

**Rosch ‘10**

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

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

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

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

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

**Baker 15** Jonathan B. Baker - Professor of Law, American University Washington College of Law. “TAKING THE ERROR OUT OF “ERROR COST” ANALYSIS: WHAT’S WRONG WITH ANTITRUST’S RIGHT” - 80 Antitrust Law Journal No. 1 (2015) - #E&F – continues to footnotes #18 and #19 – no text removed. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2333736

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

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

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

**CP – Climate Pic**

**The USFG should ban expanding the scope of antitrust law when collusion is for environmental benefits or sustainability.**

**The USFG should substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of its core antitrust laws in accordance with a comity balancing test in other instances where the exemptions doesn’t apply.**

**Creating an exemption for collusion solves warming**

**Koga 20** Dailey C. Koga J.D. Candidate, University of Washington School of Law, Class of 2021. “Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change,” 95 *Wash. L. Rev*. 1989 (2020). Available at: <https://digitalcommons.law.uw.edu/wlr/vol95/iss4/8> {DK}

Congress has the ability to codify exemptions to antitrust laws and has done so numerous times in the past.297 **Congress should pass an exemption to antitrust law for sustainability agreements using the Dutch Guidelines as a model**. This would allow companies to enter into agreements addressing climate change without fear of antitrust litigation. While this type of exemption may increase the risk of cartel behavior, keeping the exemption narrowly tailored and requiring quantitative evidence of sustainability benefits can mitigate those anticompetitive concerns. In the meantime, litigants should frame sustainability agreements in economic terms to survive antitrust scrutiny and can use past precedent as a model to do so. A. Congress Should Pass a Sustainability Exemption Congress should adopt an antitrust exemption for sustainability agreements similar to that proposed in the Netherlands.298 For agreements that have anticompetitive effects, Congress can require companies to meet the four main requirements suggested by the Dutch: (1) the agreement must have sustainability benefits, (2) the ultimate consumer must receive “a fair share of those benefits,” (3) the restraint on competition must not be greater than necessary to achieve those benefits, and (4) the agreement must not eliminate “a substantial part of the products/services in question.”299 While the broad proposal from the Netherlands represents the most ideal solution, Congress could change the exemption in two ways that would be more consistent with current precedent and also limit the risk of cartel behavior. First, the exception could require companies to always have quantitative data showing a certain threshold of environmental benefits, regardless of market share. Requiring quantitative data that shows benefits to a certain threshold could reduce arbitrary results. It could also help to partially ensure that the agreement is not a cover for a cartel in that the environmental impacts would have to be real, not just suggested or purported. Second, Congress could limit the sustainability benefits analysis to the industry in question. This type of limitation may severely limit the types of agreements companies are permitted to enter into because the agreements would have to have an impact on the specific industry. But it would be closer in line with Supreme Court precedent disallowing procompetitive justifications outside of the industry in question.300 Take the automakers’ agreement as an example of how this kind of analysis could work. Imagine that the four car manufacturers had agreed amongst themselves to increase emissions standards rather than each independently conferring with California. Under current antitrust law, it is unlikely that this agreement would be illegal per se because it does not explicitly fix prices or reduce quantity. But under a rule of reason or quick look analysis, the agreement would almost certainly fail. Courts would first examine whether the automakers have market power and whether the agreement has anticompetitive effects. The four automakers at issue here likely have market power,301 and it would be fairly simple for the government to argue that the agreement would have anticompetitive effects—the agreement could increase the price of automobiles and reduce the number of options on the market. Assuming the court found anticompetitive effects, the automakers would then have the opportunity to put forth procompetitive justifications. Under current antitrust law, it is hard to imagine what those procompetitive justifications could be. Increased innovation may represent the most effective argument, but because the automakers would not actually add a new type of product to the market, that argument would likely be unsuccessful. In contrast, if Congress granted an exemption similar to the Dutch guidelines, such an agreement could survive antitrust scrutiny if it met the four requirements. First, the companies would have to show, quantitatively, that the agreement would result in lower CO2 emissions. Given the evidence of vehicles’ sizeable contribution to CO2 emissions,302 that data likely exists. Second, the automakers would have to show that their consumers would equitably share in the benefits. Consumers would certainly stand to benefit from this agreement. Not only could reduced auto emissions improve air quality and help slow climate change,303 but car consumers could save money on gas.304 Third, as in current rule of reason analysis, the companies would have to show that the agreement was no more restrictive than necessary to achieve the benefits in question. This may be a fact-specific inquiry, but with some further guidance, companies could narrowly tailor their agreements to satisfy the third factor. The fourth factor—whether a substantial number of products would be eliminated—would likely be the most difficult for the automakers to meet. Analyzing this factor may depend on the specific terms of the agreement. But, again, companies may be able to craft agreements to satisfy this factor. For example, if the concern was that increasing auto emissions standards would eliminate nearly all pickup trucks from the market, the agreement could be crafted with different emission standards for sedans, SUVs, vans, and pickup trucks. Having guidelines like those proposed in the Netherlands would allow companies to craft their agreements to meet the four required factors while still allowing them to work together to address climate change. The most complicated part of implementing this exemption would be the way in which courts could weigh “public interest” factors with economic ones. The benefit of the Dutch model is that it builds in less arbitrary standards than those in the South African and Australian models because of its focus on quantitative data. In fact, the Dutch model fits quite well within the rule of reason analysis currently used by American courts because it could function as a burden-shifting analysis just like the rule of reason. To further address the arbitrariness problem, the exemption could require the sustainability benefits to meet a certain threshold, such as reducing carbon emissions by a certain percentage. In contrast, a simple public interest test would force judges to weigh sustainability against one of the main purposes of antitrust law—preventing unfair competition. Using the Dutch model avoids some of the arbitrariness inherent in the public interest test analysis. Not only could this exemption fit cleanly into current antitrust law, but it also could be crafted to comply with the American Bar Association’s guidelines for creating antitrust exemptions.305 First, Congress could effectively consider the potential impact of the exemption on consumer welfare given the wealth of information on the effects of carbon emissions.306 Second, by including the two alterations mentioned above, Congress could craft a narrow exemption to provide that “competition is reduced only to the minimum extent necessary.”307 Third, the goals of the exemption—curbing climate change—almost certainly outweigh the goals of antitrust law because climate change amounts to an existential crisis that will annihilate the planet if left unaddressed. And finally, Congress could easily include a sunset provision in the exemption. Although addressing climate change is vital to the future of the world as we know it, some will likely argue that antitrust law is not the appropriate avenue for tackling the problem. While companies could plausibly make substantial progress in the climate crisis if allowed to enter into agreements such as the one entered into by the automakers in California, permitting agreements among competitors comes with a risk of increased cartel behavior.308 But if we fail to curb climate change, industry will cease to exist altogether, along with the rest of our planet. It could also be politically challenging for Congress to pass such an exemption. However, a bill aimed at protecting climate change agreements from the reaches of antitrust law may be more plausible than an omnibus climate change initiative. The bill would not involve spending money or additional restrictions on businesses, which could make it easier to pass than other climate change laws. Thus, even if antitrust law was not originally intended to encompass moral or social considerations, the dire need for action on carbon emissions, and the greater feasibility of an antitrust exemption, indicate that antitrust law may, in fact, be a fitting avenue for combatting climate change.

**Warming is existential — causes humanitarian crises, geopolitical conflict, ecosystem collapse, and disease.**

**Melton 19** — Michelle Melton, former fellow in the Energy and National Security Program focusing on climate change at the Center for Strategic and International Studies, journalist at the Environmental Law Institute, J.D. from Harvard University, 2019 (“Climate Change and National Security, Part II: How Big a Threat is the Climate?,” *Lawfare,* January 7th, Available Online at <https://www.lawfareblog.com/climate-change-and-national-security-part-ii-how-big-threat-climate>, Accessed 06-18-2020)

At least until 2050, and possibly for decades after, climate change will remain a **creeping threat** that will exacerbate and amplify existing, structural global inequalities. While the developed world will be negatively affected by climate change through 2050, the consequences of climate change will be felt most acutely in the developing world. The national security threats posed by climate change to 2050 are likely to differ in degree, not kind, from the kinds of threats already posed by climate change. For the next few decades, climate change will exacerbate **humanitarian crises**—some of which will result in the deployment of military personnel, as well as material and financial assistance. It will also aggravate natural resource constraints, potentially contributing to **political and economic conflict** over water, food and energy.

The question for the next 30 years is not “can humanity survive as a species with 1.5°C or 2°C of warming,” but, “how much will the existing disparities between the developed and developing world widen, and how long (and how successfully) can these widening political/economic disparities be sustained?” The urgency of the climate threat in the next few decades will depend, to a large degree, on whether and how much the U.S. government perceives a widening of these global inequities as a threat to U.S. national security.

By contrast, if emissions continue to creep upward (or if they do not decline rapidly), by 2100 climate-related national security threats could be **existential**. The question for the next hundred years is not, “are disparities politically and economically manageable?” but, “can the global order, premised on the nation-state system, itself based on territorial sovereignty, survive in a world in which substantial swathes of territory are potentially uninhabitable?”

National Security Consequences of Climate Change to 2050 Scientists can predict the consequences of climate change to 2050 with some measure of certainty. (Beyond that date, the pace and magnitude of climate change—and therefore, the national security threat posed by it—depend heavily on the level of emissions in the coming years, as I have explained.) There is relative agreement across modeled climate scenarios that the world will likely warm, on average, at least 1.5°C above pre-industrial levels by about 2050—but perhaps as soon as 2030. This level of warming is likely to occur even if the world succeeds in dramatically reducing greenhouse gas emissions, as even the recent Intergovernmental Panel on Climate Change (IPCC) report implicitly admits. In other words, a certain amount of additional warming—at least 1.5°C, and probably more than that—is presumptively unavoidable.

Looking ahead to 2050, it can be said with relative confidence that the national security consequences of climate change will vary in degree, not in kind, from the national security threats already facing the United States. This is hardly good news. **Even small differences** in global average temperatures result in significant environmental changes, with attendant social, economic and political consequences. By 2050, climate change will wreak increasing havoc on human and natural systems—predominantly, but not exclusively, in the developing world—with attenuated but profound consequences for national security.

In particular, changes in temperature, the hydrological cycle and the ranges of insects will impact food availability and food access in much of the world, increasing **food insecurity**. Storms, flooding, changes in ocean pH and other climate-linked changes will damage infrastructure and negatively impact labor productivity and economic growth in much of the world. **Vector-borne diseases** will also become more prevalent, as climate change will expand the geographic range and intensity of transmission of diseases like malaria, West Nile, Zika and dengue fever, and cholera. Rising public health challenges, economic devastation and food insecurity will translate into an increased demand for humanitarian assistance provided by the military, increased migration—especially from tropical and subtropical regions—and **geopolitical conflict**.

Long-term trends such as declining food security, coupled with short-term events like hurricanes, could sustain unprecedented levels of migration. The 2015 refugee crisis in Europe portends the kinds of population movements that will only accelerate in the coming decades: people from Africa, Southwest and South Asia and elsewhere crossing land and water to reach Europe. For the United States, this likely means greater numbers of people seeking entry from both Central America and the Caribbean. Such influxes are not unprecedented, but they are unlikely to abate and could increase in volume over the next few decades, driven in part by climate change-related food insecurity, climate change-related storms and also by economic and political instability. Food insecurity, economic losses and loss of human life are also likely to **exacerbate existing political tensions** in the developing world, especially in regions with poor governance and/or where the climate is particularly vulnerable to warming (e.g., the Mediterranean basin). While the Arab Spring had many underlying causes, it also coincided with a period of high food prices, which arguably contributed to the protests. In some situations, food insecurity, economic losses and public health crises, combined with weak and ineffectual governance, could precipitate future conflicts of this kind—although it will be difficult to know where and when without more precise local studies of both underlying political dynamics and the regionally-specific impacts of climate change.

2100 and Beyond While the national security impacts of climate change to 2050 are likely to be costly and disruptive for the U.S. military—and devastating for many people around the world—at some point after 2050, if warming continues at its current pace, changes to the climate could fundamentally reshape geopolitics and possibly even the current nation-state basis of the current global order.

To be clear, both the ultimate level of warming and its attendant political consequences is highly speculative, for the reasons I explained in my last post. Nonetheless, we do know that the planet is currently on track for at least 3-4°C of warming by 2100. The “known knowns” of higher levels of warming—say, 3°C—are frightening. At that 3°C of warming, for example, scientists project that there will be a nearly 70 percent decline in wheat production in Central America and the Caribbean, 75 percent of the land area in the Middle East and more than 50 percent in South Asia will be affected by highly unusual heat, and sea level rise could displace and imperil the lives hundreds of millions of people, among other consequences.

But even higher levels of warming are physically possible within this century. At these levels of warming, some regions of the world would be literally uninhabitable, likely resulting in the depopulation of the tropics, to say nothing of the consequences of sea-level rise for economically important cities such as Amsterdam and New York. Even if newly warmed regions of the far north could theoretically accommodate the resulting migrants, this presumes that the political response to this unprecedented global displacement would be orderly and conflict-free borders on fantasy.

The geopolitical consequences of significant levels of warming are severe, but if these changes occur in a linear way, **at least there will be time for human systems to adjust.** Perhaps more challenging for national security is the possibility that the until-now linear changes give way to abrupt and irreversible ones. Scientists forecast that, at higher levels of warming—precisely what level is speculative—humanity could trigger **catastrophic**, abrupt and unavoidable consequences to the ecosystem. The IPCC has considered nine such abrupt changes; one example is the potential shutting down of the Indian summer monsoon. Over a billion people are dependent upon the Indian monsoon, which provides parts of South Asia with about 80 percent of its annual rainfall; relatively minor changes in the monsoon in either direction can cause disasters. In 2010, a wetter monsoon led to the catastrophic flooding in Pakistan, which directly affected 20 million people; a drier monsoon in 2002 led to devastating drought. Studies suggest that the Indian summer monsoon has two stable states: wet (i.e., the current state) and dry (characterized by low precipitation over the subcontinent). At some point, if warming continues, the monsoon could abruptly shift into the second, “dry” state, with catastrophic consequences for over a billion people dependent on monsoon-fed agriculture. The IPCC suggests that such a state-shift is “unlikely”—that is, there is a 10 to 33 percent chance that a state-shift will happen in the 21st century—but scientists also have relatively low confidence in their understanding of the underlying mechanisms in this and other large-scale natural systems.

The consequences of abrupt, severe warming for national security are obvious in general, if unclear in the specifics. In 2003, the Defense Department asked a contractor to explore such a scenario. The resulting report outlined the offensive and defensive national security strategies countries may adopt if faced with abrupt climate change, and highlighted the increased risk of inter- and intra-state conflict over natural resources and immigration. Although the report may be off in its imagined timeframe (positing abrupt climate change by 2020), the world it conjures is improbable but not outlandish. If the Indian monsoon were to switch to dry state, and a billion people were suddenly without reliable food sources, for example, it is not clear how the Indian government would react, assuming it would survive in its current form. **Major wars or low-intensity proxy conflicts seem likely, if not inevitable**, in such a scenario.

**DA – FTC Independence**

***Next off is FTC independence:***

**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 A**ct”), **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 coop**erate 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 A**ct.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 peace**156 **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.

**Global free trade reversals will cause *multiple existential impacts*.**

* Arctic conflict
* Space conflict;
* Global nuclear prolif;
* Structural wars;
* Climate;
* Geo-engineering;

**Langan-Riekhof ‘21**

et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - #E&F - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

With the trade **and financial** connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to **develop nuclear weapons**, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like **the Arctic** and **space**. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, **conflicts became endemic**, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address **climate changes**, little was done to slow greenhouse gas emissions, and some states experimented with **geoengineering with disastrous consequences**.

**cartels**

**1nc – cartels**

**Countries with export cartels can’t and won’t cooperate to procure evidence for trial.**

Weimin **Shen**, L.L.M, J.S.D., Washington University School of Law, **’20**, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy," Journal of Transnational Law & Policy 30 (2020-2021): 59-118

Concerns, however, may arise in the case of export cartels with similar effects. For example, suppose authorities in these importing jurisdictions are **unable to cooperate effectively** in investigating cartels. In that case, their investigative efforts **may not easily yield necessary evidence** on the producers' conduct in exporting jurisdictions. 60 Multiple jurisdictions may repeat the same investigative steps, resulting in extra costs for business subject to investigations. 61 Meanwhile, cooperation with the authorities of those jurisdictions may be **hampered** by the fact that they **may not perceive an immediate interest** in tackling the cartel if it does not create harmful effects for the national economy. 62 Some countries specifically exempt "export cartels" from competition law, while many others will only investigate cartels if there are adverse effects within their jurisdictions. 63 Some international cartels may be **beyond the effective reach of the laws** in the countries where they have their **most pernicious effects**.64 According to the Organization for Economic Co-operation and Development ("OECD") report, most countries in which violations occur **may not have access to the evidence necessary** to determine the guilt or innocence of the parties involved. 65 Therefore, cartels may at times **remain undiscovered** due to lack of cooperation. Harmful cartel activity could go unpunished in these importing jurisdictions when enforcing national competition law against such cartels.

Also, the extraterritorial reach of competition law, the "effect doctrine," is a sensitive issue and jurisdictional conflicts may occur. For example, two different countries may assert their own jurisdiction in the same case, leading to potential divergent assessments. 66 In such circumstances, "positive comity" provisions are now included in many bilateral cooperation agreements between countries, whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of the request.67 However, as I will illustrated in the following Chapter, international cartels could in theory be carried out either by the State or by State controlled firms. In examining their legitimacy both under WTO treaty obligations and under antitrust laws, there could be opportunities for nations to play one system against the other.

In sum, numerous changes in enforcement activity against international cartels have occurred over the past two decades: the adoption of antitrust policies prohibiting hardcore cartels by countries around the globe, vastly increased enforcement against international cartels by antitrust authorities, increased use of leniency policies, application of extraterritoriality, and a slow but growing trend toward criminalization of price-fixing. The net effect of these changes is that numerous competition policy agencies now vigorously pursue and successfully prosecute international cartels, levying increasingly large fines. However, **even where international cartel activity can be tackled effectively** by national competition laws, **inefficiencies may occur during the investigation of international cartels** and lead to **underenforcement of competition policy** and laws. In the absence of well-functioning and institutionalized cooperation mechanisms, multiple jurisdictions may repeat the same investigative steps, resulting in **extra costs** related to the investigations for business and **costs to competition authorities** from unnecessary duplication. As a result, **harmful cartel activity could go unpunished,** consumers would be harmed, and **future harmful behavior will not be deterred.**

**No solvency – injunctive relief can’t be enforced abroad.**

Ben **Bradshaw et al** is a par tner and Julia Schiller a counsel in the Washington, DC office of O’Melveny & Myers LLP, Remi Moncel is an associate in O’Melveny’s San Francisco office, **’17**, "International Comity in the Enforcement of U.S. Antitrust Law in the Wake of in Re Vitamin C," Antitrust 31, no. 2 (Spring 2017): 87-93

Having found that Chinese law required defendants to **violate U.S. antitrust law**, the Second Circuit went on to consider whether the remaining factors in the Timberlane/ Mannington Mills balancing test weighed in favor of dismissal. The court concluded that they did.32 Of particular note, the court found that while the plaintiffs may have been unable to obtain a Sherman Act remedy in another forum, complaints as to China’s export policies could be adequately addressed through diplomatic channels and the **World Trade Organization**, of which both the United States and China are members.33 The court found it significant that there was no evidence that the defendants acted with the express purpose or intent to affect U.S. commerce or harm businesses in particular. Moreover, the regulations at issue were intended to assist China in its transition from a staterun economy and to remain a competitive participant in the global Vitamin C market.34 Finally, the court recognized that according to MOFCOM the exercise of jurisdiction had already **negatively affected** U.S.-China relations, and it would be unlikely that the injunctive relief obtained by the plaintiffs in the district court would be **enforceable in China**, just as a similar injunction issued in China against a U.S. company would be **difficult to enforce in the United States**.35 Upon consideration of all of these factors, the court concluded that exercising jurisdiction was inappropriate and **dismissed the case**.

**No internal link to any innovation scenario – they have one card that says the industry loses “some materials ” then a card that says rapid industry growth solves extinction.**

**Export cartels declining now post 2018 court ruling – China has internalized norms.**

Qingxiu **Bu**, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, **’20**, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

1. Improvement of China’s law

Private litigation can catalyse and reversely transform the legislative change although it is unlikely to resolve macroeconomic disputes.182 Some of Chinese old legislations have even legalised anti-competitive conduct, which was in direct conflict with US antitrust principles at issue in theVitamin C case.183 Similar casesmay be less likely to arise going forward because the development of China’s antitrust regime184 and its continued emphasis on **market-oriented reforms** have **reduced state-compelled price fixing.**185 It is noteworthy that antimonopoly law (AML 2008) regulates not only private actors but also government agencies when they get involved in the price fixing. 186 This means that executive branches could constitute an abuse of administrative monopoly.187 Institutionally, Chinese antitrust agencies have now been consolidated under the State Administration forMarket Regulation (SAMR).188 In the wake of the Vitamin C ruling, Anti-Monopoly Bureau is committed to advise Chinese MNCs on compliance with foreign laws.189 Accordingly, a proverbial rock and a hard place situation will be on decline, which makes it impossible for an entity to comply both conflicting sets of laws.190 Given the limited deference accorded to the MOFCOM, **Chinese government agencies may thus be incentivised to avoid any potential inconsistency** and even conflicts through ex ante coordination. Given the development of antitrust laws in China, **US courts are less likely to encounter similar issues with Chinese MNCs in the future**.191 Although significant differences between AML 2008 and the antitrust laws of the US persist, a true conflict between the Sherman Act and Chinese law is **far less likely now** than two decades ago.192

**Ag innovation is irrelevant.**

**Vestby ’18** [Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/]

It is perhaps surprising, then, that there is **little scholarly merit** in the notion that a short-term reduction in access to **food** increases the probability that conflict will break out. This is because to start or participate in **violent conflict** requires people to have **both the means and the will**. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. **In reality**, **the sources of discontent** are **considerably more complex** – linked to **political structures**, **land ownership**, **corruption**, the desire for **democratic reforms** and **general economic problems** – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while **the international media** have a tendency to seek **simple resource-related explanations** – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by **more complex** political relationships.

**Impact is overhyped – they are just parroting the GOP party platform.**

Matthew **Gault**, 7/24/**2016**. Contributing Editor at War Is Boring; citing Peter Singer a cyber security expert and Yousaf M Butt a physicist serving as foreign affairs officer at the State Department’s Space and Advanced Technology office. “The Overrated Threat from Electromagnetic Pulses.” *War is Boring*. <https://warisboring.com/the-overrated-threat-from-electromagnetic-pulses-46e92c3efeb9#.6issj3rzp>.

The problem with fear over electromagnetic weapons is that it forgets two simple facts. **First**, generating enough juice to cause a significant amount of damage is **really hard**. **Second**, a country dealing with busted electronics after an EMP assault is a country **fighting a nuclear war**.

“EMP is the new test case of seriousness in national security,” cyber security expert Peter W. Singer tweeted after reading the platform. “But not in the way advocates not in on the joke think.”

I reached out to Singer and, after a brief pause to make sure I was serious, he pounced. “There’s this **irony** of the people who think it’s serious not realizing that **they’re the joke**,” he explained. “When you walk through the actual scenarios of use, **it doesn’t pass the logic test**.”

An electromagnetic pulse following a nuclear blast is a real thing. The problem is that the process of creating an EMP big enough without the devastation of a nuclear warhead is expensive, absurd and not worth the effort. That’s if it even works.

For that, we can’t recommend enough a 2010 series of articles in The Space Review by Yousaf M. Butt, a physicist currently serving as a foreign affairs officer in the State Department’s Space and Advanced Technology office.

“For a large device (greater than 100 kilotons) …. the whole region on the Earth’s surface which is within line-of-sight to the high-altitude explosion will experience the EMP pulse,” he wrote.

Which sounds scary, but there are several important caveats. The higher you detonate a nuclear device, the greater the blast radius. However, the effect of the EMP will be less. Likewise, the smaller the explosive yield, the smaller the EMP and the closer the blast will need to be to the ground to be effective.

Finding that detonation sweet-spot in the Earth’s atmosphere will take **countless tests … which no one has done**.

The blast Butt described above, one that knocks out the entire electrical system on roughly half the Earth’s surface, could only come from a **high-yield thermonuclear warhead attached to an ICBM**. So, engaging in the fantasist view, a nuke from Russia or China.

Setting aside the geopolitical gymnastics that must occur to lead to that kind of exchange, if a foreign power detonated a 100 or more kiloton in an electromagnetic attack on America, then the world is at war and there’s little strategic benefit for the aggressor to not just go ahead and nuke a city.

“It doesn’t mean it can’t happen,” Singer told me. “But if the other side is using EMPs we’re moving into thermonuclear war.”

“A weapon of mass destruction is preferable to a weapon of mass disruption,” Butt explained. “A state would be highly unlikely to launch an EMP strike from their own territory because the rocket could be traced to the country of origin and would probably result in nuclear or massive conventional retaliation by the U.S.”

Let’s say the EMP does go off in space above North America. According to the worst case scenario, the attack would fry the Pentagon’s electronics, leaving the U.S. military unable to retaliate.

However, we don’t know what the effects of an EMP might be. Studies conducted by both the Soviet Union and the United States during the Cold War produced **dramatically different results every time**.

An electromagnetic pulse is a highly unpredictable side effect of a predictably horrifying weapon. “It’s not a weapon we’ve seen past use of. Ever. Literally ever. Nor tests of,” Singer said.

Some countries have attempted to weaponize EMPs in fits and starts, but it remains a byproduct of other weapons systems, including cruise missiles as well as nukes. The idea of North Korea or Iran using a small-yield nuclear device in low atmosphere **fails** for the same reasons. North Korea can **barely manage to cobble together a crude one-kiloton bomb, let alone a device large enough to do significant damage to U.S. infrastructure**.

“Serious long-lasting consequences of a one-kiloton EMP strike would likely be limited to a state-sized region of the country,” Butt explained.

“Although grid outages in this region may have cascading knock-on effects in more distant parts of the country, the electronic devices in those further regions would not have suffered direct damage, and the associated power systems far from the EMP exposed region could be **re-started**.”

So nuclear state actors, both mighty and minor, are out. But what about terrorists? Isn’t it possible for the bad guys to get enough fissile material and construct a bomb?

“Any weapon produced by a terrorist cell would likely be a **one of a kind** and would have to **remain untested**. For a terrorist group to then mate this weapon to a **ballistic missile** and successfully carry out an EMP strike **beggars belief**,” Butt wrote.

Singer agrees. “But let’s just imagine terrorists somehow get them,” he said. “So, they’re sitting in their cave deciding on their attack. ‘We can either use our nuclear weapon in a completely untested manner, that we don’t know if it will even work, nor the exact damage it will cause, or we can just turn Washington D.C. into a molten mess.’”

“They finally get their dream of dreams, and that’s when they decide to use it in an untested manner that would kill less people … what?”

**EMPs are laughable**, but the threat of nuclear annihilation is not. It’s strange then that the Republican Party’s platform would pay such special attention to a looming threat of electromagnetic Armageddon.

**Indigenous**

**1nc - turn**

**Expanding extraterritorial applications causes foreign nations to create *blocking statutes* – causes uncertainty and turns case**

**Kava 19** (Samuel Kava, University of Maryland Francis King Carey School of Law and Johns Hopkins University Carey School of Business, 2019, “The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity” University of Maryland Carey School of Law, Journal of Business and Technology Law, Volume 15, Issue 1, Article 5, pages 157-159 <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1311&context=jbtl>) MULCH

Before the FTAIA was enacted, in 1982, many of **the United States’ closest allies were disgruntled by the U.S. courts’ expansive extraterritorial application of the Sherman Anti-Trust Act**.152 These nations confided in the territorial principle, and believed it “axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack.”153 The United Kingdom, one of the most outspoken allies against the United States’ “attempt[] to impose [its] domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the United States,” viewed the extraterritorial application of the Sherman Anti-Trust Act as ironic given the fact “the United States was founded by those who took exception to little matters of taxation being imposed extraterritorially.”154 Thus, in an attempt to “protect their nationals from criminal [and civil] proceedings in foreign courts where the claims to jurisdiction [were] excessive and constitute[d] an invasion of sovereignty**,” foreign nations enacted blocking statutes to resist the extraterritorial application of the Sherman Act.**155

The blocking statutes of each nation varied, but all served to “block the discovery of documents located in their countries and bar the enforcement of foreign judgements.”156 The United Kingdom achieved these goals with the Protection of Trading Interests Act, France with the French Blocking Law, Canada with the Foreign Extraterritorial Measures Act, and Australia with the Foreign Proceedings Act.157 The conflicting laws between the United States and its foreign counterparts **created tremendous uncertainty** regarding what nation’s laws would be applied in the event of a cross-border dispute. According to Nuno Limáo and Giovanni Maggi, economists from the University of Maryland and Yale University, “as the world becomes more integrated, the gains from decreasing trade-policy uncertainty should tend to become more important relative to the gains from reducing the levels of trade barriers.”158

Essentially, for trade to prosper, it is more important to provide producers and consumers with predictability and certainty (regarding the rule of law) rather than enacting laws that focus on free trade economics. Accordingly, it is in the best interest of governments to focus on unifying its laws **before negotiating for the elimination of tariffs or quotas.** This is not to say that eliminating trade barriers is not vital to the health of the economy—in fact, tariffs, quotas, and other trade barriers are proven to adversely affect all parties involved in the chain of distribution—**however, it is more important to unify laws before focusing on the elimination of any trade barriers.**159

As mentioned in Part I.C., the complaints of U.S. exporters and foreign governments were heard, and the United States Congress enacted the FTAIA “to address the concerns of foreign governments that the effects test established in the Alcoa case had not made clear the magnitude of the U.S. effects required to support a claim under the Sherman Act.”160 Thus, the FTAIA was implemented to bring certainty to consumers and producers by requiring that “conduct must have a ‘direct, substantial, and reasonably foreseeable effect’” for the Sherman Anti-Trust Act to apply extraterritorially.161 **This language provided the foreign community with temporary relief, and gave producers and consumers the certainty and predictability needed to establish confidence in the markets and continue trading.**

However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a “direct, substantial, and reasonably foreseeable effect” 162 on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies—i.e. the U.S. Department of Justice and the Federal Trade Commission—have taken an aggressive approach to pursuing international antitrust claims. In 2017, the U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) published the International Guidelines—a publication “explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States.”163 The International Guidelines have taken the broadest approach in determining if conduct is “direct”—finding if there is a “reasonably proximate causal nexus between the conduct and the effect” conduct is “direct”—and the narrowest view that international comity bars enforcement of U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation’s law.164 Thus, because the FTAIA has become ineffective **and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act** with Apple v. Pepper, **foreign nations will almost certainly strive to adopt modern and effective blocking statutes. These blocking statutes will revitalize uncertainty in the markets, and the global economy will be adversely affected.**

In addition, because our world is more integrated, compared to the time when the FTAIA was implemented, **the adverse economic effects may be worse if foreign nations pursue modern blocking statutes**. To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations’ laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and innovative products (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than research and development with the new blocking statutes, consumers, producers, distributors, and **the economy as a whole will be adversely affected**.

**Overall, there is a significant risk that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act**. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the global economy. Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer’s ability to purchase low cost goods, and the overall health of the global economy**. The only certainty is that trade will slow down as a result of trade policy uncertainty.** To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. **Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act** by expressly providing courts with a robust international comity analysis.

**AT: Africa Instability---1NC**

**No great power war over Africa---deterrence solves, and resource interests don’t cause escalation**

Lloyd **Thrall 15**, Associate at the RAND corporation, M.A. in international studies and diplomacy, SOAS, University of London, PhD student in War Studies at King’s College London, "China’s Expanding African Relations Implications for U.S. National Security," 2015, <http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR905/RAND_RR905.pdf>

There is **little credible potential for** a Sino-American **conflict** over resources **in Africa.** Contrary to popular and perennial assumptions about resource wars, industry and energy analysis sources project adequate supply of conventional hydrocarbons **beyond 2035**.6 Given reservoir depletion curves, any tightening of supply would be gradual. The adequacy of supply is further augmented when tertiary production and unconventional sources are considered (such as shale and tar sands). U.S. strength in unconventional sources, and potential energy independence, **further reduces the likelihood of a conflict.** Even in a future with **vastly** **inflated** hydrocarbon **prices**, these costs **pale in comparison to** those associated with a Sino-American **war,** the economic costs of which likely fall more heavily on China than the United States.7 Global hydrocarbon resources are distributed via a **fungible global market,** with many stakeholders and moderate **diversity of supply.** This enables importing states to buy a predictable supply of hydrocarbons at reasonable and competing prices over long contracts. African sources do not constitute a majority of this supply chain, and **supposed victory in a theoretical great-power resource war would not guarantee security of resource supply**. In sum, the potential for either China or the **U**nited **S**tates to be willing to **enter war with a nuclear adversary over African oil,** let alone other, **less valuable resources,** is **extraordinarily small**.8

**AT: SDGs---1NC**

**No impact to failed states.**

**Mazarr 14**—Professor of National Security Strategy at the National War College [Michael, “The Rise and Fall of the Failed-State Paradigm,” *Foreign Affairs*, Vol. 93, No. 1, Jan/Feb, p. 113-121, Emory Libraries]

THE DECLINE OF A STRATEGIC NARRATIVE

The practical challenges of state-building missions are now widely appreciated. They tend to be long, difficult, and expensive, with success demanding an open-ended commitment to a messy, violent, and confusing endeavor -- something unlikely to be sustained in an era of budgetary austerity. But the last decade has driven home intellectual challenges to the concept as well.

The threat posed by weak and fragile states, for example, turned out to be both less urgent and more complex and diffuse than was originally suggested. Foreign Policy’s Failed States Index for 2013 is **not** exactly a roster of national security priorities; of its top 20 weak states, very few (Afghanistan, Iraq, and Pakistan) boast geostrategic significance, and they do so mostly because of their connection to terrorism. But even the threat of terrorism **isn’t** highly correlated with the current roster of weak states; only one of the top 20, Sudan, appears on the State Department’s list of state sponsors of terrorism, and most other weak states have only a marginal connection to terrorism at best.

A lack of definitional rigor posed a second problem. There has **never** been a coherent set of factors that define failed states: As the political scientist Charles Call argued in a powerful 2008 corrective, the concept resulted in the “agglomeration of diverse criteria” that worked to “throw a monolithic cloak over disparate problems that require tailored solutions.” This **basic methodological flaw** would distort state-building missions for years, as outside powers forced generic, universal solutions onto very distinct contexts.

The specified dangers were **never unique** to weak states, moreover, nor would state-building campaigns necessarily have mitigated them. Take terrorism. The most effective terrorists tend to be products of the middle class, often from nations such as Saudi Arabia, Germany, and the United Kingdom, not impoverished citizens of failed states. And terrorist groups operating in weak states can **shift their bases of operations**: if Afghanistan becomes too risky, they can uproot themselves and move to Somalia, Yemen, or even Europe. As a result, “stabilizing” three or four sources of extremist violence would not render the United States secure. The same could be said of threats such as organized crime, which finds **comfortable homes** in **functioning** but troubled states in Asia, eastern Europe, and Latin America.

As the scholar Stewart Patrick noted in a 2006 examination of the purported threats issuing from weak states, “What is striking is **how little** **empirical evidence underpins these assertions** and policy developments. Analysts and policymakers alike have **simply presumed** the existence of a blanket connection between state weakness and threats to the national security of developed countries and have begun to recommend and implement policy responses.”

And although interconnectedness and interdependence may create risks, the dangers in such a world are more likely to come from **strong, well-governed states** with imperfect regulations than weak ones with governance deficiencies. Financial volatility that can shake the foundations of leading nations and cyberattacks that could destabilize energy or information networks pose more immediate and persistent risks than, say, terrorism.

**Section 5**

**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)
* **AND; “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”.**

**Agencies can *lean on interpretive discretion to reverse selective under-enforcement*. That’s distinct from *expanding legal scope on paper*.**

**Theoretically, Section 5 could already challenge the practice outlined by the Aff.**

**Federal Register: Rules and Regulations - ‘9**

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

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

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

**Sagers is Neg – the “governed” distinction.**

It says that scope is GOVERNED by three entities.

Yes, agencies can govern scope – no, Sagers does NOT say the CP EXPANDS scope.

The 2nd Sagers card begs the same question – it’s also verbal nonsense.

**Those cards access the Precision and Context warrants.**

**They’re from the formal Code of Federal Regs, use topic phrases, and get at whether agency interps “prohibits” or “expands scope”.**

**Aff severance a voter – Plan’s the locus, we’re reactive, so it’s worse for them. No clash or in-round education.**

**It is a zero-sum game – so consider whether it’s *worse* if Cplan were – instead – a topical Aff. Their thread NECESSARILY mean “Agency interp Affs” are topical:**

**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.

**Cp uses an exclusive FTC – means they investigate and address through non-judicial administrative proceedings – perm adds risk of private action**

**Rosch ‘10**

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

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

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

**A2: No solvency**

**Section 5 affords great latitude for FTC discretion.**

**Dagen ‘10**

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

The Sherman Act was enacted over one hundred years ago to prevent conduct likely to harm consumers.14 Section 1 of the Sherman Act proscribes unreasonable agreements between competitors, such as naked price fixing.15 Section 2 addresses exclusionary conduct by single firms, making it unlawful to “monopolize or attempt to monopolize” a market for goods or services in the United States.16 The Sherman Act is enforced by federal and state authorities, as well as through private rights of action. Successful plaintiffs are entitled to treble damages under the Sherman Act. The FTC, created in 1914, enforces the antitrust laws through Section 5 **of the FTC A**ct, which prohibits “**unfair methods of competition**.”17 As discussed at length below, Section 5 also “empower[s] the Commission **to define** and **proscribe** an **unfair competitive practice**, ***even though*** the practice does not infringe either the letter or the spirit of the antitrust laws.”18

A2: Private suits

**FTC can issue civil damages under Penalty Offense Authority**

**Gordon ‘21**

et al; Len Gordon, chair of Venable’s Advertising and Marketing Group, is a skilled litigator who leverages his significant experience working for the Federal Trade Commission (FTC) to help protect his clients’ interests and guide their business activity. Len regularly represents companies and individuals in investigations and litigation with the FTC – From: “The Regulatory Road Ahead: Payments Law Virtual Bootcamp” - June 8, 2021 – This specific section was written January 19, 2021 and reconsolidated into a broader doc - #E&F - https://www.venable.com/-/media/files/events/2021/06/the-regulatory-road-ahead.pdf?la=en&hash=7DA62C06072C24DB3A3C8A743AEE41FCC12E3410

Finally, the FTC could utilize a somewhat unused avenue for obtaining redress—the **Penalty Offense Authority**, which we’ve previously discussed here. This Authority authorizes the FTC to seek civil penalties (**directly not through the DOJ**) against a defendant in federal court where (1) the FTC has obtained a litigated cease and desist order against another party through an administrative proceeding p**ursuant to Section 5**(b) **of the FTC A**ct**;** (2) the cease and desist order identifies a specific practice as unfair or deceptive; and (3) a party on notice of the order (i.e., someone with actual knowledge that the practice is unfair or deceptive) then engages in that same violating conduct after the order is final.

A2: can’t solve global

**FTC has authority under Section 5 to enforce antitrust law extraterritorially** – AND doing so results in the same interpretation of comity as the plan

**Ruhl 89** (Jesse R. Ruhl, JD candidate, Dickinson School of Law, BA Franklin & Marshall College, “The International Law Limits to the FTC's International Activity: Does the Law of Nations Keep the FTC at Home?” Penn State International Law Review, 7(3), 1989, https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1100&context=psilr)

IV. Domestic Limitations to the Extraterritorial Jurisdiction of the FTC

Although the Constitution gives Congress plenary power to regulate commerce with foreign nations, congressional power to regulate international antitrust is limited by international law and **comity**.' The Supreme Court indicated this principle early in the history of the United States by recognizing that no state may exercise sovereign powers within the borders of another state without the latter's consent . 4 Nevertheless, the United States Supreme Court has ratified a series of actions by the Department of Justice where the United States has asserted jurisdiction over agreements made outside the territorial limits of the United States governing trade and commerce. The jurisdictional nexus, according to the courts, has been found when some "effect" of the agreement has been felt within the United States itself.47

A. Delegation of the Extraterritorial Authority to the FTC

As indicated earlier,4 8 Congress has delegated some of its authority to regulate commerce to the FTC.4 The FTC's authority to regulate international commerce originates in the FTC Act and the FTC's authority to enforce the FTC Act.3 0 **Section 5(a)** of the Act **includes**, as a jurisdictional feature of the statute, the authority to regulate "trade or commerce with foreign nations."51 Congress had authority to enact and the FTC has authority to enforce the Act only because the FTC Act is within the Constitutional delegation of authority to Congress "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.""2

B. FTC's Ability to Regulate Conduct of Citizens Abroad

After the Wheeler-Lea Act," the FTC's authority to regulate United States citizen's conduct occurring outside the territorial boundaries of the United States has never been seriously questioned." The scope and power of that authority was demonstrated in Branch v. FTC.58

In Branch, the FTC issued a cease and desist order 56 ordering Branch to discontinue soliciting a phony "diploma mill" in Latin America."' Branch contested the order, complaining that the FTC had no jurisdiction over his "institute" because the advertising occurred outside the territorial boundaries of the United States.58 The United States Court of Appeals for the Seventh Circuit rejected Branch's appeal. The court reasoned that since the FTC was motivated to protect Branch's competitors engaged in foreign commerce, as opposed to protecting those residents of central America who may be injured by Branch's phony activities, 9 the FTC had jurisdiction to order Branch to discontinue his practices. In so holding, the court remarked:

The Federal Trade Commission does not assume to protect the petitioner's customers in Latin America. It seeks to protect the petitioner's competitors from his unfair practices, begun in the United States and consummated in Latin America. It seeks to protect foreign commerce . . . . The right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within its territorial jurisdiction has been recognized repeatedly .... Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.6 "

The question then left for the court to decide was whether Congress had delegated to the FTC the power to regulate Branch's activity.6'

The court found that Congress had granted the authority to the FTC in § 5(a) of the Federal Trade Commission Act.62

C. FTC's Ability to Regulate Foreign Nationals

The **F**ederal **T**rade **C**ommission **A**ct also allows the FTC to exercise jurisdiction over foreign nations located outside the territorial boundaries of the United States. The United States has consistently applied its own rules of conduct concerning anticompetitive acts of foreigners outside the territorial United States which produced deleterious economic effects within the territorial United States. 3 The conflict with international law arises when the United States, through the FTC or the Department of Justice, attempts to punish a foreign national for acts which occurred outside the territorial United States but violated the United States' antitrust laws.6 It is not doubted that foreign nationals are liable for their acts which occur within the territorial United States. The question is whether an exemption exists to the principles of territorial sovereignty so that the United States may prosecute foreign nations for conduct committed outside the United States, and thus in another sovereign's territory.65

The leading case supporting this exception to territorial sovereignty principles is The S.S. Lotus,66 in which the Permanent court of International Justice held that a state may punish a foreigner for his acts abroad if those acts "form a constituent element of a crime consummated within the territory of the State. '6 7 In this case, a collision between a French and a Turkish ship had resulted in the sinking of the Turkish ship and the deaths of Turkish seamen. When the French ship later docked in Constantinople, the French officer in charge when the collision occurred was put on trial in Turkey and convicted of involuntary manslaughter. France protested the sentence, and both countries resorted to the Permanent Court of Inter national Justice to resolve the question of whether Turkey had violated France's territorial sovereignty by prosecuting the French officer. The court determined that, because the crime had effected Turkish territory (the Turkish vessel), 8 Turkey could exercise jurisdiction over the Frenchman notwithstanding the fact that the French officer had at all times remained on board the French vessel:

[I]t is certain that the courts of many countries, ... which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there . ... "

The S.S. Lotus now stands for the principle of international law that a state may exercise jurisdiction over a party if the party has in fact perpetrated conduct in a foreign country which effects the country asserting the jurisdiction. This measure of jurisdiction has now developed into the "effects doctrine" upon which the United States can reach out, through the FTC and its other regulatory agencies, to regulate conduct by actors who are not located within United States territory.7"

Rest are basically versions of rollback

**One – SCOTUS is a firewall.**

**1NC Khan says The Court’s repeatedly affirmed the FTC’s Section 5 authority.**

**And, their args don’t assume the 1NC distinctions in our CP Text.** **Our planks about *policy statements* and *data sets* mean CP avoids politics and rollback – Kovacic**

**Prefer SCOTUS *precedent* AND *empirics dipped from when the Court’s ideology was most aligned with the Chicago School*.**

**Dagen ‘10**

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

The FTC enforces Section 5, which makes unlawful “unfair methods of competition.”118 **In FTC v. Sperry** & Hutchinson Co., the Supreme Court held that Section 5 “empower[s] the Commission **to define** and **proscribe** an unfair competitive practice, **even though the practice does not infringe either the letter or the spirit of the antitrust laws**.”119 Many believe that the interpretation of Section 5 as broader than the Sherman Act is a remnant of a bygone era. But **even during the Chicago School era**, the Supreme Court reaffirmed its understanding that Section 2 and Section 5 differed. **For example, in Copperweld Corp**. v. Independence Tube Corp., while attempting to limit the reach of the Sherman Act, the Reagan antitrust team, led by Assistant Attorney General William Baxter, and FTC Chairman James Miller, submitted an amicus brief highlighting that “[t]he courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act.”120 The Court thereafter explained that single firm conduct was governed not only by Section 2 but also by Section 5.121 In 1986, the Court more specifically and directly referenced the “spirit” of Section 5, stating that Section 5 “encompass[es] not only practices that violate the **Sherman** Act and **other antitrust laws**, . . . but also practices **that the Commission determines are against public policy for other reasons.”**122

**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.

**Our *Guidance distinction* means no rollback**

* Agencies can issue *“Guidance”* (and enforce) – or they can create *“Rulemaking”* – both have legal force, but the latter tends to encounter more judicial review/resistance.

**Raso ‘10**

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

**5. Judicial Challenge**

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

**Rollback assumes Core Antitrust *at present* – it’s less likely precisely because the Aff *expands beyond* current core understandings.**

**Dagen ‘10**

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

In Part III, I provide a more comprehensive analysis of Section 5. I begin with a general discussion of the breadth of Section 5 and then address the concern that using Section 5 to fill in gaps in the antitrust laws will cause mayhem. Although some maintain that the FTC should not use Section 5 because three different appellate courts chastised the FTC in the 1980s for trying to expand the antitrust laws, those defeats involved core competition practices that the courts protect the most. **As** the **conduct moves** away **from** either **the core** or the essential, authority under both the Sherman Act and **the FTC A**ct is broader.

**Cartel Adv**

**XT No Solvency**

**Any residual solvency arguments demonstrate the link to our turn to advantage 2 and China DA – to enforce international restrictions, the US must invade other countries sovereignty, encouraging other countries to reduce respect for the US.**

Daniel **Fahrenthold**, JD Candidate @ Columbia Law School, **’19**, "Respectful Consideration: Foreign Sovereign Amici in U.S. Courts," Columbia Law Review 119, no. 6 : 1597-1632

2. International Discovery Rules. - Another area of U.S. law prone to **draw the ire** of foreign countries is **discovery**.193 United States discovery rules are **alien to most jurisdictions**, which adopt far less permissive approaches to evidence gathering by private litigants.1' Some jurisdictions resist the application of U.S. **discovery rules**,1 9 5 often through "**blocking statutes**" or **secrecy laws**, 196 and many governments reserve an active role for themselves in the approval or denial of discovery requests sent by U.S. litigants or courts.1 97

The United States has ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which the parties drafted with the purpose of harmonizing international discovery procedures among signatory states.1 98 The Supreme Court has determined, however, that U.S. courts are able to **compel foreign parties** to provide evidence in accordance with ordinary U.S. rules of discovery, rather than through the Convention procedures, even if this means overriding the foreign country's domestic law.1 99 Not surprisingly, foreign sovereigns have **found this rule somewhat** **disturbing**. The Swiss government, for instance, **strongly opposed this interpretation** of the Hague Evidence Convention and threatened that enforcement of U.S. discovery rules would jeopardize the future of Swiss compliance with the Convention.2 0 A decision to ignore a country's blocking statute or secrecy law and order discovery is subject to a balancing test, however. The Court has emphasized the importance of looking at the extent to which compliance with discovery would undermine the interests of the foreign state involved (as well as where noncompliance with discovery would under-mine important interests of the United States);201 this factor "directly addresses the relations between sovereign nations."202 Foreign sovereigns often enter amicus briefs to resist discovery orders and to **underline the importance** of their government interests in the litigation. 203 A court's ruling that gives weak deference to foreign sovereigns in this area risks **upsetting the foreign government** and **jeopardizes reciprocity** in international discovery rules. 204 A court's disregard of arguments pertaining to foreign criminal law might also, not unlike McNab, leave those subject to U.S. discovery orders stuck **between the threat of foreign prosecution** and contempt orders from U.S. courts.

**ptx**

**Error Rates**

**404**

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

**Crane ‘10**

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

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

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

**Exclusive FTC avoids false positives *AND* false negatives.**

**Salop ‘13**

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

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

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

**Dagen ‘10**

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

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

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

**Turns your delay and certainty deficits**

**Kades ’18**

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

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

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

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

**Rosch ‘10**

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

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

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

**Independence**

**Uq**

1. **The FTC chair was already chosen, 2) courts won’t hate the CP! Their ev is speculation**

**2ac Marx ’20** [Claude; November 9; Reporter for FTC Watch, B.A. from Washington University in St. Louis; MLex Market Insight, “Partisan splits on Capitol Hill over antitrust likely, but less rancor between DOJ, FTC,” <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/partisan-splits-on-capitol-hill-over-antitrust-likely-but-less-rancor-between-doj-ftc>]

New look at the top

Still, as **partisan divisions** on Capitol Hill will probably continue, so will such differences be **evident** on some **big-ticket issues** at the FTC. The agency has long been known for its **bipartisanship** regardless of which party controls the White House, but the **five commissioners** who assumed office at roughly the same time in 2018 have **clashed** over a number of **high-profile cases**.

Former Vice President Joe Biden’s election as president means changes on issues at the **FTC** that likely will **follow a course** along the lines of the **dissents** of Democratic Commissioners Rohit Chopra and Rebecca Slaughter. That includes more aggressive enforcement on vertical deals and pharmaceutical mergers, as well as a tougher approach toward individual liability of corporate executives.

The **big unknown**, of course, is **Biden’s choice** of chairman, a decision on which the president may face **lots of pressure** from the **progressive wing** of the party versus the more **establishment wing**. “He has worked closely over the years with former FTC Commissioner Terrell McSweeny, and if he looked to her either to serve as AAG [assistant attorney general] or FTC Chair, or to recommend candidates, we’d see progressive but mainstream competition agencies,” Stephen Calkins, former FTC general counsel in the Clinton administration, wrote in an e-mail.

“On the other hand, the [progressive] Open Markets group [Open Markets Institute] would be lobbying hard for the appointment of leaders like Commissioner Chopra and, were they to succeed, that would be a different approach,” Calkins added. (Chopra’s term expired in September, but he could be nominated again.)

Biden’s options may be **limited**, given the likely **GOP control** of the Senate, which must confirm anyone nominated to the FTC. The chamber is **unlikely** to confirm **anyone** its **Republican members** consider to be **too progressive**. Senate Commerce Committee Chairman Roger Wicker of Mississippi is a pro-business conservative Republican who has supported the agency.

FTC Chairman Joe Simons hasn’t said how long he intends to remain on the commission. Multiple sources suggest he will step down, but the timing of such a move isn’t known. One factor on that timing may be the agency’s Facebook probe, which may result in an antitrust lawsuit. The FTC has invested much time and resources into the probe, so Simons may want to remain for what would be a landmark case on his watch. But even if Simons decides to stay on the commission, Biden could designate someone else as chairman.

Restoring comity

The DOJ and FTC have had some **acrimonious clashes**, from clearance fights over which agency will handle high-tech matters to the battle over the FTC’s lawsuit against Qualcomm, yet there’s hope new leaders will restore greater comity.

In that Qualcomm litigation, the DOJ, in a filing before the Ninth Circuit Court of Appeals, blasted a lower court ruling in favor of the FTC’s case that Qualcomm, which makes modem chips, had rigged the market. The DOJ said the decision “threatens competition, innovation and national security.”

Though the Ninth Circuit **overruled** the **FTC’s win**, the **bitter public exchanges** in the case, according to some veteran practitioners, were **unprecedented** and **left scars**.

“I have to assume that the next AAG will meet with the next FTC chair and try to reestablish harmonious relations between the two agencies,” Calkins, a law professor at Wayne State University, added in remarks prior to Biden's election as president. “It is harmful to good competition enforcement to have the two competition agencies at war with each other. I look for a negotiated truce whether or not Trump is reelected. (In truth, if Biden is elected and appoints a respected AAG, there won’t be much to negotiate — the two agencies will just go back to customary behavior.)”

Then there's Makan Delrahim, who's served as the antitrust division chief since September 2017, an unusually long tenure for that post. The first registered patent lawyer to lead the division, Delrahim made waves with his approach to intellectual property.

Delrahim questioned whether the Obama administration went “too far” to accommodate technology implementers in standard-setting organizations that pay royalties for the use of the innovators’ technology. He expressed concern that the approach risked “undermining incentives for IP creators, who are entitled to an appropriate reward for developing breakthrough technologies.”

Look for the Biden administration to review that stance and, perhaps, change course to the division's former long-established approach, despite the time and energy that Delrahim spent promoting pro-patent-holder views.

Finally, the large number of newly confirmed federal judges will have a big impact on the next administration.

“**Even** a two-term **Biden presidency** would be conducted with a **very conservative** Supreme Court and a reasonably conservative judiciary in general,” Calkins wrote. “Defendants will anticipate good things in court, so they will be **less willing** to settle and have an **easier time winning**. The FTC in particular will face **massive challenges** as it confronts a judiciary keen to **trim the wings** of **government agencies**.”

**Independence does not mean zero accountability.**

**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/

In any event, independence as we have discussed it here cannot mean complete isolation from the political process. Any system of competition law (including its law enforcement elements) involves tradeoffs between independence and accountability. The agency’s interactions with courts, for example through judicial review of the agency’s final decisions in adjudicative proceedings, helps ensure that it operates within the boundaries set by constitutions and statutes. But accountability goes further. Even within the law enforcement context, for example, there is no judicial review of FTC decisions to enter consent settlements in administrative litigation, or of agency decisions not to prosecute. Further, even when judicial review does not operate as a check, competition agencies should be accountable to the public to explain their policy choices and to demonstrate that they have wisely exercised the discretion inherent in their mandates. To suggest that independence is an absolute value, or that judicial review fully ensures accountability, is to overlook the tension between the autonomy needed to ensure the principled execution of law enforcement and adjudication duties and the accountability needed to provide legitimacy.

**IF we solve the FTCA args we get modeling – lists six specific nations.**

**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 - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

There is little evidence to suggest that either presidents or their legislative allies in the early twentieth century could have foreseen the ramifications of their formative roles in shaping competition regimes worldwide. American competition laws, including the FTC Act, came to serve as **a template for foreign governments** that freely transplanted many elements while modifying others. A cognizant DOJ and FTC issued their Antitrust Enforcement Guidelines for International Operations in 1995, stating: “Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent.”18 But these guidelines do not paint the full picture. Inspired foreign states modeled their regulatory regimes after foundations originally shaped under the auspices of Roosevelt and Wilson, both powerful executives with aforementioned hands-on preferences in matters of antitrust. At the FTC’s launch, “Wilson emphasized assistance to business rather than the investigative functions highlighted in the House or the prosecutorial functions highlighted in the Senate.”19 The language of the U.S. antitrust laws inevitably allowed leeway for presidential influence on industry-level economic direction.

All the same, the enforcers of old were watchmen for a U.S. economy which, then as now, operated within a market economy framework. Many countries that followed the United States’ regulatory lead have been less beholden. As the prominent international relations scholar Michael W. Doyle confirms:

The most striking rates of growth of the post-war period appear to have been achieved by the semi-planned capitalist economies of East Asia—**Taiwan**, **South Korea**, **Singapore**, **Japan,** and now **China** and **India**. Indicative planning, capital rationing by parastatal development banks and ministries of finance, managed trade, and incorporated unions—capitalist syndicalism, not capitalist libertarianism—seemed to describe the wave of the capitalist future.20

The close coordination between government and big business common to state-sponsored capitalist economies is also conducive to mercantilist thinking and dependent on the incumbent administration’s economic worldview. Originating from a “historical association with the desire of nation-states for a trade surplus. . . whether it is labeled **economic** nationalism, protectionism,”21 or the like today, mercantilism is characterized by the subservience of economy to the state and its interests, and a willingness to give home-grown business enterprises an extra competitive advantage.22 Thus-inclined governments view international economic relations as conflicting, zero-sum, and better overseen through state-private sector coordination than left to wholly free markets.23 Nor is the mercantilist phenomenon limited to illiberal states that feature stateowned enterprises and other such overtly hybrid forms of corporate governance. As political leaders continue to promote economic growth and highlight personal expertise to justify and fortify their democratic legitimacy, an expansion of governments’ coordination with the private sector has followed.24 When their major industries face dismal market conditions, countries inured to “capitalist syndicalism” per Doyle are not above protectionist adjustments at the expense of their neighbors. Together with the standard mercantilist strategies of prioritizing exports and frequent use of various non-tariff barriers to thwart competitive imports,25 **selective antitrust enforcement** offers another tool.

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 its long historical evolution of counterbalancing regulatory norms. 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 Myung-Bak’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.

**Link d**

**Courts enforcing is about SHERMAN, which is our competition arg. AND, their ev concedes judges will pretend they have Econ degrees!**

**Dameron 16** [Charles S. Dameron. Yale Law School, J.D. 2015. "Present at Antitrust’s Creation: Consumer Welfare in the Sherman Act’s State Statutory Forerunners." https://www.yalelawjournal.org/note/present-at-antitrusts-creation-consumer-welfare-in-the-sherman-acts-state-statutory-forerunners]

Notwithstanding **occasional invocations** of the judiciary’s “common law” authority over the Sherman Act, federal courts have, since the Act’s earliest days, expended great energy attempting to divine the legislative purpose behind it.5If the Sherman Act were truly a blanket grant of common law-making authority to federal courts, they would hardly need to undertake such searching inquiries. The Supreme **Court’s** and **lower courts’** close attention to the Sherman Act’s **language** and legislative **history** indicates that they have sought to abide by their constitutional role as **interpreters** of **federal statutes**.6

It is therefore **more precise** to say that the judiciary enjoys an **especially wide authority** to **fill statutory gaps** when interpreting the Sherman Act due to the Act’s ambiguous language, its constancy over time, and the fact—peculiar in light of many modern regulatory regimes—that Congress did not assign **rulemaking authority** to an administrative agency. These traits do not imply that federal courts may pursue **whatever** antitrust **policy they find most desirable** or wise; courts are **obliged** to follow the statute’s **contours** to the extent that they can **perceive those contours**.7

**Means they have zero idea what “welfare” or “competition” mean in context – prefer the FTC**

**Baker 19** [Jonathan B. Baker, a former Director of the Bureau of Economics at the Federal Trade Commission, is a Research Professor of Law at American University. He has also worked as the Chief Economist of the Federal Communications Commission, a Senior Economist on the Council of Economic Advisers, a Special Assistant in the Antitrust Division of the Department of Justice. "The Antitrust Paradigm: Restoring a Competitive Economy." https://www.hup.harvard.edu/catalog.php?isbn=9780674975781]

I then turn to the contemporary imperative of restoring a competitive economy by strengthening antitrust rules and enforcement, in particular the challenge of engineering change in a conservative legal environment. I have proposed a slate of new presumptions that would enable courts and enforcers to respond to contemporary market power problems made more complicated by the growth of sophisticated, information-technology powered firms. But the Supreme **Court** stands in the way. I have therefore emphasized the sort of **arguments** that can **convince** the Court: **economic ones**. This is not to suggest that the problems of market power are only economic; market power threatens the political bargain and fosters conditions in which crony capitalism thrives. Nor is it my contention that political mobilization is unimportant; quite the contrary. However, the **justices will be most responsive to economic arguments** and evidence **concerning competition and welfare**.

**At trade turn**

**Unilateral application of extraterritorial antitrust law highlights US hypocrisy. Pro-development countries will backlash to the international trading system to protect national champion industry.**

**Waisberg**, Ivo, Professor @ Catholic University of Sao Paolo, **’19**, "International Antitrust Approaches and Developing Countries." Available at SSRN 3424274 (2019).

If the comity to respect or analyze the interests of other nations was an important ingredient in the extraterritorial application of antitrust laws, the harms caused by this system could be mitigated. Because of the little weight given to comity in the US, and in large extent in the EU, developing countries must seek alternative frameworks to **mitigate extraterritoriality**. Conversely, countries that can impose their interests through an **efficient application** of their laws in relation to conducts occurring elsewhere are not supporters of comity principles. This is the reason why American scholars argue in favor of abandoning comity and increasing extraterritoriality based purely **on American interests**.39 This makes sense from a **purely unilateral** point of view.

The point is that the current unilateral enforcement system, from a developing country perspective, is a **one-way street**. Powerful antitrust agencies can decide to enforce their laws **whenever they see fit**, and, like many trade measures, antitrust enforcement can be strongly influenced by **political decisio**ns. For the developing country, this will represent an **overenforcement** by the developed country agency. On the other hand, if the developed country underenforces its law for its national, there is nothing the developing country can do. Of course, it can be argued that underenforcement of antitrust laws by a developing country creates the need for extraterritorial measures by other agencies. Even if we agree that an underenforcement problem exists in most developing countries, it would be useful for them to **fight for an international system** that enables them to **contest developed countries for both overenforcement** and underenforcement, which is something they cannot do in the unilateral system unless a developed country decides to show some goodwill.

**Plan’s unilateral action sends signal penetrating signal unilateralism, resulting in the end of global trade, not inclusive trade. Turns growth.**

SAMUEL F. **KAVA**, JD/MBA Candidate @ JHU/UofM, **’19**,"The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity," Journal of Business and Technology Law 15, no. 1 (2019): 135-164,

Before the FTAIA was enacted, in 1982, many of the United States' **closest allies** were disgruntled by the U.S. courts' **expansive extraterritorial application** of the **Sherman Anti-Trust** Act. 152 These nations confided in the territorial principle, and believed it "**axiomatic** that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."153 The United Kingdom, one of the most outspoken allies against the United States' "attempt[] to impose [its] domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the United States," viewed the extraterritorial application of the Sherman Anti-Trust Act as ironic given the fact "the United States was founded by those who took exception to little matters of taxation being imposed extraterritorially." 154 Thus, in an attempt to "protect their nationals from criminal [and civil] proceedings in foreign courts where the claims to jurisdiction [were] excessive and constitute[d] an invasion of sovereignty," foreign nations **enacted blocking statute**s to resist the extraterritorial application of the Sherman Act.155

The blocking statutes of each nation varied, but all served to "**block the discovery of documents located** in their countries and bar the enforcement of foreign judgements."156 The United Kingdom achieved these goals with the Protection of Trading Interests Act, France with the French Blocking Law, Canada with the Foreign Extraterritorial Measures Act, and Australia with the Foreign Proceedings Act.157 The conflicting laws between the United States and its foreign counterparts created **tremendous uncertainty** regarding what nation's laws would be applied in the event of a cross-border dispute. According to Nuno Lim o and Giovanni Maggi, economists from the University of Maryland and **Yale University**, "as the world becomes more integrated, the gains from decreasing trade-policy uncertainty should tend to become **more import**ant relative to the gains from reducing the levels of trade barriers."158

Essentially, **for trade to prosper**, it is more important to provide producers and consumers with **predictability and certainty** (regarding the rule of law) rather than enacting laws that focus on free trade economics. Accordingly, it is in the best interest of governments to focus on **unifying its laws** before negotiating for the elimination of tariffs or quotas. This is not to say that eliminating trade barriers is not vital to the health of the economy-in fact, tariffs, quotas, and other trade barriers are proven to adversely affect all parties involved in the chain of distribution-however, it is more important to unify laws before focusing on the elimination of any trade barriers.159

As mentioned in Part I.C., the complaints of U.S. exporters and foreign governments were heard, and the United States Congress enacted the FTAIA "to address the concerns of foreign governments that the **effects test** established in the Alcoa case had not made clear the magnitude of the U.S. effects required to support a claim under the Sherman Act." 160 Thus, the FTAIA was implemented to bring **certainty to consumers and producers** by requiring that "conduct must have a 'direct, substantial, and reasonably foreseeable effect"' for the Sherman Anti-Trust Act to apply extraterritorially. 161 This language provided the foreign community with temporary relief, and gave producers and consumers the certainty and predictability needed to establish confidence in the markets and continue trading. However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a "direct, substantial, and reasonably foreseeable effect" 162 on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies-i.e. the U.S. Department of Justice and the Federal Trade Commission-have taken an aggressive approach to pursuing international antitrust claims. In 2017, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published the International Guidelines-a publication "explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States." 163 The International Guidelines have taken the broadest approach in determining if conduct is "direct"-finding if there is a "reasonably proximate causal nexus between the conduct and the effect" conduct is "direct"-and the narrowest view that international comity bars enforcement of U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation's law.164 Thus, because the FTAIA has become ineffective and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act with Apple v. Pepper, foreign nations will almost certainly strive to adopt **modern and effective blocking statutes**. These blocking statutes will **revitalize uncertainty** in the markets, and the global economy will be **adversely affected.**

In addition, because **our world is more integrated**, compared to the time when the FTAIA was implemented, the adverse economic effects may be **worse** if foreign nations pursue **modern blocking statutes.** To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations' laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and **innovative products** (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than r**esearch and development** with the new blocking statutes, consumers, producers, distributors, and **the economy as a whole will be adversely affected.**

Overall, there is a **significant risk** that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the **global economy.** Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer's ability to purchase low cost goods, and the **overall health of the global econom**y. **The only certainty is that trade will slow down** as a result of trade policy uncertainty. To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act by expressly providing courts with a robust international comity analysis.