Writing Law: Minimum Requirements for Enacting Robust Antitrust Legislation

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February 2024

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Introduction

The resurgence of antitrust enforcement as a political tool to tame concentrated corporate power in the United States since 2017— when more attention began being paid to Big Tech's harmful effects on our society — has resulted in an influx of proposed antitrust and other antimonopoly legislation from Congress.[1] Some of the bills lawmakers have proposed over the last seven years seek to create a fairer marketplace, stronger democracy, and more moral economic system that benefits consumers, small and independent businesses, and workers. However, some of the proposed bills are either lackluster, harmful, misguided, or outright deceptive about what goals and whose interests are being advanced.[2]

If lawmakers desire to enact genuinely transformative legislation aimed at improving antitrust enforcement and democratizing the economy, then they must draft legislation in such a way that upon its enactment it is as unambiguous and comprehensive as possible. Without crystal clear laws, Congress's efforts will be largely wasted as a hostile judiciary, a change in economic conditions, future public ambivalence, administrative apathy, or other factors will erode or undo Congress's intent with the law.[3]

This Article aims to provide legislators, policy advocates, and members of the public with guidance on how to determine whether proposed legislation aligns with the principles of fair competition, in which Congress has repeatedly grounded its justifications for the antitrust laws.[4] Specifically, this Article offers a list of 25 characteristics that exemplary legislation from Congress should include to implement these goals effectively. This list of recommendations represents the minimum requirements for effective legislation; it is not exhaustive, and other considerations may be warranted. In other circumstances, legislation may be more narrowly targeted and only include some of these characteristics. In general, the more listed characteristics a proposed legislation incorporates, the stronger its potential to advance an effective antitrust agenda. Among other benefits, these recommendations aim to ensure that a new law will be interpreted favorably by courts, understood by the public, deter potential violators, be responsive to changing circumstances, and effectively punish those who violate the law.[5]

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[1] *See, e.g., House of Representatives Launches Assault of Legislation Aimed at Taking Down Big Tech*, OPEN MARKETS INST. (June 18, 2021), https://www.openmarketsinstitute.org/publications/the-corner-newsletter-june-18-2021. *See also S.673 - Journalism Competition and Preservation Act of 2022*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/673 (last visited Apr. 18, 2023); *S.3847 - Prohibiting Anticompetitive Mergers Act of 2022*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/3847 (last visited Apr. 18, 2023).

[2] *See, e.g., H.R.2926 - One Agency Act*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/2926 (last visited Apr. 18, 2023).

[3] Emily Birnbaum, *Big Tech Divided and Conquered to Block Key Bipartisan Bills*, BLOOMBERG (Dec. 20, 2022), https://www.bloomberg.com/news/articles/2022-12-20/big-tech-divided-and-conquered-to-block-key-bipartisan-bills?leadSource=uverify%20wall.

[4] *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2022); *see also* Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. ONLINE 119 (2022), https://ssrn.com/abstract=3929159.

[5] The history of the enforcement of the antitrust laws has shown that the courts and enforcers have on many occasions done a poor job in effectuating Congress's intent. *See generally* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2022); MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS INSTITUTIONS, EXPERTISE, AND POLICY CHANGE (1991).

A. General Requirements and Guiding Principles

1. The statutory text should include a clear statement that explicitly declares Congress is using the full extent of its legislative powers under the Constitution. The law should also include a clear statement that Congress is employing as many of its constitutional powers, such as the Commerce Clause and the Tax and Spend Clause, as possible to establish the law's constitutionality.

Justification: Under the current interpretive methods used by the federal courts, judges do not assume that Congress intends to use the full breadth of its constitutional powers when it enacts a law.[6] Judges also do not assume that Congress is invoking more than one of its legislative powers to justify a statute's constitutionality. For any proposed law, it should be as clear as possible in committee reports and the statutory text that Congress has inscribed into the law its intent to use the full range of its constitutional powers and that Congress is using at least one of its constitutionally authorized legislative powers to enact a statute.[7]

Example(s): The Supreme Court's decision in *National Federation of Independent Business v. Sebelius* provides an example of the problems that can arise if Congress does not clearly justify a law with as many of its constitutional powers as possible.[8] In *Sebelius*, the Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (commonly known as the ACA or Obamacare). In a narrow 5-to-4 decision, the Court stated that the ACA was a valid exercise of Congress's taxing power.[9] This holding was controversial because Chief Justice John Roberts was believed to have acted inconsistently with his conservative principles by pragmatically deciding in favor of upholding Congress's taxing power since the litigants hardly argued the taxing power issue.[10] Rather than allowing the Supreme Court to determine which legislative power and how much of it Congress is using to justify a statute, Congress should explicitly codify into a statute as many constitutional powers as they reasonably can to ensure it is determined to be constitutional by the Supreme Court.

For the constitutional powers chosen to anchor the law, Congress must explicitly state that it is using the full breadth of its legislative powers under the chosen clauses. Including such a statement in the statutory text is important because the Supreme Court does not assume Congress uses the full breadth of its constitutional powers when it enacts a law. Consider the Robinson-Patman Act (RPA). The RPA is a federal antitrust law that prohibits price discrimination from sellers of commodities and the extraction of unfair and preferential terms from dominant buyers.[11] For purposes of declaring one of Congress's legislative powers, Section 2(a) of the RPA states that price discrimination is prohibited "where either or any of the purchases involved in such discrimination are in commerce."[12] The Supreme Court has interpreted the phrase "in commerce" somewhat narrowly. Rather than the practice, as it is

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[6] Currently, the House of Representative requires its members to state constitutional basis that justifies Congress's power to enact the law. *See* RULES OF THE HOUSE OF REPRESENTATIVES XII cl. 7(c)(1), 118th Congress (2023) [hereinafter HOUSE RULE].

[7] *See* CONG. RESEARCH SERV., R44729, CONSTITUTIONAL AUTHORITY STATEMENT AND THE POWERS OF CONGRESS: AN OVERVIEW 11-24 (2019); U.S. CONST. ART. 1, § 8.

[8] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[9] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563 (2012).

[10] Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012), https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/?sh=cebde49d701d.

[11] 15 U.S.C. §§ 13(a)-(f).

[12] 15 U.S.C. § 13(a).

prohibited by the RPA, needing only to *affect* interstate commerce,[13] the Supreme Court has stated that at least one sale of the products must cross state lines.[14] Such an interpretation is stricter than what Congress can authorize under its Commerce Clause powers.[15]

2. Include an explicit statement of Congress's broad factual findings as well as a broad and clear statement of purpose indicating the extent of the problem, the breadth of the statute, its intended effects, and who the statute intends to benefit and/or target.

Justification: Judges have typically referred to a statute's legislative history to determine Congress's intent and understand how the statute should apply to various factual circumstances, particularly when a novel issue arises.[16] However, since the 1980s, judges have become extremely hostile toward using legislative history and generally deem it unhelpful, unreliable, and incomplete.[17] Instead, judges generally assert that only the statute's explicit text is what matters.[18] Since Congress writes most laws in a manner that requires at least some interpretation from the judiciary, to give the courts as much guidance as possible, Congress can include a section in the law explicitly detailing important reasons why it has chosen to enact the law and its intended purpose. This recommendation would (at least theoretically) require reviewing courts to consider what Congress intended with enacting a bill since the intent would be explicitly codified in the law's text. Such a section can also assist courts with interpreting ambiguous sections of a statute in a way that facilitates Congress's intent.

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[13] United States v. Lopez, 514 U.S. 549, 558-59 (1995) (categorizing Congress's ability to regulate interstate commerce into three categories including the regulation of the channels of commerce, the instrumentalities of commerce, and economic activities that "affect" commerce).

[14] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-01 (1974). Note that temporary storage does not deprive the transaction of being classified as an interstate transaction. *See* Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

[15] United States v. Lopez, 514 U.S. 549, 558-59 (1995) (categorizing Congress's ability to regulate interstate commerce into three categories including the regulation of the channels of commerce, the instrumentalities of commerce, and economic activities that "affect" commerce). Conversely, the Sherman Act's reach extends as far as the commerce clause allows. Apex Hosiery Co. v. Leader, 310 U.S. 469, 485, 490-96 (1940).

[16] Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013).

[17] *See also Id.*; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 375 (2012) ("[T]he use of legislative history poses a major theoretical problem: It assumes that what we are looking for is the intent of the legislature rather than the meaning of the statutory text. That puts things backwards.").

[18] *See* Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (arguing that Textualists should only "read the words of that [statutory] text as any ordinary Member of Congress would have read them.").

However, courts ignoring the statutory text obscures the general purpose of a law, the events that led to its enactment, and the themes that guide how the law is supposed to operate. For a noteworthy article on the consequences of the federal court's ignoring legislative history concerns the interpretation and jurisprudence of the Federal Arbitration Act, *see* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006).

Example(s): Section 102 of the Truth in Lending Act[19] and Section 2 of the Norris-LaGuardia Act[20] incorporate some of Congress's factual findings and the problems the statute is intended to remedy.[21] The relevant part of Section 2 of the Norris-LaGuardia Act states:

> *Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.*[22]

3. All words and phrases should be explicitly defined in the statute.

Justification: When Congress does not define a word or phrase in a statute, courts most frequently employ a textualist analysis to determine its meaning.[23] While often asserted as an ordered and rational process, textualism can be arbitrary as there are no firm guidelines or agreed-upon rules regarding which rules of statutory interpretation judges should use.[24] Instead, judges subjectively choose from an array of rules of statutory interpretation. In fact, judges often implement the same textualist analysis to arrive at completely different results.[25] Given the breadth of available rules of statutory interpretation and the lack of any defined order in which to implement them, textualism can be just as results-oriented as the non-textualist approaches to statutory construction. Nevertheless, textualism is currently the predominant method of statutory construction. To enact the kind of fundamental change necessary to democratize the economy, Congress should draft legislation that is cognizant of this paradigm by explicitly defining all words and phrases in a law's text.[26]

Example: The words and phrases within the main substantive sections of the Sherman Act and Clayton Act are not defined in the statutory text.[27] For example, Section 3 of the Clayton Act says tying arranagements and exclusive deals of commodities are illegal if they "may be to

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[19] 15 U.S.C. § 1601.
[20] 29 U.S.C. § 102.
[21] Consider how this recommendation assisted in the formation of a favorable standing rule for the Lanham Act. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).
[22] 29 U.S.C. § 102.
[23] Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992).
[24] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii-xxviii (2012).
[25] *Consider* Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (both Justice Gorsuch, writing the majority opinion, and Justice Alito, writing a dissenting opinion used textualism to interpret Title VII of the Civil Rights Act of 1964 and arrived at completely different results).
[26] *See* Richard M. Re, *Justice Kagan on Textualism's Success*, PRAWFSBLAWG (Dec. 7, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/12/justice-kagan-on-textualisms-victory.html.
[27] *See* 15 U.S.C. §§ 1, 2, 13, 14, 18.

substantially lessen competition or tend to create a monopoly."[28] None of the words in the phrase are defined in the statutory text. As such, the federal courts have been able to interpret and reinterpret their meaning.[29] This circumstance has created both eras of vigorous enforcement when enforcers and courts interpreted the law favorably and when enforcement was significantly restricted, where enforcers and courts interpreted the law unfavorably.[30]

4. Incorporate an express severability clause to protect an enacted law and its subsections from potentially hostile and unpredictable judicial review.

Justification: Federal court judges interpret the laws Congress enacts.[31] Due to this ability, judges may also determine whether a statute is unconstitutional and thus void.[32] Absent Congress preventing the federal courts from reviewing a specific subject matter (known as jurisdiction stripping),[33] Congress can mitigate adverse decisions from the Supreme Court over a statute's constitutionality by incorporating an express severability clause into the text of a law.

An express severability clause restricts the judiciary to narrow any holding where a statute is declared unconstitutional to only the section at issue.[34] In other words, while the Supreme Court could still declare a section of a statute unconstitutional, an express severability clause prevents the entire law from being declared unconstitutional in one decision — thus requiring multiple lawsuits to be litigated.

Example: In *Seila Law v. Consumer Financial Protection Bureau*, the Supreme Court determined that the structure of the Consumer Financial Protection Bureau (CFPB), the federal agency responsible for protecting consumers from unfair practices in the financial sector, was unconstitutional on the grounds that the President was prohibited from removing the director of the agency unless for "inefficiency, neglect of duty, or malfeasance in office."[35]

Despite the ruling, the Supreme Court determined that only a slight modification of the law was required to make it constitutional. The Supreme Court merely modified how the director of the CFPB could be removed by the President while leaving the rest of the statute intact.

Part of the Court's justification for this decision was that Congress incorporated into the Dodd-Frank Act, which created the CFPB, an express severability clause that explicitly insulated the law if any part of the statute was determined to be unconstitutional.[36] The severability clause of the Dodd-Frank Act states in full:

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[28] 15 U.S.C. § 14.
[29] *Compare* Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293 (1949) *with* Tampa Elec. Co. v. Nashville Coal Co. (Tampa Elec.), 365 U.S. 320 (1961). For a more complete history of the enforcement of Section 3 of the Clayton Act and how the federal courts have changed its legal potency, *see generally* Daniel A. Hanley, *Per Se Illegality of Exclusive Deals and Tyings As Fair Competition*, 37 BERKELEY TECH. L.J. 1057, 1063-78 (2022).
[30] Consider the history of antitrust enforcement. *See* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970).
[31] Marbury v. Madison, 5 U.S. 137, 138 (1803).
[32] Marbury v. Madison, 5 U.S. 137, 138 (1803).
[33] *See* United States v. Klein, 80 U.S. 128 (1871).
[34] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2208 (2020).
[35] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2193 (2020).
[36] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209-11 (2020).

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.[37]

5. A statute should either have an immediate effective date or an effective date beginning in the next calendar year, and have no sunset provision.

Justifications: Depending on its subject matter and scope, enacting a new law often takes enormous political capital from lawmakers.[38] An effective date as close to the date of the statute's enactment as possible is the quickest way for the public to experience the benefits of Congress's legislative efforts. An earlier enactment date can also bolster the political coalition that advocated for the law, which can lead to additional (and potentially bolder) legislative reforms. Although the default for federal laws is that they become effective the date the President of the United States officially signs the bill into law,[39] including an explicit effective date in the statutory text ensures there is no ambiguity. While in some limited circumstances, firms will need more time to adjust their business operations to adequately comply with a new law, an earlier effective date is better for the public and the lawmakers supporting the law than a later one.

A proposed law should also not include a sunset provision, whereby after a specific date, the law becomes unenforceable. Sunset provisions force Congress to re-legislate an issue. If Congress desires to repeal a law, it can do so affirmatively at a later date. But laws should not include automatic expiration dates.

Example(s): The Sherman Antitrust Act, which prohibits restraints of trade and other monopolization tactics, became effective when President Benjamin Harrison signed it in 1890.[40] In contrast, the Public Safety and Recreational Firearms Act of 1994, commonly known as the Assault Weapons Ban Act, enacted only a 10-year prohibition on the selling, manufacturing, or transferring of semi-automatic weapons.[41]

B. Substance and Procedure

6. Incorporate a plaintiff-friendly legal standard that details precisely when a violation occurs. Bright-line thresholds, such as those based on a specific market share or financial metric (e.g., a specific amount of revenue, sales, or transaction size) are essential for robust enforcement.

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[37] 12 U.S.C. § 5302.
[38] Consider the enactment of the Affordable Care Act which was proposed in July 2009 and then enacted in March 2010, and the subsequent political controversy surrounding it when it came into full force. BY Davalon, *History and Timeline of the Affordable Care Act (ACA)*, EHEALTH, https://www.ehealthinsurance.com/resources/affordable-care-act/history-timeline-affordable-care-act-aca (last visited Apr. 18, 2023).
[39] *How Our Laws Are Made*, CONGRESS.GOV, https://www.congress.gov/help/learn-about-the-legislative-process/how-our-laws-are-made (last visited July 19, 2022).
[40] 15 U.S.C. §§ 1-2.
[41] Pub. L. No. 103-322.

Justification: Clearly defining all the terms in a statute prevents the federal courts from using their own arbitrary textualist and originalist analysis to determine the definitions of words and when a violation occurs.[42] Moreover, by clearly defining statutory terms, Congress can ensure whether the law's language is designed to be flexible or rigid — rather than allowing the courts to use their own judgment. One of the easiest ways for Congress to limit the courts' power and promote enforcement is to incorporate bright-line rules.

Bright-line rules can include explicit per se prohibitions where a specified method of competition is illegal for all firms or a presumptive violation.[43] For example, extensive evidence supports Congress's prohibition of all explicit and implicit non-compete agreements.[44] Bright-line rules can also be structured to incorporate market share thresholds, where a specified method of competition would only be illegal for firms above a certain market share. For example, exclusive dealing agreements should be illegal for all firms with over a 30% market share.[45] Bright-line rules can also incorporate specific financial metrics, whereby if a certain metric is exceeded, the specified method of competition is illegal. For example, Congress should amend the antitrust laws to explicitly prohibit conglomerate mergers when the total assets of the combining firms exceed $10 billion.[46]

When bright-lines cannot be implemented to regulate a specific method of competition, or it would be unwise to do so, lawmakers should instead enact bright-line presumptive violations. Presumptive violations ensure that the burden of proof is placed on defendants rather than plaintiffs to show their conduct did not violate the law.[47]

Example(s): Unclear phrasing of a law's legal standard opens the door to hostile judicial intervention. The history of the antitrust laws evinces the consequences of enacting unclear statutes that do not precisely define when a violation occurs. For example, Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[48] In 1911, the Supreme Court held in a seminal opinion that the words of Section 1 are meant to prohibit only "unreasonable" restraints of trade, about which practices the Court would be solely empowered to determine violated its terms.[49] This holding effectively meant that the Court would be highly deferential to certain kinds of conduct Congress intended to be restricted. In response, Congress enacted the Clayton Act in 1914, which explicitly listed corporate conduct it wanted to substantially restrict.[50] But even the Clayton Act's language was not as precise as it could have been. Consider Section 7 of the Clayton Act. Congress designed

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[42] Elliott M. Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 1003 (2007) (stating that the kind of textualism Justice Scalia used "often involve[d] the use of sterile and, perhaps, arbitrary grammatical rules[.]").
[43] Daniel A. Hanley, *In Praise of Rules-Based Antitrust*, COMPETITION POL'Y INT'L: ANTITRUST CHRONICLE, January 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4710387.
[44] *See e.g.,* Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (Mar. 2019).
[45] *See e.g.,* Daniel A. Hanley*, Per Se Illegality of Exclusive Deals and Tyings as Fair Competition*, 37 BERKELEY TECH. L.J. 1057 (2022).
[46] *See, e.g.,* Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75 (2020).
[47] Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONLINE 27 (2023).
[48] 15 U.S.C. § 1.
[49] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60 (1911).
[50] 15 U.S.C. §§ 14, 18.

Section 7 of the Clayton Act to prohibit mergers prophylactically.[51] To facilitate this desired goal, Congress drafted Section 7 to be more forceful than the Sherman Act with entirely different enforcement language. Nevertheless, in 1930, the Supreme Court decided to narrowly interpret the Clayton Act's language by interpreting it similarly to the Sherman Act and thus restricted its application.[52] Merger enforcement in the United States collapsed until Congress amended the Clayton Act in 1950.[53]

To further facilitate the goal of writing clear statutes and ensure proper enforcement of a law, lawmakers should also consider enacting explicit rules that exempt smaller firms or classes of individuals from the targeted conduct. One example is the Capper-Volstead Act, which provides a limited antitrust exemption for producing farmers to form cooperatives to sell their goods.[54] Thus, by allowing farmers to form cooperatives, the Capper-Volstead Act allows them to form an organization that can engage in horizontal coordinating conduct like price-fixing, which would otherwise violate the antitrust laws.[55] Congress justified this exemption on the grounds that it helped farmers ensure they received fair prices for their goods and allowed them to counterbalance the undue influence of powerful agricultural buyers.[56]

Exempting certain classes of firms or individuals ensures that the law is being enforced against Congress's intended targets. Without explicitly stating the intended targets, laws can be enforced against parties that Congress did not intend to be targeted. Consider the RPA. Congress explicitly designed the RPA to prevent large buyers from extracting preferential prices and terms for their purchases.[57] However, the text of the RPA is somewhat open-ended and does not specifically detail what kinds of firms were targeted by the statute's prohibitions. This oversight subsequently allowed federal enforcers to target smaller firms. For example, between 1961 and 1974, the Federal Trade Commission targeted 564 companies with RPA violations,

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[51] Specifically, only stock mergers were prohibited not asset acquisitions. *See* Clayton Antitrust Act, § 7, 38 Stat. 731 (1914).

[52] Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) (stating that a merger would be illegal under Section 7 of the Clayton Act only if it "injuriously affect[ed] the public"). This interpretation effectively nullified Section 7 by converting its much more favorable standard of illegality to the then rigorous Sherman Act test. DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT (1959)

[53] Daniel A. Hanley, *How Antitrust Lost Its Bite*, SLATE (Apr. 6, 2021), https://slate.com/technology/2021/04/antitrust-hearings-congress-legislation-bright-line-rules.html.

[54] 7 U.S.C. §§ 291-92.

[55] 15 U.S.C. § 1.

[56] 61 CONG. REC. 1042 (1921) (statement of Rep. Sumners); 60 CONG. REC. 363 (1920) (statement of Sen. Kellogg); 61 CONG. REC. 2048 (1922) (statement of Sen. Kellogg). *See also* Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in A Dynamic Economy*, 58 S.D. L. REV. 462, 474 (2013) ("Another well-recognized function of agricultural cooperatives is that of bargaining agents that negotiate the terms on which their members sell directly to downstream buyers. Such cooperatives function in much the same way that unions operate--they negotiate contracts that cover their members' transactions with the buyers."); Daniel A. Hanley & Claire Kelloway, *Capper-Volstead Turns 100; It's Time We Expand Its Goals, Within Agriculture and Beyond*, FOOD & POWER (Mar. 3, 2022), https://www.foodandpower.net/latest/capper-volstead-100-years-2022-3.

[57] FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960) (Congress designed the RPA to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.").

but only 36, or 6.4%, of them had annual sales of more than 100 million at the time of the initiation of the lawsuit.[58]

7. If necessary, incorporate clear, explicit, and broad exemptions for labor organizations.

Justification: Maintaining the strength of labor organizations is essential to secure widespread economic prosperity and counteract concentrations of corporate power.[59] Workers are also in a significantly weaker bargaining position than their employers. Employers structure almost every aspect of a worker's employment by requiring a worker, as a condition of their employment, to sign restrictive contracts such as arbitration agreements and class action waivers.[60] Employees are also dependent on their employment for income.[61] By contrast, employers are much less dependent on employees and can use their large customer base, size, and scale to mitigate the risk of any disruption to their operations that any one employee could pose.[62]

Example(s): Not explicitly exempting labor conduct from a law's proscriptions can lead to dire consequences. For example, although Congress never intended the Sherman Act to be used against labor organizations, the federal courts subsequently interpreted the law to be used against workers because the text of the law did not have an explicit exemption. As a result, the Sherman Act became a formidable weapon to thwart labor organizing. Eventually, it took both Section 6 of the Clayton Act, which exempts labor organizations from the antitrust laws,[63] and the Norris-LaGuardia Act to restrict how the federal courts could apply the antitrust laws to worker conduct.[64] In general, collective action from workers allows them to counteract the power of dominant firms, obtain fair prices for their products, and stabilize certain aspects of market competition.

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[58] Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTITRUST L.J. 921 (1985), at 924. A full RPA enforcement data can be found here. D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1014 (2014); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); *see also* Frederick M. Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law: A Paradox of Antitrust Policy*, 64 COLUM. L. REV. 415, 426 (1964).

[59] Daniel A. Hanley & Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power* 6, OPEN MARKETS INST. (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089862. Consider the adverse effects of the application of the Sherman Act to labor organizations. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); *see also* Daniel A. Hanley, *Putting Antitrust to Work*, COMMONWEAL MAG. (Apr. 13, 2023), https://www.commonwealmagazine.org/anti-trust-labor-biden-economy-khan-ftc-google

[60] Daniel A. Hanley, *Ending Corporate America's Coercive Contracts*, DEM. J. (Dec. 21, 2021), https://democracyjournal.org/arguments/ending-corporate-americas-coercive-contracts/.

[61] Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 169 (2021); *see also* Aditi Bagchi, *Lowering the Stakes of the Employment Contract*, 102 B.U. L. REV. 1185, 1202-07 (2022).

[62] Daniel A. Hanley & Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power* 6, OPEN MARKETS INST. (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089862.

[63] 15 U.S.C. § 17.

[64] Norris-LaGuardia Act, 47 Stat. 70. (1932), *codified at* 29 U.S.C. §§ 101 et seq. The labor injunction is broadly defined as the ability of courts to use their equitable powers to stop labor disputes. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59-66 (1991).

8. Include narrow legal defenses limited only to the statutory text.

Justification: Defendants use legal defenses as a shield against violations.[65] Ensuring a statute's legal defenses are narrow and limited only to the statutory text prevents them from being so broad that the substantive violations of a statute only exist in name. It also limits the ability of the courts to create defenses based on their own opinion or unduly expand them to erode the substantive protections afforded by Congress.

Example(s): When legal defenses have vague language, the courts can interpret them to be so broad that they effectively nullify a law's prohibitions. For example, Congress intended the RPA to strengthen Section 2 of the Clayton Act of 1914 against price discrimination. However, in *Standard Oil Co. v. FTC*,[66] the Supreme Court interpreted the RPA's meeting competition defense so broadly that it has become the most frequently used and effective means of thwarting the RPA's prohibitions.[67]

9. Incorporate a lengthy statute of limitations.

Justification: When Congress does not incorporate a statute of limitations, the doctrine of laches is the controlling analysis courts employ to determine if a plaintiff can still obtain legal relief for their injuries.[68] Laches is an "equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought."[69] To assert the defense of laches, the Supreme Court has stated that the moving party must prove a "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[70] Since the test for laches is open-ended and solely determined by the courts, it's ineffective in enforcing any law. Congress should incorporate an explicit statute of limitations.

A lengthy statute of limitations also ensures that harmed parties have sufficient time to discover their injury — if it is not apparent or takes time to manifest itself — and formulate their legal strategy. A longer statute of limitations can also increase a statute's deterrent effect and overall purpose since would-be violators would be heavily incentivized to put extra care into their actions to avoid liability. Additionally, statutes of limitations should only apply to private plaintiffs; they should not apply to public enforcers like individual states or the federal government.

Example(s): The statute of limitations for private plaintiffs concerning antitrust cases is four years after the cause of action arises,[71] which is also the default for most federal laws.[72]

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[65] *Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[66] Standard Oil Co. v. FTC, 340 U.S. 231 (1951).
[67] Standard Oil Co. v. FTC, 340 U.S. 231, 248-51 (1951); Shane Hamilton, *Supermarkets, Free Markets, and the Problem of Buyer Power in the Postwar United States*, *in* WHAT'S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II 83 (Kim Phillips-Fein & Julian E. Zelizer, eds., 2012) (stating that the Supreme Court's decision in Standard Oil co. v. FTC "effectively gutted the Robinson-Patman Act.").
[68] Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 678 (2014).
[69] *Laches*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[70] Kansas v. Colorado, 514 U.S. 673, 687 (1995).
[71] 15 U.S.C. § 15b, civil antitrust lawsuits "shall be forever barred unless commenced within four years after the cause of action accrued."
[72] 28 U.S.C. § 1658(a).

Congress has provided long statutes of limitations in many areas of criminal law, including 10 years for arson and 20 years for theft of artwork.[73] In other limited cases, Congress has explicitly stated that a statute of limitations does not apply.[74]

C. Enforcement

10. Incorporate a broad private right of action that allows the public (including individuals and class actions) to enforce the law. The law should also clearly indicate who can enforce it by detailing the relationships allowed between plaintiffs and potential defendants and all the requirements plaintiffs need to bring an actionable lawsuit.

Justification: Providing a broad private right of action allows the public to enforce the law and directly facilitate Congress's legislative command. Laws restricted to only being enforced by the federal government depend on an enforcement-friendly administration being in power.[75]

Public enforcement also has some critical limitations that make it an incomplete solution to enact the laws Congress passes. First, public enforcement is inconsistent due to changing political administrations.[76] Second, by virtue of their extensive prosecutorial discretion, public enforcement can be prone to regulatory capture, resulting in enforcers being unwilling to use the full scope of their delegated enforcement powers.[77]

Example(s): Despite the statute's broad application, the Federal Trade Commission is the only entity that can enforce the FTC Act.[78]

Even when the legislature includes private rights of action in a statute, the law must be written clearly to ensure it is unambiguous as to how broad Congress intends the private right of action to be. For example, before a series of hostile Supreme Court cases in the 1980s,[79] Congress structured Section 4 of the Clayton Act as a broad private right of action. In conjunction with a plaintiff-friendly and prophylactic legal standard limiting mergers, tyings, and exclusive deals,[80]

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[73] CONG. RESEARCH SERV., RS21121, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: A SKETCH 1 (2017).
[74] 38 U.S.C. § 4327(b), for instance, states that "there shall be no limit on the period for filing" a lawsuit alleging a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994; Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. 71, 95-96 (2021) (detailing how the factual finds of violations of Section 5(m)(1)(B) of the FTC does not have a statute of limitations).
[75] *See, e.g., A Richard Posner and George Stigler Memo: "Throttling Back on Antitrust: A Practical Proposal for Deregulation"*, PROMARKET (Apr. 28, 2022), https://www.promarket.org/2022/04/28/a-richard-posner-and-george-stigler-memo-throttling-back-on-antitrust-a-practical-proposal-for-deregulation/.
[76] *See generally* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970) (providing comprehensive enforcement data between 1890 and 1970).
[77] Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H.L. REV. 303, 368-69 (2016).
[78] See Stephanie L. Kroeze, *The FTC Won't Let Me Be: The Need for A Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U. L. REV. 227 (2015)
[79] *See, e.g.,* Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
[80] 15 U.S.C. §§ 14, 18.

Congress created a robust private right of action by giving "any person" to the ability obtain treble damages for violations of the antitrust laws, which Congress explicitly designed to "contain[] little in the way of restrictive language."[81] Congress's broad private right of action in the Clayton Act facilitated vigorous enforcement, with government and private cases numbering over 2,000 lawsuits at the height of antitrust enforcement between 1960 and 1964.[82]

When laws are unclear regarding how broad Congress intends them to be, the courts can restrict the breadth of a statute. For example, although the antitrust laws contain broad language as to who is allowed to initiate a lawsuit and obtain legal redress, the Supreme Court has nevertheless restricted their language. For example, in *Illinois Brick*, the Supreme Court has prevented "indirect purchasers" from obtaining legal redress under the antitrust laws. Instead, in antitrust law, plaintiffs must be "direct purchasers" such that they (in the Court's opinion) are the party most immediately and directly harmed by the violator's conduct.[83]

11. Include explicit statements allowing the Federal Trade Commission, Department of Justice, or other relevant federal agencies to initiate an enforcement action. Similarly, include a statement allowing state attorneys general to initiate an enforcement action as individual "persons" and as parens patriae.

Justification: Wide enforcement avenues are critical to effectuating a law's underlying purpose. Moreover, Congress typically endows federal agencies with the broad investigative authority to bolster their legal claims and prevent lawsuits from being overly delayed (at least in the initial proceedings).[84] Additionally, unlike private enforcers, the federal government has fewer funding restrictions.[85] State enforcement is also essential to administering the law effectively and deterring potential violations.

Example(s): The Clayton Act contains specific language that allows various federal agencies, including the Department of Justice, the Federal Trade Commission, the Department of Transportation (as it concerns domestic and foreign air carriers), the Surface Transportation Board (as it applies to rail carriers), and the Federal Communications Commission (as it applies to wired or radio common carriers) to enforce Section 7 and prevent mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[86] The Hart-Scott-Rodino Act authorizes state attorneys general to initiate a lawsuit on behalf of the citizens of their state as parens patriae.[87]

12. Allocate additional funding to the relevant federal agencies or state attorneys general to facilitate enforcement.

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[81] 15 U.S.C. § 15 (emphasis added); Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).
[82] Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366, 369, 370 n.9, 371 (1970).
[83] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
[84] Consider the FTC's powers. *See* 15 U.S.C. §§ 46, 49, 57b-1,
[85] Antitrust litigation is notoriously slow. *See* Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO. MASON L. REV. 395 (2018).
[86] 15 U.S.C. § 21.
[87] 15 U.S.C. § 15c.

Justification: Funding has always been necessary to facilitate Congress's policy goals. Congress must provide additional funds to the relevant enforcement parties to properly achieve its legislative directive.

Example(s): The Sherman Act exemplifies the consequences when Congress does not provide additional funding to facilitate its new regulations. In enacting the seminal law in 1890, Congress did not provide specific funds to enforce the Sherman Act, which went without enforcement funds until 1903.[88] Consequently, antitrust enforcement from the federal government was sluggish, and enforcers were reluctant to bring cases.[89]

Congress has previously provided funds for enhancing state enforcement of the antitrust laws. For example, in Section 116 of the Crime Control and Safe Streets Act of 1968, Congress allocated $30 million to the states to bolster their antitrust enforcement efforts.[90] The funding was instrumental to reviving state antitrust enforcement.[91]

13. Incorporate a clause where a final judgment in any civil lawsuit brought by any federal administrative agency or state attorneys general in which courts find that a defendant violated the law is automatically prima facie evidence against the same defendant by another party.

Justification: The state and federal governments have broad investigative powers and also have much larger budgets than private parties. To facilitate private enforcement, successful final judgments should be able to be used by private parties against the same defendant. Such a circumstance further accelerates the enforcement of the law and deters future violations.

Example(s): Section 5 of the Clayton Act provides this enforcement mechanism to plaintiffs, but only for final judgments in lawsuits initiated by the Department of Justice.[92]

D. Forum Selection

14. Empower relevant administrative agencies that can enforce the law to initiate a lawsuit in their own administrative forum rather than federal court.

Justification: An administrative agency should have the ability to litigate a claim in their own administrative forum in order to lessen the federal courts' power and influence. Administrative

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[88] William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464, 466 (1959); BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES 1890-1911, at 117 (1979); *Appropriation Figures for the Antitrust Division*, U.S. DEPT. JUSTICE, https://www.justice.gov/atr/appropriation-figures-antitrust-division (last updated Feb. 2020).
[89] William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464, 466 (1959).
[90] The Crime Control and Safe Streets Act, Pub. L. No. 94-503, § 116, § 3739(i), 90 Stat. 2407, 2416 (formerly codified at 42 U.S.C. §3739(i)) (repealed 1979) (providing $30 million in "seed money" to state attorneys general to establish antitrust enforcement units within their offices and to enforce the antitrust laws).
[91] Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1054 n.38 (1990).
[92] 15 U.S.C. § 16(a).

litigation is significantly more favorable for public enforcers than lawsuits that are initiated in the federal courts.[93]

Example(s): The Federal Trade Commission can litigate antitrust violations in its own administrative forum.[94]

15. Incorporate a clause stating that challenges to agency orders initiated by private parties should be restricted to one reviewing circuit court of appeals.

Justification: To streamline enforcement, defendants should have limited venues to challenge an agency's enforcement action, such as a rulemaking or lawsuit. Rather than allow an agency's action to be subject to review from multiple appellate courts, one court (e.g., the D.C. Circuit Court of Appeals) should have exclusive jurisdiction over challenges to an agency's orders.[95] This action would prevent defendants from engaging in targeted forum selection to seek the most favorable judicial circuit to challenge an agency's enforcement action.

Example(s): Defendants can currently appeal the FTC's enforcement actions in any state where they do business,[96] incentivizing defendants to engage in forum shopping and unduly hinders the agency's enforcement actions.

E. Remedies and Punishment

16. Include sufficient statutory damages that are adjusted for inflation and include attorney's fees and other reasonable litigation costs. A proposed law should also include automatic minimum damages for violations.

Justification: This recommendation ensures that plaintiffs are sufficiently incentivized to initiate enforcement actions and allows awarded damages for violations to increase without Congress needing to amend the law. Additionally, this recommendation ensures that when plaintiffs obtain a favorable judgment, they are guaranteed some minimum level of recovery.

Example(s): Violations of the antitrust laws automatically allow plaintiffs to recover treble damages and attorney's fees.[97]

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[93] *See* Daniel A. Hanley, *Administrative Antimonopoly*, OPEN MARKETS INST. (Feb. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044077.
[94] 15 U.S.C. § 45(b).
[95] Congress has exceptional authority to modify the jurisdiction and construction of the federal courts. *See generally* Paul Bator, *Congressional Power over the Jurisdiction of the Federal Court*, 27 VILL. L. REV. 1030 (1982); *see also* U.S. CONST. art. I, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, *the supreme Court shall have appellate Jurisdiction*, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*.") (known as the Exceptions Clause) (emphasis added).
[96] 15 U.S.C. § 21(c).
[97] 15 U.S.C. §15(aa); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946).

17. Incorporate a statement indicating that plaintiffs need to only provide courts reasonably calculated and probable damages as opposed to certain damages for courts to award recovery.

Justification: Courts often place onerous burdens on plaintiffs to calculate damages when Congress does not codify the process in the law's text, unduly disincentivizing otherwise meritorious litigation.

Example(s): The Supreme Court, in interpreting Section 4 of the Clayton Act, which allows plaintiffs to recover damages, stated that plaintiffs must show an actual competitive injury that is causally related to a defendant's violative conduct concerning RPA violations.[98] Such a requirement puts an unduly high burden on plaintiffs.

18. Include a clear and explicit statement authorizing plaintiffs to request and for courts to award punitive damages.

Justification: Punitive damages are essential for deterring future unlawful conduct, particularly for repeat violators, and give courts the opportunity to ameliorate any harm that plaintiffs have experienced.

Example(s): Title III of the Electronic Communications Privacy Act, 18 U.S.C. § 2520(b), (c) includes punitive damages.

19. Include automatic prejudgment interest on successful damages claims.

Justification: Without prejudgment interest, awarded damages are, due to inflation, often less than the actual damages incurred. Prejudgment interest helps ensure that harmed parties are fully compensated for the injuries they incur.

Example(s): The antitrust laws do not provide prejudgment interest on violations.[99]

20. Explicitly include broad equitable remedies (such as divestiture, disgorgement, or restitution) with an explicit statement declaring that they are available to private and public enforcers.

Justification: Explicitly authorizing courts to implement whatever equitable remedies plaintiffs request gives the judiciary the ability to ensure a violation of the law is appropriately punished and future violations are sufficiently deterred.

[98] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (§ 4 of Clayton Act requires showing of "actual injury attributable to something antitrust laws were designed to prevent").
[99] Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 130 n.57 (1993).

Example(s): When Congress does not explicitly list the equitable remedies available to courts to address a plaintiff's legal claims, the Supreme Court will, more often than not,[100] take a narrow view of the remedial powers available. For example, despite the courts historically interpreting the injunctive authority in Section 13(b) of the FTC Act broadly to mandate or prohibit a certain action,[101] in *AMG Capital Management, LLC v. FTC*, the Supreme Court held that Section 13(b) does not grant the FTC the ability to obtain restitution or disgorgement.[102] This ruling deprived the FTC of an essential legal avenue to return funds unlawfully taken from consumers.[103]

F. Maintenance, Evaluation, and Adaptability

21. Include a statement clearly delegating to the relevant federal agencies the authority to impose new legal obligations with legislative rulemakings bearing the force of law to adjust and modify substantive aspects of the statute.

Justification: Allocating additional rulemaking powers to federal agencies allows the statute to be flexible and address new and likely unforeseen problems without Congress needing to enact amendments to the law.

Example(s): When Congress enacted the Communications Act of 1934, Congress intended it to be "a unified and comprehensive regulatory system for the [broadcast and telecommunications] industry."[104] To further the statute's impact, Congress provided the Federal Communications Commission (FCC) with robust and broad rulemaking power that the agency has used to fundamentally and repeatedly restructure the telecommunications industry.[105] For example, the FCC has previously used its regulatory powers to prohibit newspapers and radio and television stations from being under a common owner.[106] The FCC has also used its power to ensure

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[100] A notable exception to this circumstance concerns Section 7 of the Clayton Act. 15 U.S.C. § 18. Violations of Section 7 of the Clayton Act can result in the divestiture of an acquired company. California v. American Stores Co., 495 U.S. 271 (1990). And although exceptionally rare and challenging, divestiture is even available for private litigants even though the remedy is not explicitly in the statutory text. *See* Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690 (4th Cir. 2021).

[101] Brief of Open Markets Institute as Amicus Curiae in Support of Respondent, AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021). AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021). The FTC can still obtain restitution or disgorgement, but in much narrower circumstances. *See* Bikram Bandy, *Not a One-Trick Pony: FTC Monetary Remedies Beyond Section 13(b)*, FTC (Mar. 1, 2021), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/ABA-Paper-on-Monetary-Remedies.pdf.

[102] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

[103] Bikram Bandy, *Not a One-Trick Pony FTC Monetary Remedies Beyond Section 13(b)* (2021), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/ABA-Paper-on-Monetary-Remedies.pdf.

[104] Nat'l Broad. Co. v. United States, 319 U.S. 190, 212 (1943).

[105] United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968) (The FCC was explicitly given "broad authority" to regulate "all forms of electrical communication, whether by telephone, telegraph, cable, or radio.").

[106] Amend. of Sections 73.34, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, Fm, & Television Broad. Stations, 50 F.C.C.2d 1046, 1074 (1975), *recon.*, 53 FCC 2d 589 (1975), *aff'd in part and rev'd in part sub nom.* National Citizens Committee For Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

dominant internet service providers do not limit a consumer's access to the internet or throttle their internet speeds (commonly known as net neutrality).[107]

Explicitly delegating rulemaking power to agencies is necessary because the federal courts almost never grant rulemaking powers to them unless it is stated in the text of the agency's enabling statute.[108]

When delegating rulemaking power to an agency, Congress should ensure the law is also broad enough to give the agency sufficient flexibility to address future issues without additional legislative intervention as well as survive a possible judicial challenge under the Supreme Court's major questions doctrine. The major questions doctrine requires that if an agency decides to engage in regulatory activity of "vast economic and political significance," Congress must clearly have delegated that authority to the agency, otherwise the regulatory action will be invalid.[109]

Importantly, Congress should not require the agency to repeatedly review its enacted rules and regulations. If agency leaders would like to consider modifying a rule or repealing it, they should be able to do so without being mandated to do so by Congress. Requiring an agency to engage in such frequent reviews of their regulations is prohibitively burdensome and leads to excessive litigation. A prime example involves the FCC's media ownership rules. Under the 1996 Telecommunications Act, Congress requires the FCC to reevaluate its media ownership rules every four years to determine if they are "necessary in the public interest as a result of competition," and whether to "repeal or modify any regulation it determines to be no longer in the public interest."[110] The requirement has caused a surfeit of agency litigation and has stymied FCC policy for decades.[111] A cornerstone of administrative agency operations is discretion to enact, modify, or repeal regulations, which should generally be as broad as possible.

22. Include a formal method of recurring and continuous Congressional oversight. Such oversight can include publishing mandatory annual reports by the relevant federal agencies regarding the state of the market, enforcement of the law, compliance with the law, and other relevant information for the public and Congress.

Justification: The practice of recurring reports ensures sufficient public oversight to monitor whether a law is operating as intended, its goals are coming to fruition, and the public is complying with the law's mandates. Public oversight also helps keep Congress or agencies endowed with rulemaking and enforcement power informed about whether substantive or procedural changes to the law are needed. Of course, if the relevant administrative agencies

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[107] Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).
[108] *See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). Recently, the Supreme Court has been exceptional hostile to agency action that is not clearly and unambiguously authorized in the enabling statute, *see* Mark Lemley, *Imperial Supreme Court* 4 (2022); *see also* W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2627 (2022) (Kagan, J., dissenting).
[109] Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014) (internal citations and quotations omitted).
[110] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996).
[111] A journalist later found that Section 202(h) was included in the law due to the efforts of two lobbyists employed by Rupert Murdoch's News Corp. *See* Alicia Mundy, *Put the Blame on Peggy, Boys*, CABLE WORLD (June 30, 2003), *archived at* https://indexarticles.com/technology/cable-world/put-the-blame-on-peggy-boys/.

need enhanced investigatory powers to produce the reports informing Congress and the public, they should also be provided. To further facilitate compliance with the agency's investigative orders, automatic monetary sanctions and other punishments (including prison time) should be applied to defendants not abiding by agency subpoenas.[112]

Example(s): In 1976, Congress enacted the Hart-Scott-Rodino (HSR) Act.[113] Congress intended the HSR Act to significantly bolster the prophylactic nature of the Clayton Act's prohibitions on mergers that "may be substantially to lessen competition, or tend to create a monopoly." [114] Under the HSR Act, firms must notify the FTC and DOJ of a consummating merger so that the agencies have time to review the action and determine whether they should initiate a lawsuit to prohibit the merger. Congress intended that such a requirement would "strengthen enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated."[115] Additionally, to provide enhanced communication and oversight, the Federal Trade Commission and Department of Justice are required to produce annual reports detailing the HSR Act's effects and the need for additional rules and regulations.[116]

G. Anti-Circumvention

23. Incorporate a provision that explicitly prevents the violation from being waived by any party with a contract, such as with an arbitration agreement or class action waiver, or by using some other unfair method of competition or unfair or deceptive act or practice, including unconscionable acts.

Justification: Contracts are a frequently used legal device aimed at limiting the rights of workers and consumers.[117] One particularly potent weapon is arbitration agreements. Arbitration requires that litigants relinquish their ability to litigate in court and instead litigate the issue in front of an arbitrator. Among many issues, arbitration is fundamentally unfair as it has exceptionally limited rules of discovery, limited remedies, can be used in conjunction with class action waivers to limit collective legal action, favors repeated defendants, is secretive, has no written opinion to justify the outcome, has no precedential value, and is exceptionally difficult to appeal.[118]

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[112] Administrative Agencies have been granted this type of power for more than a century. *See, e.g.,* Interstate Commerce Act, §12, 24 Stat. 383 (1887).
[113] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435.
[114] 15 U.S.C. § 18.
[115] H.R. REP. NO. 94-1373 at 2637 (1976).
[116] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a (2000)).
[117] *See* Sandeep Vaheesan & Matthew Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. STATE L. REV. 113; Daniel A. Hanley, *Ending Corporate America's Coercive Contracts*, DEMOCRACY J. (Dec. 21, 2021), https://democracyjournal.org/arguments/ending-corporate-americas-coercive-contracts/; c*onsider* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) ("[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.") (Kagan, J., dissenting).
[118] Matt Summers, *Rebuilding Antitrust Amidst Forced Arbitration*, 56 HARV. C.R.-C.L. L. REV. 449, 451-53 (2021).

Example(s): Due to the Supreme Court's radical expansion of the Federal Arbitration Act, which grossly deviates from Congress's original intent,[119] antitrust claims from consumers and dependent businesses can be thwarted by a corporation imposing arbitration agreements on workers, consumers, and other dependent firms.[120] Congress has explicitly limited the ability of corporations to use contracts to waive consumer protections. Section 2001 of the Electronic Funds Transfer Act exemplifies this prohibition. Specifically, the section prevents financial institutions from using contracts to waive any of the rights afforded to consumers by the act.[121]

24. Depending on the circumstance, include a statement of preemption or a statement not preempting state regulatory efforts. Federal legislation should typically function as a floor and allow the states to add more regulation as needed or desired.

Justification: America's federal system allows multiple levels of regulation. It also provides the opportunity for legislative experimentation.[122] In some circumstances, it is warranted so that states can enact additional regulations on top of federal minimums.[123]

Example(s): The Sherman Act provides an excellent example of this recommendation. Congress did not intend for the Sherman Act to prohibit state regulatory efforts.[124] The Supreme Court has repeatedly acknowledged that Congress meant for the Sherman Act to bolster and supplement state law rather than displace it.[125] The Supreme Court's justification is derived from the concept of federalism, lack of a clear congressional directive to supplant state efforts, and, as current Attorney General Merrick Garland stated in a prominent law review article from the 1980s, "judicial respect for the political process."[126] Senator John Sherman — the namesake of the act — noted that the law was to "arm the Federal courts ... [so] that they may cooperate with

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[119] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("he Supreme Court "has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."). *See also* Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 196-99 (2017).

[120] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[121] 15 U.S.C. § 1693l ("No writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this subchapter. Nothing in this section prohibits, however, any writing or other agreement which grants to a consumer a more extensive right or remedy or greater protection than contained in this subchapter or a waiver given in settlement of a dispute or action.").

[122] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[123] *See* Daniel A. Hanley, *More States Should Take Advantage of an Antitrust Doctrine to Make Our Economy Fairer and More Democratic*, THE SLING (Oct. 20, 2023), https://www.thesling.org/more-states-should-take-advantage-of-an-antitrust-doctrine-to-make-our-economy-fairer-and-more-democratic/ (describing how Parker Immunity positions the Sherman Act to operate as a floor for corporate regulation).

[124] California v. ARC Am. Corp., 490 U.S. 93 (1989).
Consider the Sherman Act, which according to John Sherman was intended to be a "supplement[ation of] the enforcement of" state antitrust laws. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman). *See also* Parker v. Brown, 317 U.S. 341 (1943).

[125] California v. ARC Am. Corp., 490 U.S. 93 (1989).

[126] Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 499 (1987).

the State courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States."[127]

As such, states can enact wide-ranging regulations that otherwise violate the Sherman Act. For example, Connecticut has extensive alcohol sales regulations. Specifically, Connecticut has implemented (1) "post and hold" regulations, which require wholesalers to publish their case and bottle prices every month and hold those prices for a month; (2) a requirement to sell alcohol above cost; and (3) a prohibition on quantity discounts.[128] These regulations could cause industry-wide price-fixing and collusion among retailers. However, because the Connecticut legislature directly enacted these regulations and the state government actively supervises the retailers regulated by these laws, they are not prohibited by the Sherman Act.[129]

25. Require reviewing courts to give agencies significant deference for their enforcement actions. Specifically, a law should implement procedural reforms, including codifying a version of *Chevron Deference*, restricting judicial review and private challenges to agency enforcement actions, and broadening preclusion protections of an agency's enforcement actions.

Justification: A common tactic to hinder the enforcement of a law and stifle agency action is for defendants to use the judiciary to (at least temporarily but sometimes permanently) block an agency's orders. Currently, judges uphold an agency's findings of fact based on a "substantial evidence" standard.[130] Concerning matters of law, appellate courts can review an agency's enforcement action de novo, meaning that courts offer no deference to the agency's ruling.[131] This hinders law enforcement, particularly when administered by an expert agency, unduly delays and extends the enforcement process, and weaponizes the judiciary against the public interest. Given the expertise of administrative enforcers, courts should be required to give significant deference to agency actions.

On findings of fact, Congress should restrict courts to review only for an agency's "abuse of discretion."[132] On matters of law, Congress should restrict courts to review an agency's enforcement actions only for "reasonableness" or if the agency's reasoning is "arbitrary and capricious." Both standards are more lenient than the current reviewing standards and provide more deference to agency enforcement actions from reviewing courts.[133] As such, agency actions would have significantly more legal certainty while still affording defendants an appropriate level of judicial review.[134]

Congress should also increase preclusion protection for agency enforcement actions. If an agency repeals a rule and later reinstitutes it, Congress can implement issue preclusion to

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[127] 20 CONG. REC. 2457 (1890) (statement of Sen. Sherman).
[128] Connecticut Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 24-25 (2d Cir. 2019), as amended (July 29, 2019).
[129] Rice v. Norman Williams Co., 458 U.S. 654 (1982); Fisher v. City of Berkeley, California, 475 U.S. 260 (1986). *See also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (detailing the requirements to obtain state action immunity from the antitrust laws).
[130] Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469 (1988).
[131] Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 475-76 (1988).
[132] Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 480-81 (1988).
[133] Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 475-82 (1988).
[134] Crowell v. Benson, 285 U.S. 22 (1932).

prevent subsequent re-litigation of the agency's order. This protection should be provided to the agency so long as the new order is substantially similar or identical to the previous one and invokes the same statutory authority. This recommendation bolsters an agency's enforcement efforts, preserves limited agency and judicial resources, and provides more legal certainty to private parties.[135]

Lastly, Chevron Deference is a judicial doctrine that reviewing courts implement when an agency engages in a specific regulatory action where the underlying statute is ambiguous or silent on the issue. If the agency's action is reasonable, the agency is afforded deference by the federal courts to engage in the conduct.[136] Currently, Chevron Deference is confined as a judicial doctrine that is increasingly restricted and subverted by the federal courts.[137] To ensure an agency has the flexibility it needs to enforce the underlying purpose of a statute, the federal courts should be required to grant the agency significant deference to its actions.

Example(s): Concerning the prohibition on relitigating issues, the FCC's implementation of net neutrality is a noteworthy example. Net neutrality has been a repeatedly litigated issue.[138] It is almost certain that should the FCC reinstate its policy, no matter how similar it is to its previous implementation, powerful corporations will challenge the action in court. This wastes judicial resources for previously litigated issues and unduly hinders agency enforcement.

[135] *See generally* David A. Brown, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line*, 73 CORNELL L. REV. 817, 821 (1988).
[136] *See generally* BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R44954, CHEVRON DEFERENCE: A PRIMER (May 18, 2023).
[137] Nathan D. Richardson, *Deference is Dead, Long Live Chevron*, 73 RUTGERS U.L. REV. 442, 445 (2021) ("But at the Supreme Court level, *Chevron* today applies to an ever-shrinking range of cases, has little impact on the outcome of cases to which it still applies, and is of little use as a predictive tool for future disputes. In short, Chevron's crystal has turned to mud.").
[138] *See, e.g.,* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010); Verizon v. F.C.C., 740 F.3d 623, 629 (D.C. Cir. 2014); United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674 (D.C. Cir. 2016); Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1 (D.C. Cir. 2019).