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### 1NC – Clog DA

#### State courts handle redistricting now—gives Dems the midterms

Mutnick 2/4 [Ally Mutnick, Politico reporter. “Judges take over drawing dozens of House districts — and throw Dems a bone.” 2/4/22. <https://www.politico.com/news/2022/02/04/judges-take-over-redistricting-states-00005500>

The redistricting wars are shifting into a new arena: the courtroom.

Most states have finished their maps already, but state and federal courts will direct the drawing of some 75 congressional districts in at least seven states in the coming months, marking a new phase in the process before the first 2022 primaries begin. In the next few weeks alone, North Carolina, Ohio and Pennsylvania courts are likely to impose new maps blocking Republican legislators’ attempts to relegate Democrats to small slivers of those congressional delegations.

Taken together, the court interventions have eased Democratic fears about redistricting as they sweat over a tough midterm political environment. So far, the decisions have validated the party’s state-by-state legal strategy and, critically, offered a surprising reprieve from several Republican gerrymandering attempts before a single election could be held under the new lines.

“It could really be huge,” Rep. Tim Ryan (D-Ohio) said of the Ohio Supreme Court’s decision to strike down a Republican-drawn map that could have left Democrats with just two of the state’s 15 seats. Ryan predicted a new map could yield as many six seats for his party.

“I mean, it could make the difference down here,” he said, referring to Democrats’ fight to keep their razor-thin majority.

Courts are also likely to determine the contours of the maps in Louisiana, where the Democratic governor and Republican legislature are barreling toward a deadlock; Wisconsin, where a similar partisan split has already resulted in a stalemate; and Minnesota, which is one of only two state legislatures in the country where a different party controls the upper and lower chambers.

Even more cases are pending. Republicans are backing a new suit just filed in New York to block the state’s Democratic gerrymander. And in Florida, GOP Gov. Ron DeSantis asked the state’s high court to preemptively weigh in on whether the legislature could eliminate a heavily Black district in North Florida, a request that brought the redistricting process there to a halt.

Meanwhile, federal judges last month struck down Alabama’s congressional lines and ordered Republican lawmakers to craft a new map that includes two heavily Black districts instead of one. The case, one of many where the National Democratic Redistricting Committee has gotten involved, is a significant decision that could pave the way for more Democratic seats in other southern states.

We’re tracking the latest in Congress' once-a-decade redistricting.

How each state redraws its congressional districts will change the balance of power on Capitol Hill. We break down the new maps to tell you who’s winning and who stands to lose.

“Look at the teamwork on the part of the DCCC, the National Democratic Redistricting Committee under Eric Holder’s leadership and a lot of our allies and partners,” said Rep. Sean Patrick Maloney (D-N.Y.), the chair of the Democratic Congressional Campaign Committee. “This has been a team effort and we’re in decent shape. We’re not taking anything for granted but we’re doing a hell of a lot better than I thought we would.”

Democrats notched a huge win this week in Pennsylvania when the state Supreme Court agreed to take control of the fraught congressional redistricting process there, which had been in the hands of a pro-Trump lower court judge.

Pennsylvania and its 17 congressional districts will be pivotal in determining the House majority in 2022. And the court was always set to play an outsize role in the remap because the Republican-controlled state legislature and Democratic Gov. Tom Wolf were likely to reach an impasse. But Democrats panicked when their liberal-leaning state Supreme Court declined to claim jurisdiction over the case last month. Their allies quickly asked the court to reconsider.

“We’re all waiting and waiting. I’m refreshing my screen, trying not to crash the court website,” Rep. Mary Gay Scanlon (D-Pa.) said Wednesday, less than an hour before the justices announced they would take over the case.

“Our state legislature is useless because they have failed to do their job the last two cycles, which is to draw a fair and constitutional map,” she said. “This time they just punted.”

The liberal-leaning state Supreme Court helped Democrats claim the gavel in 2018 when it ruled the GOP-drawn congressional map was an illegal partisan gerrymander, ordering a redraw that saw the delegation shift from a 13-5 Republican advantage to an even split. Democrats were counting on that backstop again.

“Republicans need to take supreme State Supreme Court races seriously,” said Adam Kincaid, the executive director of the National Republican Redistricting Trust. “We need conservative judges who will actually apply the laws as written versus these liberal judges who will just create new law. There’s no precedent for what’s happening in several of these states.”

In Pennsylvania, the commonwealth court justice assigned to the case was the same judge who handed former President Donald Trump a rare victory in his 2020 battle to have his electoral loss overturned — something she brags about on her campaign website. She will get the first pass at selecting a new congressional map, but the state Supreme Court will weigh in later this month.

In Ohio, the state Supreme Court, narrowly controlled by a GOP majority, struck down the congressional map in mid-January, giving the Republican legislature a month to alter its plan. If they miss that deadline, a bipartisan commission will get a chance at the lines.

In an 82-page ruling, the justices said that mapmakers unduly split Summit, Cuyahoga and Hamilton counties — home to Akron, Cleveland and Cincinnati, respectively. The chief justice, Maureen O’Connor, a moderate Republican, sided with three Democrats, all of whom were elected in the last few years. Democrats have made the election of state Supreme Court a top priority recently, with an eye on influencing the 2021 redistricting.

Minnesota and Wisconsin — two states with divided government — have long prepared for the courts to dominate their redistricting process.

Legislators in St. Paul have until mid-February to agree on a proposal and a five-judge panel is already preparing its own maps in the likely event that the GOP state Senate and the Democratic state house cannot agree. Minnesota just barely held onto its eight congressional seats in reapportionment and the biggest question is how they will alter the swing-seat held by Democratic Rep. Angie Craig

The Wisconsin state Supreme Court already decided in November that it would make as little changes as possible to the current map, drawn by Republicans in 2011. The justices are now considering proposals from Democratic Gov. Tony Evers, the Republican legislature and others. But because those maps largely maintain the status quo, the seat held by retiring Rep. Ron Kind (D-Wis.) is likely to remain a top-tier pickup opportunity for the GOP.

Democrats are perhaps most optimistic about netting seats in North Carolina, where a liberal majority on the state Supreme Court heard opening arguments Wednesday against a Republican congressional map that could relegate Democrats to just three of the 14 seats. Republicans’ state legislative campaign arm ran ads urging Justice Sam Ervin, a potential swing vote, to recuse himself. He declined.

“Looking at the makeup of our North Carolina Supreme Court, we have a very, a very good chance to have a decision made that particularly extreme, intentional partisan gerrymandering suppresses the ability of voters to have their votes count,” said Rep. Kathy Manning, a Democrat who won her Greensboro-based district in 2020 after a lower court ruled Republicans had unfairly cracked it.

The new GOP proposal would split the city again, leaving Manning nowhere to run. But she’s continued to raise money and prepare to seek reelection because she believes the court will honor communities of interest in the Triad region.

“I’m really optimistic that I’m going to get a united Greensboro,” she said.

#### But, it’s time sensitive

Li 21 [Michael Li, Tim Lau, Brennan Center NYU. “The Emerging Fight over Gerrymandering.” 3/16/21. https://www.brennancenter.org/our-work/research-reports/emerging-fight-over-gerrymandering]

Li: This upcom­ing redis­trict­ing cycle will take place much later than normal. Usually, most states complete the redis­trict­ing process by the end of summer. This time, because of Covid-related delays, states likely won’t even get census data until Septem­ber 30 or perhaps even a bit later, after which it will need to be processed. So, redis­trict­ing prob­ably can’t start in earn­est until late Octo­ber or Novem­ber, which will create complex­it­ies in a number of states.

From a legal stand­point, some states will have to make emer­gency changes to the dead­lines that are in their laws. Redis­trict­ing in a lot of states will take place in a special session, which is often­times a rushed affair with fewer proced­ural protec­tions. The governor or legis­lat­ive lead­ers often control the timing of these special sessions, which means that there’s the poten­tial not only for gaming the process but also for push­ing redis­trict­ing to the last minute, which will give less time for judi­cial review of discrim­in­at­ory maps.

The poten­tial short-circuit­ing of litig­a­tion time is espe­cially worry­ing. Histor­ic­ally, redis­trict­ing was done by the summer, which gave you at least six to nine months to bring legal chal­lenges to try to win changes to maps before they went into effect. Now, you may have weeks instead of months, which increases the like­li­hood that discrim­in­at­ory maps will be used for at least the 2022 elec­tions before changes get ordered in. That, again, will cut sharply against communit­ies of color.

#### The plan spills over to open the floodgates on litigation in state courts

Wright 11 [Joshua Wright, Executive Director of the Global Antitrust Institute, Professor Antonin School of Law. “Revisiting the Theory and Evidence on State CPAs and FTC Act Section 5 Follow-ons.” 2/15/11. <https://truthonthemarket.com/2011/02/15/revisiting-the-theory-and-evidence-on-state-cpas-and-ftc-act-section-5-follow-ons/>]

One of the most fundamental issues in the ongoing debate concerning the costs and benefits of expanded FTC Section 5 enforcement is the extent to which one must be concerned with its collateral consequences. A central claim of proponents of a broad interpretation of Section 5 coupled with its aggressive enforcement is that concerns with false positives are misplaced because plaintiffs do not have a private right of action, and thus collateral consequences associated with follow-on litigation will be muted.

Commissioner Rosch has articulated this view concerning the lack of “spillover effects” of federal enforcement:

A plaintiff cannot rely on favorable Section 5 case law in a federal treble damage action. Neither can a federal district court rely on such a decision because the FTC alone can avail itself of Section 5 at the federal level. Conversely, the spillover effects on federal law enforcement of Supreme Court substantive law jurisprudence that is the product of concern about such treble damage actions can be reduced if the Commission uses Section 5, instead of traditional antitrust law that is equally applicable to private and public plaintiffs.

On the other hand, Commissioner Kovacic has highlighted how state Consumer Protection Act enforcement and federal enforcement are interdependent and could generate significant collateral consequences. In discussing the N-Data settlement, Kovacic observed that the Commission was downplaying the role of State CPAs (sometimes called “Little FTC Acts”) in an effort to justify expanded and aggressive use of Section 5:

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition (“UMC”) or unfair acts or practices (“UAP”). The federal and state UMC and UAP systems do not operate in watertight compartments. As commentators have documented, the federal and state regimes are interdependent. [Citations omitted]. By statute or judicial decision, courts in many states interpret the state UMC and UDP laws in light of FTC decisions, including orders. As a consequence, such states might incorporate the theories of liability in the settlement and order proposed here into their own UMC or UAP jurisprudence. A number of states that employ this incorporation principle have authorized private parties to enforce their UMC and UAP statutes in suits that permit the court to impose treble damages for infringements.

At the end of the day, the question concerning the collateral consequences of Section 5 enforcement is an empirical one. And as I’ve discussed at some length, the discussion thus far has involved been plenty of assertion and little empirical data:

The claim is, quite simply, that such state level follow-ons don’t happen. Unfortunately, this side of the debate has been a data-free zone thus far. Well, almost data free. Much has been made about the fact that the N-Data settlement itself did not give rise to private causes of action under any “Little FTC Acts.” For example, Chairman Leibowitz has pointed to the fact that no plaintiff in N-Data filed under a state consumer protection act as evidence that “Section 5 violators do not find themselves subject to private antitrust actions under federal law— and probably under state baby FTC acts as well—certainly not for treble damages.” … A systematic empirical evaluation of state CPA litigation to determine how frequent Section 5 follow-on litigation occurs seems like a superior alternative to the current debate.

On this front — in a recent speech, Commissioner Rosch shifted the debate in the right direction, i.e. toward empirical evidence and away from broad-sweeping theoretical assertions. Writing about the potential for state “little FTC Act” follow-on actions to Section 5 enforcement actions, the Commissioner writes:

The biggest threat of follow-on relief most likely comes from state “little FTC Acts.” Indeed, this was the concern that Commissioner Kovacic expressed in his dissent from the N-Data settlement.26 However, an exhaustive study of state “little FTC Acts” has found that most of these statutes have such significant limitations that there is little likelihood of follow-on litigation.27 In any event, in the wake of the few Section 5 cases that the Commission has brought thus far—including N-Data,28 Valassis,29 and U-Haul30—there have not been any follow-on suits, so until there is more evidence that “little FTC Acts” actually have deleterious consequences for our Section 5 enforcement, I have no reason to consider the hypothetical risk of those actions to be a real threat.

There is some elaboration of this discussion in n. 27 (emphasis added):

See Justin J. Hakala, Follow-On State Actions Based on the FTC’s Enforcement of Section 5 at 7 (Wayne State Univ. Law Sch., Working Paper Grp., Oct. 9, 2008), available at http://www.ftc.gov/os/comments/section5workshop/537633-00002.pdf (“[T]he follow-on actions

that are possible are not numerous enough, nor are they certain enough, to give the Commission or the courts cause for concern.”). A review of state “little FTC Acts” on file with the National Association of Attorneys General similarly shows that the possibilities of follow-on state court litigation from FTC Section 5 cases are quite limited. Only nineteen states have a private right of action, and only eleven of those have a multiple damages provision. Of the eleven states, only two have mandatory trebling (Alaska and Hawaii). Two states (North and South Carolina) have mandatory trebling only if the violation was willful or knowing. One state (Wisconsin) has mandatory doubling, and two (New Hampshire and Massachusetts) have mandatory doubling with a possibility for more damages if the violation was willful or knowing. The rest of those eleven (Vermont, Rhode Island, Montana and Washington) have discretionary trebling, and one of those (Washington) has a cap of $25,000.

Let me make offer the bullet point version of my analysis here and continue with the details below the fold.

First, Commissioner Rosch appropriately shifts the focus of the debate from the theoretical to the empirical. Understanding State CPAs is important to understanding the likely collateral consequences of Section 5 enforcement.

Second, the data Commissioner Rosch relies upon are incomplete and, in some cases, require correction to be useful to answer the question at hand. Recall that the issue is whether Section 5 judgments are likely to have collateral consequences. One must then understand the mechanisms through which these collateral consequences would occur. One is that Section 5 cases would encourage private cases under the Sherman Act (e.g. here and here). A second mechanism is that Section 5 enforcement actions could be used to facilitate enforcement actions under State CPAs — this is where the debate has focused. In either event, the key point is that it should be obvious that while “automatic liability” from a Section 5 judgment under the follow-on statute i.e., either the State CPA or Sherman Act, is surely helpful from the plaintiff’s perspective, it is not necessary for the follow-on. Commissioner Rosch has chosen to focus on only those states that have “incorporated” the FTC standard into the State CPA. This is understandable. But I think it is a mistake. Even if it is not, the data he relies upon is still not correct.

Third, when one corrects the data to include all State CPAs, it becomes pretty clear that these statutes provide a fairly profitable opportunity to free-ride upon Section 5 enforcement efforts.

As it turns out, there has been some significant research done on State CPAs over the past several years. I was involved in much of it, through the Searle Center Civil Justice Institute on State Consumer Protection Acts, which issued this Report in 2009. There is a wealth of evidence in there, as the Report offers a comprehensive sweep through existing state consumer protection legislation, as well as data from some 17,000 litigated judicial opinions under those statutes from 2000-07. I’m also involved in ongoing studies of State CPAs and their effects at the George Mason Searle Civil Justice Institute, along with Henry Butler, Eric Helland and Samantha Zyontz.

Let me start by clarifying the “incorporation” point and its relevance for the antitrust follow-on question. The fact that Section 5 judgments do not automatically result in liability under Sherman Act Section 1 or 2 in federal court makes these follow-ons different in at least some important ways from the state CPAs, where at least in principle, liability is automatic. However, the debate over whether Section 5 consents are free of collateral consequences doesn’t turn on automatic liability. Rather, the debate is over whether and to what extent Section 5 consents and judgments generate collateral consequences in the form of follow-ons that can lead to the same treble damages actions that generate the concerns about socially costly false positives in the Section 2 setting. “Follow-ons” in federal court pursuant to Sherman Act claims, which are in turn based upon Section 5 enforcement actions, suggest that “incorporation” is not a necessary condition for policy relevance. The real question is whether the underlying state CPA is amenable to a follow-on claim. There is a second question of whether such a claim is likely; I’ll return to that issue.

First, let’s correct the data. Much of this is in the Report linked above (and we’ve done a significant amount of work since then). But I also would be more than happy to provide the underlying and updated data to Commissioner Rosch and his staff at their request.

The Commissioner relies both upon Hakala (2008) and a NAAG study which I have not been able to track down. Here are the data Commissioner Rosch reports from the NAAG study:

19 states have a private right of action

11 of those have multiple damages provisions

It is pretty clear the NAAG data (though I don’t have it) are restricted to those State CPAs that expressly incorporate the FTC standard. Hakala, on the other hand, restricting his attention to the 29 “incorporation” states, finds:

27 states with private rights of action

20 of those have multiple damages provisions

It is unclear why Commissioner Rosch reports the data from the NAAG study rather than the “exhaustive” Hakala study. It is also unclear what time frame the NAAG study is using to examine the state CPAs, i.e. the numbers could be correct for some earlier period. Hakala, to his credit, provides an explanation for his focus on incorporated CPAs (“lacking this incorporation, these states do not present any possibility of follow-on actions in the traditional sense”). If the traditional sense means “automatic liability” conditional upon an FTC judgment under Section 5, that is no doubt true. But given that the policy issue here is the collateral consequences from FTC Section 5 enforcement, and ruling out states where plaintiffs could bring claims based upon Section 5 enforcement actions without automatic liability is mistaken. For example, some states have very permissive liability standards but are not incorporated. In fact, there is some evidence that State CPA standards are significantly easier for plaintiffs to satisfy than the FTC standard, whether or not there is incorporation. Nonetheless, the central point is that both the Hakala and NAAG studies appear to be restricting their attention to incorporated State CPAs, which is less useful for our purposes than all state CPAs. Further, at least one is either wrong or out of date.

Here is what the Searle Study finds in terms of state CPA statutes (see, in particular, Appendix A in the study that cites the relevant statutes — with some states having more than one):

All states and D.C. had a private right of action by 2009 (Iowa added its on 7/1/2009)

37 states allowed some form of enhanced (either multipliers or punitive) damages either by statute or case law

These data pretty clearly suggest that potential follow-on plaintiffs will not have any trouble finding a state CPA with a friendly standard and generous remedies. The evidence of the quantity and quality of litigation activity under these statutes is also quite consistent with the notion that the plaintiff’s bar finds them quite suitable.

Having said the above, let me note clearly what I am not claiming. The above pretty clearly, in my view, shows that State CPAs are not a bar to follow-on actions. The law “on the books,” as they say, is certainly conducive to those follow-on actions. The debate thus far has focused around that point. Commissioner Rosch’s focus on what is in the statutes is helpful in that regard. And I hope the data here move the ball forward.

I can imagine that Section 5 advocates might respond “sure, but where is the evidence of actual Section 5 follow-on actions under State CPAs?” It is a fair question. As Commissioner Rosch points out, there have only been a handful of Section 5 enforcement actions thus far — and so it is pretty speculative business to make bold predictions about how frequent they will be. I agree with that. But given that the relevant question here is how much Section 5 activity should there be, an assessment of the likely costs of that activity — including collateral costs through follow-on litigation — is important to discuss and analyze with the best available data.

Having limited data, we might turn to theory. It is there where I might take objection to Commissioner Rosch’s conclusion that he has no reason “to consider the hypothetical risk of those actions to be a real threat.” Hypothetical, because perhaps the private plaintiffs bar will ignore the availability of permissive standards, free-riding upon agency work under Section 5, and generous remedies! Maybe they will. But doesn’t that seem rather far-fetched? And at a minimum, it’s highly ironic in light of the FTC argument that it is those pesky and aggressive private plaintiffs’ overuse of Section 2 that has influenced the Supreme Court to restrict the law in ways that shouldn’t apply to agencies???

Query: if these naive plaintiffs’ lawyers the Commission appears to envision in the State CPA environment ever talked to and were able to learn from those resourceful and aggressive antitrust plaintiffs’ lawyers that justify its desire to free themselves of the constraints of Section 2 case law — would the Section 5 advocates change their tune?

Isn’t it best to assume that the private plaintiffs bar is behaving rationally and will bring profitable cases under state CPAs with multiple damages? And for fans of behavioral antitrust, let’s not get tied down in the rationality assumption for plaintiffs’ lawyers. If we assume economic agents that irrationally take on too much risk, we would see too much use of State CPAs and thus even greater collateral consequences!

Anyway, the argument seems to be that the private plaintiffs bar is insufficiently creative, resourceful, or aggressive enough to make use of a perfectly operational statute that allows free-riding on the Commission’s efforts and access to attorneys’ fees and multiple damages. If the existing empirical evidence doesn’t entirely resolve the question of estimating how large the problem collateral consequences will be, the theoretical arrows point pretty clearly in the direction of caution.

#### The spike trades-off with judicial functioning in other areas

Warren 15 [Daniel R. Warren, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis]

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Extinction – democracy *AND* climate change

Funes 22 [Yessenia Funes, Climate Director, Atmos Magazine. “No Time to Waste in 2022.” 1/5/22. https://atmos.earth/climate-voting-rights-democracy/]

If that’s not a marker for the fall of democracy, well, I don’t know what is. A year later, more than 725 individuals have been charged for their crimes, but only some 31 have been sentenced to time behind bars, per The Washington Post. The longest sentence so far? Some five years. Meanwhile, at least 19 states have passed laws to restrict access to voting, according to a recent report from the Brennan Center. Gerrymandering by the Republican Party may very well strip Black Democrats of their power across the U.S. So while a particular group of citizens attacks democracy with their bare hands, we have so-called leaders in Congress attacking democracy with the legislation they write.

Welcome to The Frontline, where we see that democracy hangs in the balance. I’m Yessenia Funes, climate director of Atmos. This new year will be a critical one for the United States’ future. Midterm elections are 10 months away, and their outcome will determine U.S. climate policy—as well as the integrity of our legislative bodies. Whom voters (those who are still able to vote, anyway) elect may very well decide what the future of our planet looks like.

When I ask Saad Amer about how he feels about 2021, all he can do is laugh. As the cofounder of Plus 1 Vote, a nonprofit dedicated to increasing youth voter turnout, Amer knows intimately the ways 2021 left voting rights in shambles. He remembers Jan. 6, 2021, as a day that went from joyous to jarring. He started the day celebrating his team’s success in Georgia, where voters managed a climate victory in a run-off election, but ended his day witnessing the Capitol insurrection unfold.

The lack of consequences that has since occurred has left him feeling disappointed and anxious about what’s to come. “We can’t have a habitable climate without a functioning democracy,” he said. “Without a functioning democracy, we won’t have a habitable planet.”

Amer isn’t exaggerating. American democracy is at risk, and the actions our leaders take to address this in 2022 will set the tone for the rest of our lives. The Intergovernmental Panel on Climate Change set the deadline to 2030 for dramatic emissions cuts. That work should already be underway, but it’s not at the scale necessary. Meanwhile, the midterms are coming up in November, and the presidential election is two years away. In preparation, the Republican Party has been busy passing restrictions around mail-in voting, early voting, absentee ballot dropboxes—all tools that help make voting easier on the working class. They’ve also chiseled away at the administrative set-up of elections, which may encourage the manipulation of elections.

“I would love to see people electrify their relationship to Congress and decarbonize the politics so that we can get our work done.”

As a result, the Democratic Party is trying to pass a federal package to strengthen voter rights. First, it must change the filibuster, a Senate tool meant to encourage debate but that has actually resulted in delays passing laws. That’s top of the agenda for Senate Majority Leader Chuck Schumer. We can only hope that second on that agenda is the climate crisis.

Sure, 2021 was a shift from 2020. The U.S. is refocused on science and environmental justice. Still, communities on the ground need to actually feel these changes in their everyday lives if the Democratic Party wants their support, said Mustafa Santiago Ali, the vice president of environmental justice, climate, and community revitalization at the National Wildlife Federation. The people already living through the climate emergency or pollution crisis need to see actions that transform their lives.

“I’m very concerned because everything comes down to the vote,” Santiago Ali said. “You can’t have a winning formula for climate change without making sure there are folks in office who are going to do what’s necessary to make that become a reality.”

Tamara Toles O’Laughlin, CEO and president of the Environmental Grantmakers Association, emphasized the need for a holistic vision from the president—one that effectively includes solutions to healthcare, education, employment, and housing within climate policy. “These things are not happening separately,” she said. “They’re happening at the same time.” The Build Back Better Plan was a pretty impressive opportunity to do that, but it appears unlikely at the moment. Whether it or something like it is passed before the midterms may affect how folks vote (if at all) come November.

And the clock is ticking.

Let’s look at the midterms more closely. The conspiracy that fueled the insurrection—that the 2020 presidential election was stolen—lives on through who’s running in 2022. Some 230 Congressional candidates support Trump’s lies around the election, according to The Washington Post. This reality exists under the backdrop of voter disenfranchisement that’s keeping people out of the polls.

As stated in a report published Tuesday by the Center for American Progress, a left-leaning U.S.-based think tank: “A large segment of the American public has decided they do not trust the electoral system—at least not when their favored candidate loses. Changing those hearts and minds is a long-term challenge that is going to require thoughtful, long-term solutions. In the meantime, however, policymakers ignore the short-term problem at their peril. Election officials might refuse to certify the next election. Bad actors might try to tamper with the results of the election—or prevent their opposition from voting—under the pretense of preventing fraud. And, even when the election is over and done, members of Congress might refuse to respect the Electoral College results.”

It’s time for our elected officials to take on this challenge before it’s too late. For too long, Black, Indigenous, and other voters of color have been pushed to the margins. They’re among our most engaged on environmental issues. They’re the key to climate action. In 2022, our elected officials need to seize the opportunity.

“I appreciate decarbonizing and electrifying everything, but I would love to see people electrify their relationship to Congress and decarbonize the politics so that we can get our work done,” Toles O’Laughlin said. “If we do that in 2022, the rest will be relatively survivable on the road to a habitable planet.”

### 1NC – Trade DA

#### The United States federal government should

#### not expand the scope of its core antitrust laws

#### keep antitrust enforcement at its current level

#### **Antitrust expansion opens the floodgates of protectionism – that ends free trade**

Murray 19 [Allison Murray, Loyola Law, Judicial Law Clerk for U.S. Bankruptcy Courts. Edited by Loyola Law Professor David Kesselman and the ILR team of editors and staff. “Given Today’s New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade’s Coffin?” 2/28/2019. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr]

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States (“U.S.”), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.4 To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions that could counteract that progress.6 Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

#### Nuke war

Oppenheimer 21 [Dr. Michael F. Oppenheimer, Clinical Professor at the Center for Global Affairs at New York University, Senior Consulting Fellow for Scenario Planning at the International Institute for Strategic Studies, Former Executive Vice President at The Futures Group, Member of the Council on Foreign Relations, The Foreign Policy Roundtable at the Carnegie Council on Ethics and International Affairs, and The American Council on Germany, “The Turbulent Future of International Relations”, in The Future of Global Affairs: Managing Discontinuity, Disruption and Destruction, Ed. Ankersen and Sidhu, p. 23-30]

Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

### 1NC – Adv CP

#### The United States federal government should

* establish an independent antitrust court designed for the review of cases brought by the FTC and DOJ
* substantially enhance FTC and DOJ review and enforcement of its core antitrust laws
* establish a flexible treble damage model for FTC and DOJ cases in the court
* remove the possibility for civil damages for accepted leniency program applicants
* promote the benefits of private enforcement in speeches, testimony, and international for a
* hold monetary incentives in binding escrow for foreign antitrust regimes and release them if and only if they accommodate aggregated claims by private plaintiffs alleging collusive or exclusionary harms arising from cartelistic behavior.

#### First and second plank solve the whole aff and avoid court clog

Holleran 20 [Keith Holleran, associate in the antitrust group in Axinn's Washington, DC office, George Mason Law, Antonin Scalia School of Law. Concurrence Antitrust Writing Award 2020. “Establishing an Independent Antitrust Court.” 2020. <https://awards.concurrences.com/IMG/pdf/4._establishing_an_independent_antitrust_court.pdf?56466/614536766da09a9216d1e0809972eb9aa909eb4d>]

Benefits of an Independent Antitrust Court

Specialized courts can be of great benefit to society at large. While judicial specialization also leads to some negative consequences, the benefits of an independent antitrust court would greatly outweigh them. The main benefits from an independent antitrust court are that the Antitrust Court would be more efficient than generalist courts, their decisions would be higher quality, and there would be a greater uniformity of decisions. These benefits in theory also apply to the FTC hearing antitrust cases, but the Antitrust Court provides the added benefits of objectiveness in making decisions and an expediated adjudication process.

Efficiency in the Antitrust Court

The Antitrust Court would be more efficient than generalist courts simply because the Antitrust Court is made up of experts in antitrust law. “Judges who regularly handle a single class of cases are expected to dispose of their work in less time than their counterparts on generalist courts who see that class of cases less frequently.”5 Antitrust Court judges are made up of experts in the field, and so they would require much less preliminary research to get brought up to speed on a given case. Generalist judges may not see many antitrust cases each year, and so they would have to research antitrust law and gain an understanding of what needs to be resolved and proven in every case. As antitrust cases often involve highly complex economic models and arguments, more and more is required of generalist judges to make an accurate decision.

An ancillary gain in efficiency is realized from generalist courts no longer having to work through complicated antitrust cases, as they are now brought before a specialized court.6 Antitrust cases can take years to resolve, and these cases can clog up a generalist court’s docket. “It is now generally accepted that the regular federal courts, and especially the courts of appeals, are critically overloaded.”7 Removing all of these cases to a specialized court frees up generalist judges to resolve other cases quicker.8

#### Last plank solves EU modeling – we’re yellow

Davis ’17 [Joshua and Robert Lande; 2017; Professor and Director of Center for Law and Ethics at the University of San Francisco; Venerable Professor of Law at the University of Baltimore, M.P.P. and J.D. from Harvard University; Scholar Works, “Restoring the Legitimacy of Private Antitrust Enforcement,” Ch. 6]

D. Foreign Jurisdictions

The importance of private enforcement is increasingly recognized outside the United States. A number of leading jurisdictions in recent years have adopted, or are considering, private rights of action for antitrust (often called “competition law” outside the United States) violations to supplement their traditions of public enforcement. The leading jurisdiction to do so is the European Union (EU). Following the European Court of Justice’s landmark Crehan decision,23 which held that each member state must provide a meaningful cause of action for persons injured by reason of a violation of EU competition law, in 2014 the European Commission (Commission) enacted a Directive that authorizes private parties to bring damages actions for violations of EU Competition law.24 Although the Directive’s provisions are not likely to be sufficient to compensate most European victims of anticompetitive behavior fully,25 it nevertheless is an important and positive step forward.26 The EU should be commended and encouraged to make changes that are likely to lead to even more optimal compensation of victims, such as permitting opt-out victim class action suits.27

In Canada, section 36 of the Competition Act provides a right of recovery of damages for conduct that contravenes certain substantive provisions of the Act, including price-fixing. Prior governmental decisions that the conduct was illegal create a presumption of illegality in any subsequent private suits for damages. There is also a limited right of access to complain to the Competition Tribunal in refusal to supply, exclusive dealing, and tying and territorial restrictions, but no right to seek damages. Class actions have been used a number of times for settlement purposes but none has been litigated to judgment as of the date of this report. Other common law countries such as Australia have also implemented limited private rights of action with most recoveries coming by way of settlement rather than a litigated judgment.28

In sum, jurisdictions all around the world are increasingly recognizing the importance of creating a private-public partnership to enforce competition law by creating private suits for damages and other private actions. However, very few jurisdictions outside the United States have vigorous systems of private enforcement. In part this is due to a well-organized campaign by defendants and potential defendants to thwart private actions by misleadingly pointing to alleged flaws with the U.S. system of private enforcement.29 Despite the lack of a sound underlying empirical foundation, they warn foreign jurisdictions against expanding private rights of action for victims in almost apocalyptic terms.30 The next administration should forcefully point out the benefits of private enforcement in speeches, testimony, and at international fora, and correct any disinformation about the U.S. system that is promulgated by potential lawbreakers.

### 1NC – Con Con CP

#### The United States, using a strictly limited constitutional convention, should expand the scope of its core antitrust law to accommodate aggregated claims by private plaintiffs alleging collusive or exclusionary harms arising from cartelistic behavior.

#### It competes on “federal”, solves case and DAs via follow-on, and avoids politics.

Elving 18—(Senior Editor and Correspondent on the Washington Desk for NPR). Ron Elving. March 1, 2018. NRP, “Repeal the Second Amendment? That’s Not So Simple. Here’s What It Would Take”. <https://www.npr.org/2018/03/01/589397317/repeal-the-second-amendment-thats-not-so-simple-here-s-what-it-would-take>.

A new Constitutional Convention? If all this seems daunting, as it should, there is one alternative for changing the Constitution. That is the calling of a Constitutional Convention. This, too, is found in Article V of the Constitution and allows for a new convention to bypass Congress and address issues of amendment on its own. To exist with this authority, the new convention would need to be called for by two-thirds of the state legislatures. So if 34 states saw fit, they could convene their delegations and start writing amendments. Some believe such a convention would have the power to rewrite the entire 1787 Constitution, if it saw fit. Others say it would and should be limited to specific issues or targets, such as term limits or balancing the budget — or changing the campaign-finance system or restricting the individual rights of gun owners. There have been calls for an "Article V convention" from prominent figures on the left as well as the right. But there are those on both sides of the partisan divide who regard the entire proposition as suspect, if not frightening. One way or another, any changes made by such a powerful convention would need to be ratified by three-fourths of the states — just like amendments that might come from Congress.

### 1NC – Politics DA

#### Next, reconciliation da.

#### The United States Senate should not hold committee hearings or floor votes on H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act.

#### Manchin’s back in negotiations. New deal will include climate and natural gas support. Biden’s key.

Nilsen 3/25 [Ella Nilsen and Lauren Fox, CNN, "Manchin engaging with Biden administration on new climate and economic bill but timeline unclear", 3/25/22, https://www.cnn.com/2022/03/25/politics/manchin-climate-economic-package-negotiations/index.html]

Sen. Joe Manchin, the moderate Democrat from West Virginia who torpedoed President Joe Biden's climate and economic bill in December, is having informal discussions with White House officials about measures involving energy, prescription drug costs, tax changes and deficit reduction that he could potentially support in a new version of that package.

Democrats and climate advocates have stressed the importance of passing clean energy measures while Democrats have a majority in the Senate -- albeit slim -- as the climate crisis takes an increasing toll on Americans and US infrastructure.

After informal conversations over the weekend, the White House engaged with Manchin on several items that could be included in a plan. A source familiar with the talks told CNN these conversations are still in their infancy and the ideas aren't close to being finalized.

Still, the new talks come amid a flurry of meetings Manchin has had with high-ranking economic and climate officials in the Biden administration.

Last week, Manchin hosted Biden's top economic adviser Brian Deese in West Virginia, along with US Energy Secretary Jennifer Granholm and US Interior Secretary Deb Haaland at a series of events last Friday focused on coal communities and the energy transition in Manchin's home state. A tweet from Manchin on Friday evening showed Deese went zip-lining with the senator near the New River Gorge.

After the visit, Granholm told CNN she thinks Manchin understands the need to act on clean energy in Congress.

"I think he's very receptive to it," Granholm said. "He understands as he continues to say we're in a transition.

Manchin also had dinner Wednesday with Biden's top international climate official -- US Climate Envoy John Kerry -- during his trip to Paris for the International Energy Agency's annual meeting.

"We talked and shared a table last night at dinner and we had a nice conversation about it all," Kerry told CNN Thursday, not going into details about what was discussed.

Manchin's spokesperson Sam Runyon told CNN that Manchin "remains seriously concerned" about inflation, and believes paying down the national debt and raising taxes on high earners and corporations "must be our first priority."

Runyon also said Manchin wants to prioritize measures to lower the cost of prescription drugs and promote US energy independence and combat climate change.

"He has made clear that we can protect energy independence and respond to climate change at the same time," Runyon said. "We must maintain energy independence by advancing an all-of-the-above energy policy to continue producing energy cleaner than anywhere else in the world."

More fossil fuel, in addition to clean energy

An economic package and the fate of Biden's climate agenda are riding mostly on Manchin's shoulders. Build Back Better -- the original version of this bill that was scrapped in December -- included more than $500 billion in clean energy measures, without which analysts say the US will be unable to meet its climate targets.

Two sources familiar with the discussions said even as a line of communication between the White House and Manchin are open again, White House officials are proceeding with caution in their talks with Manchin. The sources requested anonymity due to the sensitivity with of the discussions.

"I think they're cautious because they've been burned a couple times and they don't want to be burned again," a source close to the White House told CNN.

Manchin had signaled he would support Build Back Better for months last year before publicly coming out in opposition of the bill in December.

Manchin has previously said he's supportive of clean energy tax credits. But amid Russia's invasion of Ukraine, the chair of the Senate Energy Committee has also called for more fossil fuel production and infrastructure to be built in the US to help Europe move away from Russia's natural gas.

"We went from basically six weeks ago having no clear idea what the impetus would be for Chairman Manchin to want to get anything done, and now there is at least a clear reason for him and for all of the Senate to act on energy policy," Christy Goldfuss, senior vice president for energy and environment policy at the Center for American Progress told CNN.

Goldfuss said that while the current global energy crunch opened the door to new conversations on energy and clean energy, it's still a "big question mark" as to whether those result in a new bill.

Kerry told CNN he is optimistic a climate action bill will pass through Congress, calling it "absolutely imperative."

"I don't want to speculate what happens if we don't," Kerry told CNN. "I'm going to count on doing it, because we've got to do it."

#### The plan faces fierce opposition

Lambert 17 [Lisa Lambert and Pete Schroeder, Reuters, July 11, 2017, https://www.reuters.com/article/us-usa-consumer-arbitration/republicans-strike-back-at-new-u-s-ban-on-forced-arbitration-idUSKBN19W1PJ

WASHINGTON (Reuters) - Republicans lawmakers on Tuesday started trying to kill a brand-new U.S. rule prohibiting banks and credit card companies from requiring customers who open new accounts to sign an agreement that they will not join a group lawsuit in the event of a dispute. The Consumer Financial Protection Bureau on Monday finalized the new rule banning “mandatory arbitration clauses” requiring consumers to forego class-action suits and instead settle disputes in negotiations overseen by arbitrators frequently hired by companies.

The rule immediately ran into fierce opposition by Wall Street and Republicans who control both Congress and the White House. They have long criticized the consumer agency, which is run by a Democrat, Richard Cordray.

Senator Tom Cotton, a member of the Banking Committee, has already announced he is drafting a resolution to kill the rule. His fellow Republican Senator Pat Toomey, chair of the subcommittee on financial institutions and consumer protection, said he is considering a similar step.

Republican lawmakers plan to eliminate the rule, using a law that allows Congress to undo new regulations with simple majority votes in both chambers and a signature from the president.

Analysts and consumer advocates have said the agency’s rule may survive the Congressional challenge. Still, the U.S. Chamber of Commerce is contemplating a legal challenge and Trump administration officials are also looking at ways to kill the rule.

Isaac Boltansky, a policy analyst for the investment firm Compass Point Research & Trading, said the rule has a slightly better than 50 percent chance of surviving in Congress. Joe Valenti, who tracks the issue for the liberal-leaning Center for American Progress, said the House of Representatives was unified against the rule, which opponents have argued benefits class-action lawyers, not consumers.

#### Warming causes extinction—US action is key.

Fuchs 18—(Senior Fellow @ The Center For American Progress, A Former Deputy Assistant Secretary Of State For East Asian and Pacific Affairs And A Guardian Us Contributing Opinion Writer). Michael H Fuchs. 11/29/2018. The Guardian. "The ticking bomb of climate change is America's biggest threat". https://www.theguardian.com/commentisfree/2018/nov/29/ticking-bomb-climate-change-america-threat.

Imagine that US leaders were told that hundreds of nuclear weapons were set on a timer to detonate across the planet, progressively and in increasing numbers, over the coming years and decades. The lives of millions would be upended, if not made nearly impossible to survive, by transformed weather patterns and resource scarcity. Tens of millions would become migrants as regions became uninhabitable. Millions would die, more and more as time went on. If this science fiction were reality, US leaders would lead an international effort to immediately disarm and dismantle the weapons.

But this isn’t science fiction. Climate change is a ticking time bomb, literally threatening to end human life on earth over the coming centuries. As climate journalist Peter Brannen describes it, Earth faced a similar crisis hundreds of millions of years ago during the “Great Dying” when volcanoes spewed so much carbon dioxide into the air – including magma that blanketed an area as large as the lower 48 US states, 1km deep – that it almost killed all life. Today, Brannen says, “we’re shooting carbon dioxide up into the atmosphere 10 times faster than the ancient volcanoes”.

Even in the shorter term, climate change will make the world far more dangerous. A World Bank Group report estimates that climate change could drive 140 million people to move within their countries’ borders by 2050. A report by the Trump administration finds climate change could reduce the size of the US economy by 10% – more than twice as bad as the worst part of the Great Recession – by 2100. Growing resource scarcity could cause more wars. Deadly and destructive extreme weather events such as Hurricanes Harvey and Maria and California’s Camp fire are mild symptoms of the plague to come.

There is no greater national security threat than climate change. Even the specter of nuclear war between great powers – the only thing that could remotely mimic the effects of climate change over time – is a much lower risk than climate change, which is already happening.

Every year we fail to act the problem grows, and the solution becomes more difficult. As America dithers, climate change is sparking a slow-motion nuclear-scale holocaust. If the world fails to urgently mitigate climate change, no other challenge – not the rise of China, Russian aggression, terrorism, nor some other future geopolitical peril – will matter because humans won’t survive to be the cause of these threats or suffer from them.

America’s failure is not for lack of capacity to safeguard against future threats – the US invests hundreds of billions of dollars every year in defense to deter adversaries such as Russia and China, and tens of billions more in intelligence capabilities to monitor threats. Instead, America is paralyzed by a lack of political will. Donald Trump and his allies in Congress – many of whom deny the existence of climate change – are making the problem worse. The president announced his intent to withdraw the US from the Paris climate agreement and is rolling back regulations that would have cut emissions.

Despite this dark reality, there is reason for hope. In 2015, the world came together to negotiate the Paris agreement, which set the goal of limiting global temperature increases to well below 2C. Despite a hostile Trump administration, many US governors, mayors, businesses and private citizens are already leading the way. So are other countries as they seize the economic and public health opportunity that comes with a clean energy future.

The path ahead, to say the least, is daunting. Even if the US were not to leave the Paris climate agreement, the action required to realize its potential is enormous. US policymakers will need to use every policy tool in their toolbox to drive unprecedented deployment of clean energy and build out zero-carbon transportation infrastructure. When the US leads by example, domestic emissions will fall, and new diplomatic doors to more ambitious climate action will open.

### 1NC – T Exemptions

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

1 The extent of the area or subject matter that something deals with or to which it is relevant.

*‘we widened the scope of our investigation’*

#### It’s bounded by exemptions and immunities

Layne E. Kruse 19, Co-Chair, Melissa H. Maxman, Co-Chair, Vittorio Cottafavi, Vice Chair, Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/2019, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies the application of antitrust to already covered activities---it does not curtail an exemption or immunity.

#### Vote neg:

#### Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

#### Affs must specify their agent in the plan text – that prevents 2AC pivots that ruin neg ground – reject the team to deter

### 1NC – EU CP

#### The European Union should expand the Representative Actions Directive to cover abusive anticompetitive business practices and expand the definition of Qualified Entities to include non-member state parties.

#### EU Representative Actions Directive solves the aff but avoids abusive lawsuits

EP 20 [European Parliament Press Release, “Parliament today endorsed a new law that will allow groups of consumers to join forces and launch collective action in the EU.” 11/24/20. <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92116/eu-consumers-will-soon-be-able-to-defend-their-rights-collectively>]

The new rules introduce a harmonised model for representative action in all member states that guarantees consumers are well protected against mass harm, while ensuring appropriate safeguards to avoid abusive lawsuits.

All member states must put in place at least one effective procedural mechanism that allows qualified entities (e.g. consumer organisations or public bodies) to bring lawsuits to court for the purpose of injunction (ceasing or prohibiting) or redress (compensation). This legislation aims to improve the functioning of the internal market by stopping illegal practices and facilitating access to justice for consumers.

More rights for consumers and safeguards for traders

The European class action model will allow only qualified entities, such as consumer organisations, to represent groups of consumers and bring lawsuits to court, instead of law firms.

In order to bring cross-border actions to court, qualified entities will have to comply with the same criteria across the EU. They will have to prove that they have a certain degree of stability and be able to demonstrate their public activity, and that they are a non-profit organisation. For domestic actions, entities will have to fulfil the criteria set out in national laws.

The rules also introduce strong safeguards against abusive lawsuits by using the “loser pays principle”, which ensures that the defeated party pays the costs of the proceedings of the successful party.

To further prevent representative actions from being misused, punitive damages should be avoided. Qualified entities should also establish procedures to avoid conflict of interest and external influence, namely if they are funded by a third party.

Collective actions can be brought against traders if they have allegedly violated EU law in a broad range of areas such as data protection, travel and tourism, financial services, energy and telecommunication.

Finally, the directive also covers infringements that have stopped before the representative action is brought or concluded, since the practice might still need to be banned to prevent it from recurring.

Quote

The rapporteur Geoffroy Didier (EPP, FR) said: “With this new directive, we found a balance between more consumer protection and giving businesses the legal certainty that they need. At a time when Europe is being severely tested, the EU has demonstrated that it can deliver and adapt to new realities, better protect its citizens and offer them new concrete rights in response to globalisation and its excesses”.

Next steps

The directive will enter into force 20 days following its publication in the Official Journal of the EU. Member states will then have 24 months to transpose the directive into their national laws, and an additional six months to apply it. The new rules will apply to representative actions brought on or after its date of application.

Background

The Representative Action Directive, presented in April 2018 by the European Commission, was agreed by EP negotiators and EU ministers in June 2020. The bill, which is part of the New Deal for Consumers, comes as a response to a recent series of scandals related to breaches of consumers’ rights by multinational companies. In some member states, consumers can already launch collective action in courts, but now this option will be available in all EU countries.

#### Declining U.S. private action causes E.U. fill in – solves the aff but the plan reverses it

Fiebig 16 [Andre Fiebig, partner in the Chicago office of Quarles & Brady LLP. author of EU Business Law (2015), published by the Business Law Section of the American Bar Association. He is also coauthor of Antitrust and American Business Abroad (4th ed. 2016). “The Increasing Importance of EU Competition Law for U.S. Companies.” 1/20/16. https://www.americanbar.org/groups/business\_law/publications/blt/2016/01/06\_fiebig/]

U.S. courts are increasingly refusing to hear cases based on foreign conduct which several decades ago they would have entertained. Motorola Mobility v. AU Optronics is a recent example of this contraction. In that case, a foreign subsidiary of Motorola Mobility acquired LCD screens which it assembled into Motorola mobile phones sold into the United States. The Seventh Circuit held that the U.S. Sherman Act was not applicable to foreign LCD screen manufacturers who had conspired to fix the prices of those LCD screens. According to Judge Posner, author of the opinion: “No longer is the United States the world’s competition policeman.” Motorola Mobility v. AU Optronics, 775 F.3d 816, 826 (7th Cir. 2014).

Implications of Expanded EU Extraterritorial Jurisdiction

The expansive extraterritorial application of EU competition law together with contracting U.S. extraterritorial jurisdiction will facilitate increased private litigation in Europe commensurate with the objectives of the European Commission. As of December 27, 2016, the new EU Damages Directive requires all EU member states to “ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.” Directive 2014/104/EU, 2014 O.J. (L 349) 1.

This legislative development is not as insignificant as it may first appear to a U.S. observer. Consumers and companies injured by violations of EU competition law have generally not been able to bring a private claim in Europe for the injuries they suffered as a result of the anticompetitive conduct. In those member states where such private claims were theoretically possible, plaintiffs experienced significant hurdles. Consequently, private competition law claims were virtually nonexistent. The dominant view was that competition law is a public law which should be enforced by the public enforcement agencies. The Damages Directive is designed to promote more private cases to supplement the enforcement efforts of the European Commission and the national competition authorities.

In addition, the European Commission has issued a recommendation to the EU member states encouraging them to do more to facilitate collective actions. Although collective actions as envisaged by the recommendation can be roughly compared to U.S. class actions, they differ in several critical aspects. Out of fear of facilitating the perceived abuses associated with U.S.-style class actions, the Commission recommendation requires that each class member affirmatively opt-into the class in order to be bound by the result. Moreover, the recommendation prohibits contingency fees and the injured parties are limited to compensatory damages. Unfortunately these attributes of U.S.-style class actions which facilitate their abuse are the preconditions for the achievement of the public objectives which class actions were designed to achieve. Consequently, collective actions in the EU are moving toward a system in which third parties (claim aggregators) acquire the rights of several parties to bring a lawsuit. Although these claim aggregation agents are encountering resistance in Europe, once they break through, the European cases that the U.S. courts are increasingly reluctant to hear will be brought in the EU.

**Only EU competition law solves SDGs**

Fotis 21 [Panagiotis N. Fotis, Adjunct Professor, Hellenic Open University, Master in Business Administration (MΒΑ). Member of General Directorate of Competition at Hellenic Competition Commission. “Sustainable Development and Competition Policy.” 1/12/21. https://erl.scholasticahq.com/article/18578-sustainable-development-and-competition-policy]

Abstract

The European Union (EU) has in recent years made **significant efforts** to incorporate green growth issues to EU strategic policies in favor of public and private sectors. In this paper, we present critical aspects of the European Green Growth Deal and we discuss the role of competition policy on **promoting** **sustainability issues**. Competition policy should and can be a **reliable mechanism** to promote **sustainable growth** across the globe.

1. Introduction

The European Union (EU) has in recent years made significant efforts to incorporate green growth issues to a **concrete framework** that enables the implementation of green growth objectives in the EU strategic policies, in favor of public and private sectors. The objective of this paper is to present critical aspects of the European Green Growth Deal and to discuss the role of competition policy, on promoting and enhancing sustainability issues. For this purpose, Section 2 reviews the literature and Section 3 presents critical data of Sustainable Development Goals (SDGs). Section 4 highlights the role of competition policy and Section 5 concludes and offers some policy implications.

2. Literature Review

Competition policy relates to green growth, that is, it can take into account **environmental** and social **priorities**, through **exceptions**, **exemptions** and **exclusions**; through substantive competition rules fostering social or ecological **purposes** and through the enhanced application of competition laws (Gehring, 2006).[1] The second and the third categories are common methods used in many jurisdictions and are often perceived as the legitimate expression of broader public policy goals.

Koundouri et al. (2020) state that public and private funding should be channeled to those businesses that are sustainable and those that are willing to invest and to be monitored according to the EU taxonomy for sustainable investments. Sachs et al. (2019) suggest six transformations to achieve SDGs, that is, education, health, low – carbon energy, nutrition, environment and digital revolution, through the collaboration of state and businesses.

Lianos (2018) questions the monocentric model of competition law relying on the price-based revealed preference approach of a representative consumer and presents a polycentric competition law.

Schinkel & Spiegel (2017) argue that coordination of output or prices may boost investments in sustainability if firms are willing to choose green investments before choosing their profit maximized variables.

3. European Green Growth Agenda

Green Growth should foster economic development and natural assets must continue to provide the necessary resources in favor of humanity. Environmental sustainability seems to provide economic **opportunities** rather than challenges through the implementation of innovation and investments (OECD, 2011).

The European strategy, as part of European Green Deal, focuses on **sustainable growth** through smart, inclusive and **competitive** low-carbon economy. On the same ground, circular Action Plan, “focuses on the entire life of products [for ensuring] that the resources used are kept in the EU economy for as long as possible.”[2]

The European Green Growth Agenda (**EGGA**) is part of Commission’s policy to implement the United Nations (UN) 2030 Agenda as well as SDGs and covers all sectors of the economy (Sachs et al., 2019). It focuses on the transformation of the EU into a **competitive economy** with no net emissions of greenhouse gases in 2050. The SDGs, which were adopted in September 2015 by the General Assembly of the UN, defined 17 development goals for both developed and developing countries, encompassing economic, financial, institutional, social and environmental dimensions. Almost a year later, in 30 November 2016, the European Commission (EC), among others, proposed a new 30% energy efficiency target for 2030 (Polemis & Fotis, 2019).[3]

Table 1 presents critical indicators of SDGs of the top five EU countries and Greece from 2010 to 2018. Particularly, it is evident from Table 1 that Norway, Iceland, Sweden, Finland and Latvia are the first five countries with the highest share of renewable energy in gross final energy consumption by sector (SRE) in 2018. Slovenia, Belgium, Netherlands, Lithuania and Italy are the top five countries with the highest recycling rate of waste (RRW) in 2016. Slovenia has increased the percentage rate of recycling waste by 28% from 2010 to 2016.

Table 1 Critical indicators of SDGs of the EU28, Eurozone, Greece and top five EU countries from 2010 to 2018 **\*Table 1 Omitted for formatting\***

Table 1 also depicts greenhouse gas emissions intensity of energy consumption (GGE). Lithuania shows the highest intensity in 2018, following by Bulgaria, Netherlands, Cyprus and Luxembourg. The top five EU countries regarding energy import dependency (EID) in 2018 are Malta, Luxembourg, Cyprus, Belgium and Italy.

In regard with Greece, gross final energy consumption in 2018 is 18%, just above the average percentage of EU28. Also, Greece’s percentage share of energy import dependency in the same year is almost 70,6%, far above the average percentage of EU28 and Eurozone countries, while regarding greenhouse gas emissions, Greece is below the average figures of EU28 countries (81,4%), but it is far below also the corresponding percentage emissions of the top five EU countries.

In the light of the above evidence, the top five EU countries have made promised steps towards Green Growth regarding the use of renewable energy and the elimination of Greenhouse gas emissions. However, since all of them show high levels of energy import dependency, more efforts should be made towards the **implementation** of EGGA.

In regard with Greece significant progress needs to be made, in particular by expanding the cyclical economy, taking actions to tackle climate change and ensuring biodiversity and a sustainable environment. The latter is a priority, particularly for Greece, as an import intensive country (“National Plan for Energy and the Climate,” 2019), in order to follow a Sustainable Growth path for the transition of the Greek economy (Pissarides Commission, 2020).[4]

4. Green Growth and the Role of Competition Policy

Competition authorities should not provide straightforward competition rules when certain segments of a market need to be guaranteed to promote the development of a desirable new technology. Enhancing further competition in certain markets could also be **in favor** of green growth. Policies to encourage green growth consumption patterns have an enhanced link with competition policy. For instance, competition laws that prevent misleading advertising could be helpful to ensure greater respect for the rights of consumers, which is a component of sustainable development **in** many instances.

Around the globe one of the first cases encompassing sustainability issues is the Shell/Tepco Case[5]. In 2001, the Competition Tribunal of South Africa for the first time expressed its reading of the public policy evaluation in South African competition law. The European Court of Justice (ECJ), regarding Case C-379/98, stated that “[t]he use of renewable energy sources for producing electricity, is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.” The ECJ decided that **while the law was violated** by the anti-competitive behavior of the dominant firm, it was doing so for **protecting the environment.**

According to the HCC (2020), the Greek Competition Commission, has the power to issue an exemption decision under article 1 par. 3 of Law No 3959/2011. In its Decision No. 457/V/2009 the HCC issued an exemption decision under article 1 par. 3 of Law No 3959/2011 to the Public Company of Electricity (DEH) for an exclusive supply agreement for 15 years with a lignite mine for the generation of electricity, among others, on the grounds that security of energy supply would benefit direct consumers (HCC, 2009). Moreover, in its Decision No. 627/V/2016 the HCC cleared with commitments the acquisition of Piraeus Port Authority SA (PPA) by COSCO (Hong Kong) Group Limited (COSCO), among others, on the grounds that the clearance of the acquisition would benefit the public sector and the “users” of the Greek port, by €368,5 million (HCC, 2016).[6]

With regard to Greek and European merger control, public interest considerations do not form part of the substantive test in both regimes. However, past case law indicates that HCC has engaged with green growth arguments, although in all of these cases sustainability has played a secondary role in the decision reached (HCC, 2020). Particularly, in HCC’s Decision No. 682/2019 the notifying party put forward two strategic objectives for the clearance of concentration; on the one hand, the reduction of energy required at all stages of its production process, through the recycling of aluminium products (scrap) by products whose use has been completed and, on the other hand, the achievement of acquired firm’s green attitude in favor of sustainable development (HCC, 2019).[7]

All in all, the above mentioned case law indicates that competition policy should and **must be** the **driving force** of sustainability. The next step is to internalize green growth externalities into completion law towards sustainable growth.

5. Results and Policy Implications

The interconnection between competition policy and sustainable growth is **unquestionable**. The former may play crucial role by enhancing sustainability through competition rules. National competition authorities must be the mechanism fostering sustainable growth by taking into account various aspects of externalities and comparing discounted gains against environmental costs. The analysis reveals that EU countries should strengthen their efforts towards Sustainable Development, particularly by eliminating their dependency from energy imports.

One of the critical requirements for green growth is green investments, as it has been set out by EGGA (EC, 2019). Competition policy should, therefore, offer the incentives to firms to improve technological progress towards greener technologies and to avoid investments funds being channeled to brown technologies for short-term returns (Capasso et al., 2019).[8] For these purposes, it should balance the negatives and positives during the evaluation of firms’ anti-competitive behavior for **protecting the environment**.

**Failure causes cascades of existential threats.**

**Fenner and Cernev ‘20** [Richard Fenner; Jan. 2020; Director of the MPhil in Engineering for Sustainable Development at Cambridge; Australian National University, Canberra, Australia; “The importance of achieving foundational Sustainable Development Goals in reducing global risk,” Volume 115, https://www.sciencedirect.com/science/article/pii/S0016328719303544]

Fig. 3 demonstrates that cascade failures can be transmitted through the complex inter-relationships that link the Sustainable Development Goals. Randers, Rockstrom, Stoknes, Goluke, Collste, Cornell, Donges et al. (2018) have suggested that where meeting some SDGs impact negatively on others, this may lead to “crisis and conflict accelerators” and “threat multipliers” resulting in conflicts, instability and migrations. Ecosystem stresses are likely to disproportionately affect the security and social cohesion of **fragile** and poor **communities**, amplifying latent tensions which lead to political instabilities that **spread far beyond** their regions. The resulting “bad fate of the poor will end up **affecting** the **whole global system**"(Mastrojeni, 2018). Such possibilities are likely to go beyond incremental damage and lead to **runaway collapse**.

The **W**orld **E**conomic **F**orums’ Global Risks Report for 2018 shows the **top** five **global risks** in terms of **likelihood** and **impact** have changed from being economic and social in 2008 to environmental and technological in 2018, and are **closely aligned** with many SDGs (World Economic Forum, 2018). The report notes “that we are much less competent when it comes to dealing with complex risks in systems characterised by feedback loops, tipping points and opaque cause-and-effect relationships that can make intervention problematic”. The most likely risks expected to have the greatest impact currently include extreme weather events natural disasters, cyber attacks, data fraud or theft, failure of climate change mitigation and water crises.

These are represented in Fig. 3 by the following exogenous variables. “Climate change” drives the need for Climate Action (SDG 13), “Cyber threat” may adversely impact technology implementation and advancement which will disrupt Sustainable Cities and Communities (SDG 11); Decent Work and Economic Growth (SDG 8) and the rate of introduction of Affordable and Clean Energy (SDG 7), with reductions in these goals having direct consequences in also reducing progress in the other goals which they are closely linked to. “Data Fraud or Threat” has the capacity to inhibit innovation and Industrial Performance (SDG 9), reducing competitiveness (and having the potential to erode societal confidence in governance processes). “Water Crises” (linked with climate change) have a direct impact on Human Health and Well Being (SDG 3) as well as reducing access to Clean Water and Sanitation (SDG 6) and reducing agricultural production which increases Hunger (SDG 2). The causal loop diagram also highlights “Conflict” as a variable (driven by multiple environmental-socio-economic factors) which together with regions most impacted by climate degradation will lead to an increase in migrant refugees enhancing the spread of disease and global pandemic risk, thus impacting directly on Human Health and Well Being (SDG 3)

4.2. Existential and catastrophic risk

The level and consequences of these risks may be severe. Existential Risks (ER) have a wide scope, with extreme danger, and are “a risk that threatens the premature extinction of humanity or the permanent and drastic destruction of its potential for desirable future development” (Farquhar et al., 2017,) essentially being an event or scenario that is “transgenerational in scope and terminal in intensity” (Baum & Handoh, 2014). With a smaller scope, and lower level of severity, global catastrophic risk is defined as a scenario or event that results in at least 10 million fatalities, or $10 trillion in damages (Bostrom & Ćirković, 2008). Global Catastrophic Risk (GCR) events are those which are global, but they are durable in that humanity is able to recover from them (Bostrom & Ćirković, 2008; Cotton-Barratt, Farquhar, Halstead, Schubert, & Snyder-Beattie, 2016) but which still have a long-term impact (Turchin & Denkenberger, 2018b).

Achieving the **S**ustainable **D**evelopment **G**oal**s** can be considered to be a means of **reduc**ing the long-term global **catastrophic** and **existential risks**

for humanity. **Conversely** if the targets represented across the SDGs remain **unachieved** there is the potential for these forms of **risk** to **develop**. This association **combined** with the **likely emergence** of **new challenges** over the next decades (Cook, Inayatullah, Burgman, Sutherland, & Wintle, 2014) means that it is of great value to identify points within the systems representations of the Sustainable Development Goals that could both lead to global catastrophic risk and existential risk, and conversely that could act as **prevention**, or **leverage points** in order to avoid such outcomes. This identification in turn enables sensible policy responses to be constructed (Sutherland & Woodroof, 2009).

Whilst **existential threats** are **unlikely**, there is **extensive peril** in **global catastrophic risks**. Despite being lesser in severity than existential risks, they **increase** the **likelihood of** human **extinction** (Turchin & Denkenberger, 2018a) through **chain reactions** (Turchin & Denkenberger, 2018a), and **inhibiting** humanity’s **response to other risks** (Farquhar et al., 2017). It is **necessary** to **consider** **risks** that **may seem small,** as **when acting together**, they can have **extensive consequences** (Tonn, 2009). Furthermore, the high adaptability potential of humans, and society, means that for humanity to become extinct, it is **most likely** that there would be a **series of events** that **culminate** in **extinction** **as opposed to one** large scale **event** (Tonn & MacGregor, 2009; Tonn, 2009).

Whilst the prospect of existential risk, or global catastrophic risk can seem distant, the Stern Review on the Economics of Climate Change estimated the risk of extinction for humanity as 0.1 % annually, which accumulates to provide the risk of extinction over the next century as 9.5 % (Cotton-Barratt et al., 2016). With respect to identifying these risks, it is known that in particular, “**positive feedback loops**… represent the **gravest** existential **risks**” (Kareiva & Carranza, 2018), with pollution also having the potential to pose an existential risk.

## Cartels Adv

### 1NC – Turn

#### Existing law deters cartelization BUT expansion decks the economy

Muris 21 [Prepared for the U.S. Chamber Institute for Legal Reform by Timothy J. Muris, Sidley Austin LLP, American lawyer and academic who served as Chairman of the Federal Trade Commission from 2001 to 2004, Jonathon E. Nuechterlein, partner and co-leader of Sidley's Telecom and Internet Competition practice, Sidley Austin LLP. “Private Antitrust Remedies: An Argument Against Further Stacking the Deck.” March 2021. https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf]

The Value of Private Arbitration

The Report further calls for abolition of pre-dispute arbitration clauses, which are generally applicable only to plaintiffs in contractual privity with the defendants they wish to sue. According to the Report, such clauses “allow [defendants] to evade the public justice system—where plaintiffs have far greater legal protections—and hide behind a one-sided process that is tilted in their favor.”42 That claim is wrong in several respects.

FIRST Nearly one hundred years after passage of the Federal Arbitration Act of 1925,43 private arbitration has proven itself as a fair, less expensive, and speedier alternative to the court system for adjudicating business disputes of all kinds, including antitrust claims. Indeed, recent research suggests that consumers tend to fare better, and receive compensation far sooner, when they proceed via arbitration rather than in court.44 In all events, the process is hardly “tilted in … favor” of antitrust defendants.45

SECOND The supposedly “greater legal protections” the Report attributes to court-based antitrust litigation operate mainly to the benefit of plaintiffs’ attorneys, not their clients. It is true that arbitration commonly lacks key features endemic to antitrust litigation, such as massive discovery burdens for defendants and one-way feeshifting for plaintiffs’ lawyers. But those features do not make traditional multi-year court litigation fairer than arbitration; they make it more costly for defendants, more conducive to forced settlements, and thus more likely to bestow a contingency fee windfall on plaintiffs’ attorneys. Restricting the availability of arbitration would enable plaintiffs’ lawyers to bring more meritless suits and, by forcing companies to settle them for substantial sums, would increase their costs of doing business and ultimately raise the price of goods and services economy-wide.

THIRD Contractual arbitration provisions do not enable anyone “to evade the public justice system”46 even where they apply. No matter what provisions private parties agree to, defendants remain fully accountable, in court, to two federal antitrust agencies and 50-plus state AGs, all of which appear eager to build on the new wave of antitrust cases they have recently brought against some of America’s largest companies.

The Report suggests, without citation, that eliminating arbitration clauses is necessary anyway because even though antitrust authorities can hold wrongdoers accountable in federal court, they are “susceptible to capture by the very monopolists that they [are] supposed to investigate.”47 No one familiar with the theory of “capture” or with America’s antitrust enforcers would make such a claim. “Capture” is a phenomenon associated with industry-specific regulators, not the generalist antitrust litigators who lead and staff the U.S. Department of Justice’s Antitrust Division, the Federal Trade Commission, and state AGs’ offices. Those litigators have strong incentives to bring aggressive cases against prominent defendants, both to gain professional experience and to make a name for themselves. Such experience and reputation are especially valuable for antitrust enforcers who wish someday to transition to private law firms. If anything, antitrust enforcers are more likely to be prodded into marginal litigation by a target’s rivals than to be argued into submission by the target itself.

Conclusion

Private litigation will continue playing a central role in the enforcement of U.S. antitrust law. But antitrust plaintiffs already enjoy advantages in private litigation that are unparalleled in other areas of U.S. civil liability.

Those advantages have spawned litigation abuses even against the backdrop of today’s substantive antitrust doctrine, and the economy-wide costs of those abuses will only increase if, as the populists propose, Congress expands the scope of substantive antitrust liability. As America begins to rebuild its post-pandemic economy, now is not the time to stack the litigation decks even more lopsidedly against private enterprise.

#### \*Decline causes fast nuclear wars

Liu 18 [Quan Liu, M.D., Greater China, The Economist Group. “The next economic crisis could cause a global conflict. Here's why.” 11/13/18. https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why]

The response to the 2008 economic crisis has relied far too much on monetary stimulus, in the form of quantitative easing and near-zero (or even negative) interest rates, and included far too little structural reform. This means that the next crisis could come soon – and pave the way for a large-scale military conflict.

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

### 1NC – Class Actions Fail

#### Antitrust class actions don’t deter

Zygimantas Juska, Leiden University, 2017 The Antitrust Bulletin 62(3), The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement, https://journals.sagepub.com/doi/pdf/10.1177/0003603X17719764

The primary goal of this chapter has been to determine whether antitrust private enforcement, and more specifically class actions, accomplish the stated goals of compensation and deterrence. In order to assess the compensatory effectiveness, this chapter has presented the success and failure presump- tions. By applying the actual compensation rate of 40% in automatic distribution settlements and a 25% claiming rate in claims-made settlements, it was found that antitrust class actions fail to pass the defined threshold in small-stakes class actions. More importantly, the class action device is determined to provide very low proportional compensation to an insignificant number of antitrust victims. This is notable due to the unique nature of antitrust litigation: widespread overcharge, significant adminis- trative fees, expensive counterfactual assessments and low settlement awards. Another criticism of attorneys’ overpayment has also been confirmed. Despite of class members remaining largely under- compensated, the class counsel usually reaps significant rewards without any connection to the (lack of) success of the distribution. It was argued that amounts higher than three times that of the expen- diture costs can be already considered as overpayment. Consequently, the empirical data proved that the class counsel typically receives higher proportional compensation, which sometimes can even be a tens of times higher compensation than the expenditure. In order to appreciate the cy pres controversy, the 20% failure presumption has been set; that is, if more than two out of ten cy pres settlements are frivolous. Because of the limited data available, there was no attempt to draw definite conclusions. However, it was found that dubious cy pres distributions often occur in antitrust cases, suggesting that a majority of antitrust distributions attract dubious actions.

A crucial point in this respect is that the failure of the compensation goal accelerates the expansion of deterrence through private attorney general actions. Given that the aggregation of a large group of victims is allowed without a particular objective to provide effective compensation, and while the disproportionately high payment is reserved for the antitrust plaintiff bar, private attorneys have sufficient incentives to enforce antitrust rules aggressively. In order to arrive at this conclusion, the chapter assessed the elements of controversy through the optimal deterrence theory. It was found that the DOJ enforcement has more effect on the probability of detection, but the class action litigation scores higher points in maximizing the monetary penalty. However, the full effect of deterrence is diminished due to the following factors. First, the courts are reluctant to certify antitrust class actions. Second, cases are settled for amounts closer to the actual damages rather than treble damages. Third, class members receive much less than actual damages, meaning that the infringers internalize only low costs from the harm caused. Due to these obstacles, class action litigation does not deter rational actors during or before the antitrust violation; it has an effect only when the investigation is started. While the optimal deterrence should be a function of three equal components acting together—corporate fines, personal sanction and damages actions—the current scheme only allows for private litigation to serve a secondary function. However, even if private remedies were enhanced by additional support from public enforcers, by relaxing rules on certification and by capping settlements for higher than actual awards, optimal deterrence would not be achieved. It is highly questionable whether attorneys would bring more cases under the proposed model, as capping settlements may bring dissuasive effective for attorneys’ incentives to sue. Therefore, the multiplier of 1/3 in detecting and convicting cartels would remain similar. Another viewpoint is that capped settlements would potentially ensure full award for class member, but this value is much lower than the optimal penalty, which necessitates awarding the damages as high as three times of the ‘net harm to others’.

### 1NC---Growth High

#### Growth strong now. Predictive.

Porter 3/25 [Ira, author for University of Delaware Press focused on economics and fiscal policy. “US Economy Looks Strong” https://www.udel.edu/udaily/2022/march/economic-forecast-loretta-mester-federal-reserve-cleveland-ceee/]

U.S. economic growth continues to surge. And despite recent geopolitical action taken in Ukraine, which is causing markets to fluctuate, the U.S. economy will continue to see gains in 2022. That was the tone of the overall message of the 2022 Economic Forecast on Feb. 24.

This year’s event, sponsored by University of Delaware’s Alfred Lerner College of Business and Economics’ Center for Economic Education and Entrepreneurship (CEEE) and the Lyons Companies, was held virtually. Video can be found online.

Featured speakers included Loretta Mester, president and chief executive officer of the Federal Reserve Bank of Cleveland, Michael Farr, president and CEO of Farr, Miller & Washington LLC and chief market strategist for Hightower Advisors, and Hilary Provinse, executive vice president and head of mortgage banking at Berkadia, a Berkshire Hathaway company.

Dave Lyons Jr. gave opening remarks for the event, which his father David Lyons Sr. started in 2006, to educate Lyons Companies employees about how changes in the economy were expected to affect clients with whom they worked. It grew in 2007 when the company partnered with both UD to host the event and Michael Farr to speak. Carlos Asarta, Lerner College professor of economics and James B. O’Neill CEEE director, represented the university during the presentation.

Farr described David Lyons Sr., who passed away in 2018, as a great friend.

“David Lyons really cared about his community and he cared a lot about Delaware, and he wanted to make a difference. And this was one of the many ways David did that,” Farr said. “I always like to remember him as we start our program.”

A look into the U.S. economy

Mester, who participated in a 2019 Economic Forecast at UD, was the keynote speaker. She began her remarks assuring people that the U.S. economy was not to be underestimated. The proof was in the numbers.

Despite pandemic challenges the GDP grew 5½% in 2021, which was the highest pace since 1984. U.S. firms added 6.7 million jobs to their payrolls and the unemployment rate dropped to close to 4%, which was close to its pre-pandemic level.

“The economy’s strength was reflected by a strong demand by households and businesses, which was supported by fiscal and monetary policy,” Mester said. “And because vaccinations allowed the economy to reopen.”

Mester alluded to demand colliding with supply and labor shortages at one point, which caused prices to soar. As a result, inflation is currently the highest that it has been in 40 years, and nominal wages are accelerating.

“Differences in virus conditions and virus containment policies across the globe have disrupted global supply chains. Firms are struggling to get necessary parts and materials through clogged ports and transportation channels,” Mester said.

Mester said that because of this many businesses are facing higher costs for materials and this continues to put a strain on the economy. But there are hopeful signs, she said. Some businesses have started reporting that delivery times were becoming more predictable, but they had to wait longer than normal. There are signs that by the second half of 2022 there will be an easing of supply chains.

In addition to supply chain hiccups, businesses are struggling to find workers, Mester said. Payroll employment is almost 3 million jobs below its pre-pandemic rate. Pandemic related factors including child and elder care and fear of the virus have contributed to these factors. This does not include gig economy jobs. This number is low despite strong job level gains. Ultimately those job gains suggest positive signs for the labor market, Mester said.

“Now these factors should fade over time, but the precise timing and magnitude are open questions,” Mester said. “And if you look over a longer horizon, labor force participation has been trending down since the early 2000s due to demographics, and add to that that many more people retired during the pandemic than predicted.”

What this has done is prompt businesses to increase wages, offer signing bonuses, offer remote work and more flexible work schedules. In many cases, wage increases are not keeping up with inflation, Mester said. Personal consumption expenditures (PCE) inflation was above 6% by the end of 2021 and personal consumer price index (CPI) inflation was above 5%. While inflation is currently high, Mester said she expects it to improve but still be over 2% for 2022 and 2023.

To slow inflation, which Mester said is the Federal Open Market Committee’s goal, accommodation will be removed and the Fed Fund rate, which is now at zero to a .25%, will be increased starting in March.

Ultimately, Mester said she thought that the economic outlook for the remainder of 2022 would be that expansion will continue.

She said that U.S. households and businesses have healthy balance sheets and that once the Omicron variant is behind us, the country’s demand should rebound.

The housing economy

Provinse gave insight into the commercial real estate market as it relates to the economy. Commercial real estate was hit hard by the pandemic but there remain opportunities on which investors can capitalize, she said. Domestic and international firms have already started doing so.

Provinse said similar to the way that some American households are flush with money because of the pandemic so are companies, and that 2021 saw the largest transaction volume and interest in commercial real estate in the history of the markets. She expects an additional 5-10% increase for 2022. Investors need somewhere to park their money, Provinse said, and commercial real estate is a way to keep up with inflation because property owners can raise rent and lease costs.

“So we're seeing a lot of investment as this kind of potential hedge against inflation costs,” Provinse said.

Another positive for the industry is that, although interest rates will go up in the coming two years, cap rates for commercial real estate will hold steady. That, combined with a slowed but still increasing GDP, is great for the long term in commercial real estate, Provinse said.

As part of her session, Provinse broke down three sectors of the commercial real estate business, how they have been affected by the pandemic and their outlook moving forward. The first sector was office space. Provinse pointed out that she was giving her talk virtually from her home office to underline the fact that many employers had to switch to offering remote or hybrid work schedules during the pandemic, but now companies want to know when employees will return for in-office work.

“I think now that we’re kind of getting past Omicron, I think a lot of firms are saying April 1st is our return to office date,” Provinse said.

Provinse said more companies will shift to requiring employees to return to the office, which will drive demand for commercial real estate, and is one of the reasons why most companies haven’t made dramatic changes to their lease terms. Ultimately, companies believe in-person work is better for training and company culture, Provinse said.

Retail and the hospitality industry have struggled during the pandemic, but are starting to come back, Provinse said. In retail, people are shopping more online and regional malls are getting crushed. There is no data to show when that trend might change. But strip malls anchored by grocery stores have seen strong growth and traffic.

“We all still have to go to the grocery store,” Provinse said. “We all want to get our nails done at the nail salon, so those strip malls are coming back and I think we see positive trends in retail for 2022.”

The hospitality industry was absolutely hit the hardest by the pandemic, Provinse said. The world was on lockdown at home without places to go. The good news is that leisure travel has come back with high demand. Provinse said Americans have lots of money in their pockets from the pandemic and are willing to spend it on leisure travel, which has been great for hotels. She cautioned that business travel has not seen the same boost, and that because of how people are able to communicate via Zoom, she doesn’t know if people are going to feel the urgency to travel as much for business.

Provinse concluded her remarks with what she described as the ''belle of the ball in commercial real estate”: the housing market. It was the hottest sector and saw the most growth. What has stood out because of limited supplies to build homes is rental housing, Provinse said. Leasing activity is the highest it has ever been and apartment occupancy is at an all-time high, and that means that rent prices are going up.

This trend will continue in commercial real estate, she said, and it has spawned movement of people to the southern United States.

### 1NC – Chems

#### Chem growth and green innovation high

Deloitte 22, [2022 chemical industry outlook, https://www2.deloitte.com/us/en/pages/energy-and-resources/articles/chemical-industry-outlook.html]

As the chemical industry moves into 2022, strong demand for both commodity and specialty chemicals should keep prices robust throughout the year. The industry should also experience increased capital expenditure as leading industry players focus on building capacity and expanding into growing end markets through both organic and inorganic routes. However, the industry could face margin pressures amid raw material cost inflation, which will likely remain high through the first half of 2022.

One of the critical areas of focus for most US chemical companies in 2022

will likely be sustainability and decarbonization. Many chemical companies are expected to increase investment in research and development (R&D) capabilities and leverage advances in decarbonization and recycling technologies to lower their and their customers’ carbon footprint, as well as reduce plastic waste. As a result, 2022 should see more industry players create goals and plans around abatement of emissions and monetization of waste. Learn more about what lies ahead in our annual industry outlook.

## New Adv

### 1NC – Circumvention

#### The plan’s exploited to increase concentration – turns the aff

McAfee 15 [R. Preston McAfee, former Prof. Economics and Management, California Institute of Technology. American economist and distinguished scientist at Google. Previously, he served as chief economist at Microsoft. He has also served as an economist at Google, vice president and research fellow at Yahoo! Nicholas V. Vakkur, University of Texas, Austin, now at RAND. “The Strategic Abuse of Antitrust Laws.” 6/25/15. https://www.justice.gov/atr/strategic-abuse-antitrust-laws]

Section 4 of the Clayton Act explicitly permits private antitrust litigation, and makes plaintiffs entitled to treble damages (three times the actual damage) plus the cost of bringing the suit. Consumers and firms in the same line of commerce who are injured by exclusionary conduct have legal standing to sue. Shareholders, employees of an injured firm, and suppliers of other inputs to the injured firm cannot sue. Generally, directly injured parties have standing to sue and indirectly injured parties do not.

Section 7 prohibits mergers that lessen competition. The lessening of competition is a somewhat clearer standard than the problematic -attempt to monopolize“ language of the Sherman Act. Section 7 can be used privately to block mergers of rivals.

The focus of the present study is private litigation against other firms. Such private litigation creates a potential tool for harassing, harming and extorting payments from other firms. In our review of cases, we have identified seven distinct purposes, all unrelated to the social goal of promoting competition, to which the antitrust laws can be put. The potential for antitrust laws to be misused exists because antitrust cases are complicated and expensive to defend. Much of the behavior proscribed by the antitrust laws is subject to the -rule of reason,“ in which a class of behavior is illegal if it doesn‘t have a pro-competitive explanation. The prohibition on price discrimination in Section 2 of the Clayton Act is an example of a rule of reason analysis. Consequently, defendants in antitrust suits can be compelled to provide explanations and analysis of their behavior, produce a mountain of documents sometimes running into the tens of millions of pages, and have their executives spend days or even weeks in depositions and preparation for depositions. The nature of antitrust lawsuits is that it can be much more expensive to defend against a lawsuit than to bring a suit, although the threat of countersuits makes this more symmetric. This feature Â more expensive to defend than to bring Â makes the antitrust laws a useful strategic tool in attacking a rival.

The seven strategic uses of the antitrust laws that we have identified are:

Extort funds from a successful rival.

Change the terms of the contract.

Punish non-cooperative behavior.

Respond to an existing lawsuit.

Prevent a hostile takeover.

Discourage the entry of a rival.

Prevent a successful firm from competing vigorously.

The first two represent a taking - "give me something (cash, better contract terms) and I won‘t expose your vulnerability to an antitrust lawsuit“. It should not be obvious that such extortion would work Â what stops other firms from bringing suit? In order for it to work, it must be that the plaintiff has a unique standing Â no other firm is so well positioned to bring the suit, perhaps because other firms in the industry could not have been injured by the defendant‘s behavior.

The third use of the antitrust laws exploits the expensive nature of antitrust litigation, and the fact that it may be much cheaper to bring a suit than to defend against a suit. The modern theory (e.g. Abreu, Pearce and Stachetti, 1990) of cooperation requires punishments for misbehavior, and the theory emphasizes the problem that punishment harms the punisher. Thus, the theory points to the problem that even when a firm fails to cooperate, rivals may want to avoid the punishment. This is most easily understood in the context of cooperation on price, but applies equally to other forms of cooperation such as jointly lobbying the government for favorable laws. Price cooperation is usually supported by the threat of a price war, which is ruinous for all industry participants. Thus, if a firm violates a cooperative agreement, perhaps by taking more than their share of the market, the rivals would hesitate to launch a price war to punish the miscreant, because all would lose from the war. The ideal punishment harms the punished firm but not the punishers. Launching an antitrust suit may be relatively inexpensive to the punisher and yet impose significant costs on the punished firm. In this way, antitrust lawsuits are useful punishments for the purpose of enforcing cooperative agreements.

When a firm has a legitimate grievance against another firm, such as patent infringement or trademark infringement, one way for the defendant to defend themselves is to attack in response. Antitrust suits are frequently filed in response to other suits, because they balance the settlement process (-you drop yours and I‘ll drop mine“) and they permit discovery against the plaintiff, thereby making the imposition of costs more symmetric. This is the fourth strategic use of the antitrust laws.

Because mergers within an industry (-horizontal mergers“) result in increased market concentration, an antitrust suit is a natural defense against a hostile takeover. Antitrust lawsuits generally require extensive discovery and may take years to investigate. Consequently, the antitrust laws often create an effective defense against a takeover, because the time horizon is too long for the acquirer. Moreover, an antitrust lawsuit may give the target firm time to execute other defenses like poison pills (spinning off valuable assets) or spending cash needed for a leveraged buyout by the acquirer.

The antitrust laws were formulated to promote and enhance competition. However, the last two uses turn the laws on their head and use the antitrust laws to prevent competition.3 In one case, entry of a large and efficient firm is discouraged by threatening the firm with a suit claiming the attempt to monopolize. The last, but not least, use of the antitrust laws is to discourage an efficient firm from competing as effectively as it could otherwise. A successful firm is potentially vulnerable to less successful rivals alleging intent to monopolize, and less successful rivals can use successful firm‘s vulnerability to inhibit competition.

### 1NC – AT: Cartels

#### Cartelization is on the decrease---detection and deterrence working now.

Alain Verbeke and Caroline Buts 8-17. McCaig Research Chair in Management and is a Professor of International Business Strategy at the Haskayne School of Business, University of Calgary. Professor at the department of applied economics of the Vrije Universiteit Brussel. The Not So Brilliant Future of International Cartels. Published by Cambridge University Press on behalf of The International Association for Chinese Management Research. 08-17-2021. Pg. 6-7

As explained in the previous section, we do not dispute the possibility that international cartels could become more important in the future under carefully defined conditions. We are doubtful, however, even when accepting B&C’s broad definition of this governance mode, that international cartels will gain ground more generally, vis-à-vis other forms of governance in international business, when multinational enterprises face increased political risk.

A key element, and perhaps a surprising one, explaining our doubt about the bright future of cartels is four clear trends in cartel regulation that are now creating significant political risk for international cartel members (admittedly not covering B&C’s benevolent cartels). First, competition policy is now a priority for policy makers around the world, as reflected in the progress made in detecting, investigating, and prosecuting cartels (OECD, 2020; OECD, 2021b). Recently published data indicate that 68% of global cartels (with members from at least two different continents) have been prosecuted by multiple jurisdictions, with average cartel fines being very high at €19.3 million (OECD, 2020).

Second, the consequences of being caught as a cartel member have gradually become more severe and far-reaching, both for the orchestrating and the participating companies, and for the employees involved (Ordóñez-De-Hano, Borrell, & Jiménez, 2018). Depending on the jurisdiction, a wide array of sanctions is now being deployed, including personal fines, trade prohibitions, and prison sentences (these have increased sevenfold over a recent five-year period, OECD, 2020). After a finding of cartel-behavior from the competition authority, the legal battle usually continues in the form of lawsuits for damages whereby victims file claims and may also coordinate their actions, e.g., to recover cartel overcharges (Burke, 2019).

Third, cartel investigations have also become more sophisticated. Leniency policies – providing immunity from fines for the first player who admits to the existence of a cartel and discloses information on its functioning – are on the rise. This powerful tool serves both detection and deterrence purposes in the realm of anticompetitive behavior (Margrethe & Halvorsen, 2020; Marvão & Spagnolo, 2018; Miller, 2009). It incentivizes cartel members to become whistle blowers.

Companies will be less likely to join a cartel if they know that its members may be enticed to disclose cartel operations, (Brenner, 2009; Vanhaverbeke & Buts, 2020).

A larger number of agencies than before now also have the mandate to conduct ‘dawn raids’, in order to collect evidence of cartel behavior and they can even enter private premises of employees during their search for incriminating material. In addition, sophisticated econometric analyses have become standard practice to provide evidence of coordinated conduct in industry and to calculate cartel overcharges (Parcu, Monti, & Botta, 2021).

Fourth, competition authorities have invested more in outreach, communicating competition rules through dedicated events, online campaigns, and competition networks. Compliance programs have also been on the rise with an increasing number of mainly large companies investing in compliance training to abide by competition rules (De Stefano, 2018).

The increased efforts to fight anticompetitive agreements in industry are now deterring and destabilizing cartels. Following a substantial increase in the number of cartels that have been ‘caught’, the average life span of these cartels is now going down rapidly (OECD, 2020). The fight against illegal, anticompetitive behavior will intensify further in the near future, rather than governments shifting their focus to contemplate potential benefits. At the same time, the beneficial effects have been widely acknowledged of international collaboration forms that are legally allowed by various competition policy regimes (and are therefore not considered cartels), see for instance Martínez-Noya and Narula (2018) on international R&D cooperation.

# 2NC

### Adv CP

#### Independent court solves the aff better – efficiency, specialization, and uniformity

Holleran 20 [Keith Holleran, associate in the antitrust group in Axinn's Washington, DC office, George Mason Law, Antonin Scalia School of Law. Concurrence Antitrust Writing Award 2020. “Establishing an Independent Antitrust Court.” 2020. <https://awards.concurrences.com/IMG/pdf/4._establishing_an_independent_antitrust_court.pdf?56466/614536766da09a9216d1e0809972eb9aa909eb4d>]

Introduction

Antitrust cases are extremely complex, and often take years to resolve. Generalist judges are required to look at intricate economic models and a long set of facts to try and determine if certain conduct is prohibited by the antitrust laws. The Federal Trade Commission (FTC), as an expert agency, has an adjudicative framework that helps resolve these complex cases. However, the gains to this setup are somewhat offset by the FTC functioning as both the prosecutor and adjudicator in these cases. Setting up an independent antitrust court (the Antitrust Court) allows litigants to receive the benefits of a specialized, expert court without the same drawbacks of the current framework.

Antitrust enforcers in the United States are the FTC, Department of Justice (DOJ), states, and private parties. All of these enforcers would benefit from having their cases decided by a specialized court made up of expert judges. The United States already has some specialized courts in place, and the United States could look to these courts for guidance in setting up the Antitrust Court. Other countries have also set up an independent tribunal for antitrust cases, and their structure could be followed as well.

The Antitrust Court will be more efficient, produce higher quality decisions, and create a more uniform policy for firms to follow compared to the current framework. While there are some harms that will arise from setting up the Antitrust Court, these will be significantly outweighed by the benefits. The United States should create an independent, specialized antitrust court for the benefit of consumers, firms, and the antitrust agencies.

#### Courts are captured and wreck implementation – fiat doesn’t solve because antitrust is case-by-case

Posner 22 [Eric A. Posner, Kirkland & Ellis Distinguished Professor, University of Chicago Law School. Filippo Lancieri, a Post-Doctoral Fellow at the ETH Zurich Center for Law and Economics and a Research Fellow at the Chicago Booth Stigler Center. Luigi Zingales, Robert C. McCormack Distinguished Service Professor of Entrepreneurship and Faculty Director of the UChicago Booth Stigler Center. “The Political Economy of the Decline in Antitrust Enforcement in the United States.” January 2022. https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/528900/1/CLE\_WP\_2022\_01.pdf]

As we posited in our theoretical framework from Part II, policy changes made by technocrats can be democratically legitimate if there is at least some form of direct or indirect endorsement either by politicians taking credit for the changes in policy or by strict scrutiny during the nomination process (technocrats were appointed for this specific reason). Yet, neither takes place in the case of the Supreme Court-sponsored diminishment of antitrust enforcement. As we have seen in Part III.A., the weakened enforcement takes place despite the expressed will of Congress and public statements by presidents (either in speeches or in party platforms) that favor strong enforcement (or, alternatively, ignore it).

Many justices acted inconsistently with the commitments to antitrust enforcement that they made in their nomination hearings. Justices Sandra O’Connor, David Souter, Clarence Thomas and Ruth Bader Ginsburg all affirmed the importance of antitrust law for protecting small businesses and eliminating monopolies. Yet in their rulings, O’Connor, Souter and Thomas displayed little sympathy for antitrust enforcement and a great deal of sympathy for large businesses. They are among the most anti-antitrust justices ever sat in the Supreme Court. Their record in defense of small businesses is also dismal: O’Connor voted for large companies in 84% of her rulings, Souter in 86% of his, and Thomas in 93% of his. Similarly, Justice Ginsburg was among the most anti-antitrust enforcement of the Democratic appointed Supreme Court justices. She voted against antitrust enforcement in 38% of the cases she participated in, compared to a party average of 29%. More impressively, 73% of her votes were against small businesses. Justice Roberts is another good example of these contradictions. While he has acknowledged the importance of strong antitrust enforcement in general and of private antitrust enforcement in particular, he leads all justices in his antagonism to enforcement (86% of his votes in both general and private enforcement cases).

These justices were also in the majority in landmark antitrust cases that greatly and negatively impacted enforcement during the 1990s and 2000s. Justice Ginsburg authored the decision in Volvo Trucks that puts the final nail in the coffin of the Robinson-Patman Act as a source of enforcement. Roberts, Souter, and Thomas joined the majority in Twombly (which greatly restricted private enforcement), together with Breyer—a Clinton nominee. Roberts and Thomas joined the majority in Italian Colors, which further restricted private enforcement of antitrust laws. O’Connor, Souter, Thomas, and Ginsburg all joined the unanimous court in State Oil v. Khan (which changed the law with regards to maximum Resale Price Maintenance) and Roberts and Thomas joined the majority in Leegin, which the antitrust restrictions on resale price maintenance.

The Court’s increasing business-friendliness, anti-antitrust enforcement and pro-large businesses stance occurred concurrently with, and likely as a result of, increased business attention and influence over the appointments and performance of the US judiciary. Starting in the 1970s, business groups poured money into law and economics research and conservative legal networks like the Federalist Society (founded in 1982), with the goal of amplifying business influence and impact on the judiciary as well as the larger intellectual culture.164 As Lewis Powell, then a corporate lawyer, wrote in a Memorandum to the American Chamber of Commerce,

“American business ‘plainly is in trouble’; the response to the wide range of critics has been ineffective, and has included appeasement; the time has come—indeed, it is long overdue— for the wisdom, ingenuity and resource of American business to be marshaled against those who would destroy it.”

While Powell urged businesses to act through the democratic process by participating in public argument, he also argued that businesses should also try to influence universities and the courts. As to the latter point, he noted that “the judiciary may be the most important instrument for social, economic and political change,” and urged the Chamber of Commerce to model itself on the American Civil Liberties Union and other organizations that used the courts to advance their goals. “This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.” 166 Two months later Powell was appointed to the Supreme Court by President Nixon—a President who publicly campaigned on his support for strong enforcement of the antitrust laws. His nomination did not feature any mention of antitrust enforcement, but Powell would solidify a majority against strong antitrust enforcement on the Court.

The Chamber of Commerce, which is funded by American businesses, now plays a role in advancing business interests through lobbying and litigation. The Chamber of Commerce has, for example, expressed opposition to the major recent bills that seek to strengthen antitrust law and to increase funding for antitrust enforcement by the FTC. 167 Through its litigation arm, it has filed numerous amicus briefs urging courts to weaken antitrust enforcement, 168 although its influence has been limited because it does not file an amicus brief when the opposing parties are both businesses.169 Still, research has shown that the International Chamber of Commerce’s (ICC) amicus briefs have been extremely successful over the last several decades: a majority of the Court has agreed with them more than the amicus briefs of any other party except the U.S. government. In the area of antitrust, the ICC has scored notable victories for business interests, including Twombly.

Business groups have attempted to influence judges in other ways. They have financially supported Chicago school economics and judicial training programs that sought to inculcate judges with Chicago school tenets. 170 A paper by Ash et al. documents the role of various judicial training programs that promoted Chicago school ideas on antitrust law. The paper provides evidence that appeals court judges who attended a business-sponsored, stylized “law and economics” training (the Manne Program) that mostly included lessons based on Chicago school theories became significantly more likely to vote in favor of lax antitrust enforcement, though a small sample prevents the authors from having clear identification for all samples and specifications. 171 These findings, however, do not include Supreme Court justices, as only Justice Ruth Bader Ginsburg attended the program. In a separate analysis, Sying Cao finds a statistically significant and economically meaningful relationship between district judges’ economic sophistication (measured by the use of economic terms in decisions and previous economics education) and pro-business rulings (a major portion being antitrust cases).172 However, her analysis does not find a statistically significant impact for the Manne program in addition to judges’ previous knowledge and exposure to law and economics more generally. Cao attributes the conflicting results to either a selection effect of district judges who attended the program in the first place (versus circuit court judges in Ash et al.) or to sample restrictions that make the articles somewhat hard to directly compare (Cao lacks specific attendance data for judges for a pivotal period between 1976 and 1986).

To summarize, the data presented and other scholarship on the evolution of the Supreme Court antitrust jurisprudence suggest three things. First, the nomination hearings indicate that there was no public support for a reduction of antitrust enforcement. Whatever the real views of the nominees, they clearly learned a lesson from the Bork nomination, which is that opposition to antitrust enforcement is politically unpopular. Second, there also was no publicly expressed, democratically tinged endorsement by the nominees, the president, or the Senate that the Supreme Court would or should use its power to weaken antitrust laws. Third, once in office, these justices greatly weakened antitrust law. This all takes place while antitrust is a non-politically salient topic to the public, but a pressing topic to the large business community that directly promoted, and benefited from, the lax enforcement of the antitrust laws.

Part IV. Taking stock: a death by a thousand cuts

We have shown that the decline in antitrust enforcement since the mid-1970s was not the result of a popular mandate, but the outcome of decisions by regulators and judges who were largely acting on their own rather than at the direction of elected officials, and behind-the-scenes budget cuts in Congress. Under our theoretical framework, a policy decision with important policy consequences that is made by an elected official, who campaigned on it, is democratically sanctioned and presumptively in the interest of the public. A decision made by a delegated expert (judge or regulator) whose appointment was publicly vetted and whose views were endorsed by elected officials is also democratically sanctioned albeit less so. When a decision is made by an elected official who does not openly advocate for it in an election or is shielded from public scrutiny by inclusion in general omnibus legislation or made through obscure procedural shortcuts, the decision receives a weaker democratic sanction. And when an appointed official makes policy decisions, and does so in the absence of public attention, that decision receives a still lower level of democratic sanction. At the lowest level, federal judges whose views on antitrust law were unknown at the time of their appointment (or misleadingly expressed by the nominee during the confirmation process) and who votes to make policy changes to antitrust law receive the lowest level of democratic sanction.

#### The plan depends on private actors to bring suits—takes multiple years.

Heaton 19—(lawyer for Hogan Lovells, BSC from University of Exeter, Committee Member, London Solicitors Litigation Association). Nicholas Heaton and Benjamin Holt. December 2019. “Private Litigation Guide”. Global Competition Review Insight. Accessed 10/17/21.

From the filing of a complaint to the rendering of a verdict, private antitrust cases take an average of two to five years. Cases involving class actions or particularly complex issues can take an even greater period of time.

#### Monetary remedies plank solves deterrence

Kades 21 [Michael, attorney at the FTC for 20 years, senior antitrust counselor to Senator Amy Klobuchar, economics at Yale. “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law” https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/]

Market power and its abuse are far too prevalent in the U.S. economy, increasing the prices consumers pay, suppressing wage growth, limiting entrepreneurship, and exacerbating inequality. Equitable Growth’s 2020 antitrust transition report identifies a lack of deterrence as a key problem: “Antitrust enforcement faces a serious deterrence problem, if not a crisis.”

As the report explains, “Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.” In the face of such warnings, it is a particularly bad time for the Supreme Court to unanimously reject 40 years of lower court rulings and conclude that the Federal Trade Commission can neither force companies to give up the profits they earned by violating the law nor compensate the victims of those violations. (The first remedy is called disgorgement, and the second remedy is called restitution.)

Whether the Supreme Court in April correctly interpreted the statute at issue in the case, AMG Capital Management LLC v. Federal Trade Commission, is less important than its implications. Professor Andy Gavil discusses a potential silver lining in the Supreme Court’s decision—the glass-half-full approach. He argues that if the Supreme Court faithfully applies its approach to statutory interpretation, then it could open the door to broader application of the antitrust laws.

I look at the direct impact of the decision—the glass-half-empty approach. I argue that the decision deprives the antitrust agency of a critical, albeit imperfect, weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry. Although it has used disgorgement in competition cases sparingly, those awards have deterred the entire industry from engaging in the challenged conduct.

Before the recent Supreme Court decision, the disgorgement awards in competition cases went far beyond the impact in a single case. The savings include benefits from the conduct that did not occur. If the commission cannot seek monetary remedies, then companies will keep the rewards of their illegal conduct. Perversely, the companies causing the greatest harm will benefit the most from April’s decision.

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

On the bright side, Congress can easily restore the FTC’s ability to seek monetary remedies, and the idea has some bipartisan support. The remainder of this piece discusses how disgorgement has been a successful tool in antitrust cases and what we can expect if Congress does not restore the FTC’s ability to seek broader and more equitable remedies, including monetary relief.

#### Private parties can still report violations to enforcement agencies, which subsumes any benefits of private antitrust

Tim Reuter 16. Associate Principal with more than 10 years of experience in competition economics at RBB Economics, PhD in competition economics. “Private antitrust enforcement and the role of harmed parties in public enforcement.” Eur J Law Econ (2016) 41:479–507. https://link.springer.com/content/pdf/10.1007/s10657-015-9495-y.pdf

\*\*AA = Antitrust Authority

We investigate in this paper the consequences of introducing private trials on enforcement efficacy, taking into account the fact that private parties have the possibility to report breaches of competition law to the AA. The objective of our paper is to investigate (1) whether the effects of introducing private trials on the number of enforcements errors continues to hold as predicted when also considering the effect on public enforcement and (2) whether the private trial possibility remains a socially desirable instrument under this consideration. As we will discuss in Sect. 1.3, there is considerable evidence that private parties play an important role also in public enforcement. Failing to acknowledge this role and ignoring the interplay between the possibility to privately sue for damages and the incentives to supply information to public authorities introduces a systematic bias in the evaluation of private antitrust enforcement. We address the hence highly topical matter of the enforcement effects of private trials in the light of private incentives to present evidence to the AA to induce public investigations.

Our study establishes that allowing private trials, in contrast to previous results, does not necessarily decrease the probability that guilty firms will go undetected. The mechanism to arrive at this result is as follows. If an injured firm has the possibility to sue, it might no longer be willing to cooperate with the AA, since by bringing suit it can achieve equivalent payoffs that would result from a public prosecution. Thus, going to trial and reporting evidence to the AA are substitutable strategies. However, under the assumption that the court will be more likely than the AA to commit an error, reporting would be superior from a social point of view, because the strength of the private party (initial evidence) is combined with the investigative powers of the authority (as Harrington 2006 argues). Consequently, reporting has a higher social value than suing, but this value might not be fully internalized by the firm due to the private expenses of reporting.

#### Only DOJ leniency programs solve detection and deterrence

Lamontanaro 20 [Aleksandra, Fordham University School of Law, associate with Oved & Oved. “Bounty Hunters For Algorithmic Cartels: An Old Solution for a New Problem.” Fordham Intellectual Property, Media, and Entertainment Law Journal, Volume 30 XXX, Number 4, Article 6, pp. 1290-1300]

Leniency Program Is Not a Panacea for Cartel Detection The Leniency Program (“the Program”), first introduced in 1978, has become the backbone of the DOJ’s cartel detection and enforcement.196 Today, the Program provides corporations and individuals that come forward with information about their cartels an opportunity to avoid a criminal conviction and fines.197 To be qualified for leniency, an entity must (1) be the first among the cartel members to come forward,198 (2) stop its own participation in the cartel, (3) fully admit to its role in the conspiracy, (4) identify its coconspirators, (5) make restitution where possible,199 and (6) cooperate fully with the DOJ.200 If the Division has not already started its own investigation into the reported cartel, leniency is automatic for qualified companies and individuals.201 Additionally, leniency can still be available after the commencement of the investigation if the same algorithmic code (if available) or a similar publicly accessible algorithm in order to see whether it produces the same inflated prices that sparked the authorities’ interest.

The Leniency Program has been extremely successful, resulting in the detection and conviction of major international price-fixing cartels, billions of dollars in fines, and incarceration of cartel members.203 Between 2005 and 2010, ninety percent of all fines recovered from cartels were tied to the participation of leniency applicants.204 More than half of the DOJ’s ongoing international cartel investigations are initiated or otherwise advanced by information from leniency applicants.205 The Leniency Program is an effective tool in cartel detection because it destabilizes cartels by creating a race among conspirators to the prosecutor’s door to be the first to confess.206 Each cartelist knows that it can report others in exchange for full immunity. Accordingly, a firm is left wondering whether it can trust its fellow cartelists, who happen to be its business competitors, to look out for the firm’s best interests.207

### EU CP

#### No modelling – the aff undermines developing antitrust regimes globally – finishing

Murray ’17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

With nowhere else to go, private litigants have naturally flocked to the United States for remedial assistance, creating an issue for developing antitrust regimes.12 Several implications attend foreign plaintiffs seeking recovery in the United States. American courts have recognized the importance of allowing foreign plaintiffs to bring claims in the United States under the Sherman Act.13 Before 2004, there was a significant chance that parties injured abroad by global cartels that directly harmed the United States would be able to sue in US courts to recover their losses.14 But, as illustrated above, private litigants applying US antitrust law for redressing harm that occurred abroad create tensions over sovereignty with other countries.15

Moreover, bringing claims to the United States strips valuable opportunities for young foreign antitrust regimes to develop their own jurisprudence, depressing the effectiveness of global antitrust enforcement and stalling the emergence of private redress.16

\*\*\*Begin Footnote 16\*\*\*

See Fox, Remedies, supra note 14, at 580 (recognizing that effective enforcement by every antitrust jurisdiction would be better than the United States unilaterally strengthening its own enforcement efforts for global benefit). But see generally Dodge, supra note 2 (arguing that, due to the complexity of multilateral conflict-of-law approaches weighing foreign interests, US courts should only employ Alcoa’s US-centric effects doctrine to encourage growth of international antitrust law so long as all courts similarly apply such unilateral approaches); Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 ANTITRUST L.J. 711 (2001) (drawing on the US prosecution of the Vitamins Case cartel to show that aggressive US extraterritoriality can lead to comprehensive international antitrust enforcement).

Others have proposed ideas for multilateral international antitrust enforcement, including a proposal from a group of antitrust scholars (the Munich Group) that involves the creation of an international agency tasked with enforcing a globally adopted antitrust code. See Int’l Antitrust Code Working Grp., Draft International Antitrust Code as a GATTMTO-Plurilateral Trade Agreement, 5 WORLD TRADE MATERIALS 126 (1993) [hereinafter DIAC] (proposing the establishment of an international antitrust agency sharing the responsibility of enforcement of an international antitrust code with national governments); Wolfgang Fikentscher, On the Proposed International Antitrust Code, in ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 345-47 (John O. Haley & Hiroshi Iyori eds., 1995) (describing the code by one of its drafters). The DIAC addresses private redress in a similar fashion to EU law: mandating that national governments provide for certain remedies, though ultimately allowing each signatory to determine the appropriate parties to seek remedial action. See DIAC, supra note 16, at 180- 81 (addressing “Remedies” under Article 15 to include redressing private harm but stopping short of creating a private right of action); see also infra § II.B (summarizing the EC Directive). However, because such an international code is not yet a practical reality, this Note will focus on how US jurisprudence should operate in absence of international law to create a suitable environment for the growth of international private redress. For more information on the DIAC or other supranational antitrust law, see Steven L. Snell, Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity, 33 STAN. J. INT’L L. 215, 221-235 (1997) (discussing the search for international consensus on antitrust law, including the DIAC); Ulrich Immenga, Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy, 4 PAC. RIM L. & POL’Y J. 93, 150-51 (1995) (introducing the recommendation for the DIAC); see generally Wood, supra note 1 (examining efforts and difficulties in establishing an international antitrust code); Mark R. Joelson & Joseph P. Griffin, International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis, 11 INT’L LAW. 5 (1977) (advocating for an international convention as the most effective means of curtailing restrictive business practices engaged in by transnational enterprises while detailing challenges and past attempts).

\*\*\*End Footnote 16\*\*\*

Worldwide jurisdictions are increasingly recognizing the importance of private rights of action to enforcement efforts.17

\*\*\*Begin Footnote 17\*\*\*

See infra § II.B. See also Cavanagh, Lessons, supra note 8, at 629-30 (highlighting that while private remedy in the United States has been under siege in federal courts, the rest of the world has been contemplating the adoption of the private right of action); Pheasant, supra note 11, at 59 (noting that the 2004 Ashurst Study authorized by the EC recognized that importance of private enforcement of EU competition laws due to insufficient resources at the EC and EU Member States’ national competition authorities). But see Rajabiun, supra note 7, at 190-91 (detailing resistance to private enforcement, particularly in civil law countries and those with small economies)

\*\*\*End Footnote 17\*\*\*

Within the past ten years several countries have expanded private parties’ ability to recover harm from unlawful anticompetitive behavior by allowing collective action.18 However, private actions remain rare in many developing antitrust jurisdictions with little, if any, precedent establishing the basis for compensatory damages or discovery.19

In response to international criticism of the statute’s unbridled transnational application, the United States has curtailed the Sherman Act’s reach both judicially and legislatively.20 Judicially, courts looked to international comity, the practice of taking into account the interests of other nations.21 The Ninth Circuit was the first court to invoke international comity in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., which used an interest-balancing test to determine whether exercising jurisdiction was proper.22 Legislatively, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), which attempts to delimit and define the cross-border reach of US antitrust laws by introducing an objective test under the effects doctrine.23 Powerful arguments can be advanced in the American interest for applying US antitrust laws beyond US borders, including adequately protecting American competition and consumers, deterring inimical foreign anticompetitive behavior affecting the United States, especially in an increasingly globalized economy, and providing remedial measures to US victims of such conduct.24 However, these interests in providing protection and redress are counterbalanced by equally important rationales for limiting the extraterritorial span of US antitrust law, such as costly overregulation, avoiding international disputes, allowing nascent worldwide antitrust regimes to develop to beget increased antitrust enforcement, and avoiding harmful interference with antitrust regulators’ amnesty programs.2

#### The plan nukes foreign antitrust – amicus briefs cite treble damages, international law

* Emparagan upholds customary international law comity rulings
* Remedies are disagreed upon, treble damages are controversial and undermine competition law development because of the scale of remedy
* Amicus briefs cite harms to sovereignty and challenges to leniency programs which undermine international antitrust development

Breyer 4 [Justice Breyer, “Opinion of the Court, F. HOFFMANN-LA ROCHE LTD., ET AL., PETITIONERS v. EMPAGRAN S.A. ET AL. ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.” 6/14/04. https://www.law.cornell.edu/supct/pdf/03-724P.ZO]

We turn now to the basic question presented, that of the exceptionís application. Because the underlying antitrust action is complex, potentially raising questions not directly at issue here, we reemphasize that we base our decision upon the following: The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the Sherman Act does not apply) for two main reasons.

First, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10, 20ñ22 (1963) (application of National Labor Relations Act to foreign-flag vessels); Romero v. International Terminal Operating Co., 358 U. S. 354, 382ñ383 (1959) (application of Jones Act in maritime case); Lauritzen v. Larsen, 345 U. S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law that (we must assume) Congress ordinarily seeks to follow. See Restatement (Third) of Foreign Relations Law of the United States ßß403(1), 403(2) (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); Hartford Fire Insurance Co. v. California, 509 U. S. 764, 817 (1993) (SCALIA, J., dissenting) (identifying rule of construction as derived from the principle of “prescriptive comity”).

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony particularly needed in today’s highly interdependent commercial world.

No one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused. See United States v. Aluminum Co. of America, 148 F. 2d 416, 443ñ444 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶236 (1978).

But why is it reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim? Like the former case, application of those laws creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See Restatement ß403(2) (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation’s interests, extent to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of American companies, see Restatement ß402; and some of the anticompetitive pricefixing conduct alleged here took place in America. But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct that Congress sought to forbid, for Congress did not seek to forbid any such conduct insofar as it is here relevant, i.e., insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct also causes domestic harm. See House Report 13 (concerns about American firmsí participation in international cartels addressed through ìdomestic injuryî exception). But any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter.

We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim? We can find no good answer to the question.

The Areeda and Hovenkamp treatise notes that under the Court of Appealsí interpretation of the statute

“a Malaysian customer could . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel memberís] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U. S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have intended that result.î P. Areeda & H. Hovenkamp, Antitrust Law ¶273, pp. 51ñ52 (Supp. 2003).”

We agree with the comment. We can find no convincing justification for the extension of the Sherman Act’s scope that it describes.

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. See, e.g., Hartford Fire, 509 U. S. at 797ñ799 (noting that the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy); see also, e.g., 2 W. Fugate, Foreign Commerce and the Antitrust Laws ß16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints).

Regardless, even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. See, e.g., 2 ABA Section of Antitrust Law, Antitrust Law Developments 1208ñ1209 (5th ed. 2002). And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody. E.g., Brief for Federal Republic of Germany et al. as Amici Curiae 2 (setting forth German interest “in seeing that German companies are not subject to the extraterritorial reach of the United States’ antitrust laws by private foreign plaintiffs—whose injuries were sustained in transactions entirely outside United States commerce—seeking treble damages in private lawsuits against German companies”); Brief for Government of Canada as Amicus Curiae 14 (“treble damages remedy would supersede” Canada’s “national policy decision”); Brief for Government of Japan as Amicus Curiae 10 (finding “particularly troublesome” the potential “interfere[nce] with Japanese governmental regulation of the Japanese market”).

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Brief for Federal Republic of Germany et al. as Amici Curiae 28ñ30; Brief for Government of Canada as Amicus Curiae 11ñ14. See also Brief for United States as Amicus Curiae 19ñ21 (arguing the same in respect to American antitrust enforcement).

#### Here’s another card on leniency applications – kills enforcement.

Bloom ’05 [Margaret; 2005; King's College London and Freshfields Bruckhaus Deringer, Former Director of Competition Enforcement, UK Office of Fair Trading; New York University Annual Survey of American Law; “Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies - A Post-Empagran Perspective from Europe,” vol. 61, p. 433-452]

F. The Mix of Civil Leniency Regimes and Possible U.S. Treble Damages Will Discourage Leniency Applications in Those Cases Where Plaintiffs Might Be Able to Establish a Link With the United States

Given that the incentive to apply for leniency is likely to be significantly weaker in a civil regime than a criminal one, there is a real risk of deterring applications by opening up the possibility of U.S. treble damages actions. If so, fewer cartels will be uncovered. The amici curiae briefs in Empagran for the United Kingdom, Ireland, and the Netherlands4' and for Germany and Belgium argued this point strongly.42 However, even where there is the possibility of such U.S. treble damages actions, some leniency applications might continue if executives consider they could be at risk of imprisonment by a European court. But even in those member states with criminal powers, this may not be a sufficiently strong countervailing factor until some executives have been sentenced to jail. In international cartels that include the United States, the decision whether to apply to the Department of Justice for amnesty will be the key one. If, despite the risk of extensive private actions, a company makes a U.S. application, it will also make follow-on or parallel applications in Europe.

The possibility of U.S. treble damages will discourage leniency applications if plaintiffs might establish a link with the United States. Uncertainty creates a disincentive to seek leniency. A party that has done no business with U.S. purchasers, but has been engaged in a global cartel, may well be prepared to run the risk of fines in the EU, rather than make a leniency application that will trigger the risk of engagement in U.S. legal proceedings with potentially substantial treble damages awards by a jury. If so, they will not apply for immunity in Europe and the cartel will probably not be uncovered.43 Apart from any applications that follow on or are parallel to those of the Department of Justice, surviving applications to the European authorities would likely mostly concern smaller cartels clearly having no effect on the U.S., such as national or local cartels and those in non-tradable goods or services. Some examples of these could be the cartels of brewers in Belgium and in Luxembourg that were prohibited by the European Commission in 2001 with fines of C92m44 and C0.45m45 respectively, and the industrial gases cartel in the Netherlands that was prohibited by the European Commission in 2002 with fines of C26m.46 Leniency programs are not only beneficial through uncovering cartels but also through deterring cartel behaviour because of an increased risk of defection and exposure. Hence, bigger European cartels would likely increase undetected.

### 1

#### DELAY – remedies come too late to remedy competition

Jones 20 [Alison Jones & William E. Kovacic 20, Jones is a professor at King’s College London; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255

In the discussion above, we have been addressing the types of remedies that are imposed at the conclusion of a lawsuit. A problem in highly dynamic markets, however, is that the lag between the initiation of a case and a final order on relief may be so great that market circumstances have changed dramatically or the victim of allegedly improper exclusion may have left the market or otherwise lost its opportunity to expand and contest the position of the incumbent dominant firm. In this context, the antitrust cure arrives far too late to protect competition. The relatively slow pace of antitrust investigations and litigation (with appeals that follow an initial decision) has led some observers to doubt the efficacy of antitrust cases as effective policy-making tools in dynamic commercial sectors.

#### No threat of detection – data

Thépot 16 [Florence Thépot, PhD (UCL); Lecturer in Competition and EU Law, University of Glasgow. “Can Compliance Programmes contribute to effective antitrust enforcement?” 2016. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2791638]

There are currently two major enforcement challenges around antitrust infringements: a low probability of detection of anti-competitive agreements, as a result of which practices are typically well concealed - and the current level of corporate fines imposed is deemed to be under-deterrent.11

\*\*\*Start Footnote 11\*\*\*

Empirical studies estimated a probability of detection of between 13-17% of cartels that were eventually detected. See: 1. Bryant and Eckard (1991); Combe, Monnier and Legal (2008), 2. Wils also concludes that based on such a probability of getting caught, the deterrent level of the fine would be about 150% of the annual turnover in the products affected by the infringement (Wils 2002).

\*\*\*End Footnote 11\*\*\*

A very important element of the effectiveness of sanctions is the perceived probability that an illegal act is detected. The threat of a jail sentence or a high pecuniary sanction deters the wrongdoing only if detection can be expected.

#### Cartels solve themselves quickly

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University, “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

Generally cartels contain seeds of their own destruction... cartel members are reducing their output below their existing potential production capacity, and once the market price increases, each member of the cartel has the capacity to raise output relatively easily. The tendency is for cartel members to ‘cheat’ on their quota, increasing supply to meet market demand and lowering their price.

Most cartels agreements are unstable at the slightest incentive they will quickly disband, and returning the market to competitive conditions… Cartels appeared most strongly in those industries defined by scale and scope economies and with high fixed costs… Therefore, they are more common in wealthy countries with big businesses. Cartels also tended to appear among domestic firms first, before going international (except, for example; early– zinc, rail, shipping… cartels)…

#### Prices take years on average to stabilize – time distinction between disbandment and successful enforcement is negligible

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University; **internally citing John Connor, Professor of industrial-organization economics at Purdue University, specializes in empirical research in antitrust policy, PhD University of Wisconsin**; “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

In the study ‘Cartels and Antitrust Portrayed: Private International Cartels’ by John Connor; calculates the range of cartel price overcharge to be between 17% and 21%… it’s important to note that the research may under-estimate the true extent of the higher price from cartels… Also, the study shows that prices don’t fall very quickly to market levels after a demise of a cartel. Rather, prices fall gradually over a period of time– few months, even few years, e.g., after the ‘construction concrete products industry’ cartel was dissolved, prices were still falling three years later…

#### Antitrust class actions fail – plaintiffs win just 2 percent of cases

Pedro Caro de Sousa, Antitrust Digest, Oct 5, 2018

http://antitrustdigest.net/joshua-p-davis-and-robert-h-lande-on-restoring-the-legitimacy-of-private-antitrust-enforcement-in-a-report-to-the-45th-president-of-the-united-states-american-antitrust-institute/

Somewhat surprisingly, the authors do not address one important reason why private enforcement has faced strong headwinds in the US: criticisms of (excessive) private enforcement have led to the adoption of substantive competition doctrines that make it extremely hard to establish antitrust infringements other than hard-core cartels. These substantive doctrines, which impose high standards of proof of anticompetitive effects, often combine with the procedural obstacles the authors identify, and with the inherent ambiguity of post-Chicago economic theories of harm, to create a context where bringing successful claims is difficult. The result is that private (and public) claims of antitrust infringements become harder to bring. For example, plaintiffs won a favourable judicial ruling on section 2 (i.e. unilateral conduct) claims in just two percent of all cases between 2000 and 2008 (see this paper by the FTC).

#### Chemicals impact is biodiversity loss---that won’t cause extinction

Kareiva & Carranza 18, \*Director of the Institute of the Environment and Sustainability at UCLA, Pritzker Distinguished Professor in Environment & Sustainability and Chair, Doctorate, in the Environmental Science and Engineering program, \*\*PhD Student at University of California, Riverside. (Peter, Valerie, “Existential risk due to ecosystem collapse: Nature strikes back”, *Futures*, 102, pg. 39-50, doi: 10.1016/j.futures.2018.01.001)

While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species number declines locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al 2017; Vellend et al., 2013). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

What about the remaining eight planetary boundaries? Stratospheric ozone depletion is one—but thanks to the Montreal Protocol ozone depletion is being reversed (Hand, 2016). Disruptions of the nitrogen cycle and of the phosphorous cycle have also been proposed as representing potential planetary boundaries (one boundary for nitrogen and one boundary for phosphorous). There are compelling data linking excesses in these nutrients to environmental damage. For example, over-application of fertilizer in Midwestern USA has led to dead zones in the Gulf of Mexico. Similarly, excessive nitrogen has polluted groundwater in California to such an extent that it is unsuitable for drinking and some rural communities are forced to drink bottled water. However, these impacts are local. At the same time that there is too much N loading in the US, there is a need for more N in Africa as a way of increasing agricultural yields (Mueller et al., 2012). While the disruption of nitrogen and phosphorous cycles clearly perturb local ecosystems, end-of-the-world scenarios seem a bit far-fetched.

Another hypothesized planetary boundary entails the conversion of natural habitats to agricultural land. The mechanism by which too much agricultural land could cause a crisis is unclear—unless it is because land conversion causes so much biodiversity loss that is species extinctions that are the proximate cause of an eco-catastrophe. Excessive chemical pollution and excessive atmospheric aerosol loading have each been suggested as planetary boundaries as well. In the case of these pollution boundaries, there are well-documented mechanisms by which surpassing some concentration of a pollutant inflicts severe human health hazards. There is abundant evidence linking chemical and aerosol pollution to higher mortality and lower reproductive success in humans, which in turn could cause a major die-off. It is perhaps appropriate then that when Hollywood envisions an unlivable world, it often invokes a story of humans poisoning themselves. That said, it is doubtful that we will poison ourselves towards extinction. Data show that as nations develop and increase their wealth, they tend to clean up their air and water and reduce environmental pollution (Flörke et al., 2013; Hao & Wang, 2005). In addition, as economies become more circular (see Mathews & Tan, 2016), environmental damage due to waste products is likely to decline. The key point is that the pollutants associated with the planetary boundaries are so widely recognized, and the consequences of local toxic events are so immediate, that it is reasonable to expect national governments to act before we suffer a planetary ecocatastrophe.

#### No correlation between economic decline and war.

Walt 20, Robert and Renée Belfer professor of international relations at Harvard University. (Stephen M., 5/13/20, “Will a Global Depression Trigger Another World War?”, *Foreign Policy*, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/)

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”   
Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

### 2

#### Data proves new private AND public enforcement harms competition more than it helps

Lincicome 21 [Scott Lincicome, director of general economics and Cato’s Herbert A. Stiefel Center for Trade Policy Studies. “Antitrust Is So Hot Right Now. Three Reasons It Should Cool Off.” 6/30/21. https://www.cato.org/commentary/antitrust-so-hot-right-now-three-reasons-it-should-cool]

Beyond the theory, antitrust skepticism is also warranted from its practice. In particular, there is a long and ignominious history of U.S. antitrust laws being abused by both private parties (whom the law empowers to challenge competitor companies’ anticompetitive behavior) and the government itself.

Northwestern’s Fred McChesney summarized the former issue several years ago:

One of the most worrisome statistics in antitrust is that for every case brought by government, private plaintiffs bring ten. The majority of cases are filed to hinder, not help, competition. According to Steven Salop, formerly an antitrust official in the Carter administration, and Lawrence J. White, an economist at New York University, most private antitrust actions are filed by members of one of two groups. The most numerous private actions are brought by parties who are in a vertical arrangement with the defendant (e.g., dealers or franchisees) and who therefore are unlikely to have suffered from any truly anticompetitive offense. Usually, such cases are attempts to convert simple contract disputes (compensable by ordinary damages) into triple‐​damage payoffs under the Clayton Act.

The second most frequent private case is that brought by competitors. Because competitors are hurt only when a rival is acting procompetitively by increasing its sales and decreasing its price, the desire to hobble the defendant’s efficient practices must motivate at least some antitrust suits by competitors. Thus, case statistics suggest that the anticompetitive costs from “abuse of antitrust,” as New York University economists William Baumol and Janusz Ordover (1985) referred to it, may actually exceed any procompetitive benefits of antitrust laws.

In a 2004 piece, Preston McAffee and Nicholas Vakkur document that private litigation has been used as a tool for “harassing, harming and exporting payments” from other firms in at least seven distinct ways—each of which is unrelated to the public goal of promoting healthy market competition.

Extort funds from a successful rival.

Change the terms of a contract.

Punish non‐​cooperative behavior.

Respond to an existing lawsuit.

Prevent a hostile takeover.

Discourage the entry of a rival.

Prevent a successful firm from competing vigorously.

They cite examples of each such “strategic action” and document how these cases did nothing but enrich the plaintiffs at the defendants’ expense. And, as they note, the law itself permits such abuse because it tilts the playing field heavily against defendant companies:

The potential for antitrust laws to be misused exists because antitrust cases are complicated and expensive to defend. Much of the behavior proscribed by the antitrust laws is subject to the “rule of reason,” in which a class of behavior is illegal if it doesn‘t have a pro‐​competitive explanation. … Consequently, defendants in antitrust suits can be compelled to provide explanations and analysis of their behavior, produce a mountain of documents sometimes running into the tens of millions of pages, and have their executives spend days or even weeks in depositions and preparation for deposition.

Private lawsuits have declined in recent years, but companies can also try to hurt their competitors by aiding government investigations, as Oracle did during the Microsoft case. Also, private suits may be making a comeback. For example, just this year several publishers, including The Daily Mail, have filed antitrust suits against Google and Facebook (who compete with those same publishers for ad dollars and also sell them ad services) for supposedly manipulating search results to steer users away from their websites. Several farmers have filed antitrust suits against “big ag” companies for colluding to prevent seed and fertilizer price transparency on certain e‑commerce sites. I won’t guess as to the merits of these cases, but they seem to track the McAffee/​Vakkur framework and—regardless—show that private antitrust actions, which have a history of abuse, aren’t a relic of a bygone era.

Private companies, moreover, aren’t the only potential abusers of antitrust law. As McChesney notes, several studies have shown that “patterns of antitrust enforcement are motivated at least in part by political pressures unrelated to aggregate economic welfare.” This includes not only politicians’ efforts to stop mergers that would close plants or outsource jobs in their home districts, but also more nefarious objectives. As former FTC chief economist Jonathan Baker documents, for example:

Lyndon Johnson held up the antitrust review of a bank acquisition until a newspaper publisher, who also ran one of the merging banks, agreed to reverse the paper’s editorial position against him. President Nixon ordered the Justice Department not to appeal a lost court challenge to a merger by International Telephone & Telegraph, allegedly in exchange for a substantial contribution by ITT to the Republican National Convention. Nixon also threatened three major television networks with antitrust lawsuits in an effort to extract better news coverage and allegedly accepted a campaign contribution from Howard Hughes in exchange for withholding an antitrust challenge to a planned Las Vegas hotel acquisition.

In June of last year, moreover, DOJ whistleblower John Elias testified before the House Judiciary Committee that the Trump administration’s Antitrust Division investigated 10 cannabis industry mergers—subjecting them to intense scrutiny (at considerable cost yet with no official enforcement actions taken)—simply because Attorney General Bill Barr “did not like the nature of their underlying business.” Elias also claimed that the Antitrust Division’s political leadership initiated another investigation—of an emissions agreement between several automakers and the state of California — after Trump angrily tweeted about the deal, disregarding standard process for determining whether to open and publicize a case.

Then, of course, there are recent antitrust actions against Facebook from both the right and the left, neither of which—as the preceding links show—appear to be well‐​grounded in economics or law (but have plenty of political support). As noted at the outset, at least one federal judge now seems to agree, sending the FTC back to the drawing board because it’s case against Facebook lacked “any indication of the metric(s) or method(s) it used to calculate Facebook’s market share” (which is kinda the whole point in an antitrust case!). And there’s Ted Cruz and colleagues threatening antitrust action against Major League Baseball on express political grounds, or recent indications that Democrats’ new “Big Tech” legislation has been modified to exempt Microsoft.

Surely, not every antitrust action that the government threatens or files has such seedy political origins, but these and other cases again should give us pause before diving headlong into a deep pool of new interventions. And they’re a big reason why many economists believe that, overall, the costs of antitrust enforcement outweighs any benefits.

#### No food war

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.

#### No Latin-America war

* Security threats are isolated and insurgent – no escalation
* Interstate war is unlikely

Regional peace continued for decades with support

Countries don’t have modernized militaries to fight

Governments prioritize internal security threats

Sanchez 2/7/19 [Wilder Alejandro Sanchez, Defense IQ researcher who focuses on geopolitical, military and cyber security issues. Are main battle tanks obsolete? The view from Latin America. Feb 7, 2019. https://www.defenceiq.com/armoured-vehicles/articles/is-heavy-armour-obsolete-the-view-from-latin-america]

While there are ongoing border disputes (e.g. Bolivia and Chile or Guyana and Venezuela) and tensions (mostly coming out of Venezuela these days), security threats in the region are generally insurgent in nature. For example, terrorist movements like Colombia’s ELN and EPL, Peru’s Shining Path, or Paraguay’s EPP; narco-cartels in Mexico; or organised gangs such as the Maras in Central America or the Primero Comando da Capital in Brazil. These entities are highly mobile and operate in isolated regions or in urban areas.

Latin American governments continue to acquire new (or used) platforms for their armed forces, but heavy armour is not purchased particularly often. Some recent deals worth noting are:

In December 2018, the Brazilian Army completed the transfer of 25 M41C light tanks to the Uruguayan army. “Of the 25 vehicles, 15 were completely refurbished by Brazil while the remaining 10 will be used for parts. Those that will remain intact will be assigned to armoured infantry units, which currently use M24 light tanks,” Jane’s explains.

In 2016, Russia delivered 50 T-72B1 tanks to Nicaragua. The platforms are “an upgrade of the 1970s-era main battle tank and feature explosive reactive armour and thermal weapon sights, among other improvements.”

Venezuela has received a plethora of Russian weaponry over the past couple of decades, though these deals have been quite scarce in recent years due to Caracas’ financial crisis. Amongst the acquisitions are T-72 tanks, as well as infantry fighting vehicles like the BMP-3M, and an array of transport vehicles.

"Latin American governments continue to acquire new (or used) platforms for their armed forces, but heavy armour is not purchased particularly often"

As for other nations, while no other major sales have occurred, there are ongoing reports about armoured vehicles in need of modernization or replacement. For example, Chile possesses Leopard 2A4 tanks, and it will be interesting if they will be upgraded anytime soon, given that the Chilean government is replacing the famous Copper Law, which helps fund the Ministry of Defence. Meanwhile, Peru has yet to find a replacement for its old T-55 tanks, while Ecuador recently upgraded several AML and M113 A2 Plus armoured vehicles, as the country does not possess heavy armour.

As for Mexico, its fleet consists of light and medium armoured vehicles. Finally, Colombia also possesses light armoured vehicles; for example, media reports published in late January show vehicles that appear to be the EE-09 Cascavel, a 6x6 light tank, on patrol in urban areas close to the border with Venezuela.

Latin American Armoured Vehicle Requirements

The intrastate conflict that has plagued many Latin American countries is one of the strongest drivers for defence spending. Many countries continue to acquire new (or refurbished) platforms, such as Brazil’s new carrier Atlantico, Chile’s new Sikorsky S-70i Blackhawk helicopters, Argentina’s used AB-206 helicopters, or Mexico’s new patrol vessel Reformador. As for Peru, the Andean state has commenced the construction of a second landing platform vessel, BAP Paita. However, when it comes to heavy armour (or even medium armour) new contracts have been quite scarce in recent years.

One argument in favour of procuring heavy armour is so that nations can maintain minimal deterrence capabilities. While interstate warfare is very unlikely, it does not mean that the scenario is impossible. The Venezuelan government’s behaviour, particularly during the 2008 crisis in the Andes is an example of this ever-present possibility. Nevertheless, given the region’s current peaceful status, limited defence budgets and other security threats, it is understandable that regional governments have other priorities. Moreover, the focus for Latin American governments is the acquisition of multipurpose platforms, which can be utilized not solely for war.

#### Their ev is ab south Africa – no ev that collapses GG

Kaira ’17 [Thula; July 4; C.E.O. of the Competition Authority in Botswana, qualifications in law and competition economics from the University of Zambia and King’s College at the University of London; Competition Law and Economic Regulation in Southern Africa, “Cartel enforcement in the southern African neighbourhood,” Ch. 3]

Why neighbours must be worried about cartels unearthed in South Africa

South Africa is a key source of direct and indirect investment in sectors such as mining, retail and, to an extent, manufacturing. SACU’s BLNS countries’ import bill from South Africa has been dominated by petroleum and related products (including bitumen), cement, motor vehicles, iron ore and concentrates. By 2012, Botswana was the fourth-largest destination for South African exports, at 5.1% of the exports, which accounted for 91.4% of total intra-SACU imports (see SACU, 2012). As for the SADC, the main intra-SADC trade export items include petroleum, agricultural products, electricity and clothing and textile products (SADC, n.d.).

Competition policy and law in SACU/SADC countries is increasingly emphasising job creation, poverty reduction and citizen or small and medium enterprise (SME) empowerment. The International Competition Network has recognised that these alternative objectives of competition policy go mostly hand in hand with the traditional ones (ICN, 2002). The fact is that even the very alternative objectives will not be achieved where there are cartels. This is partly why cartel enforcement has become an important part of competition policy in many countries. Cartel activity has the propensity to stage-manage competition and provide a facade of competition when in actual fact there is collusion and a reduction in consumer surplus.

Where cartels thrive, there are a number of adverse effects. Business opportunities will remain controlled by cartels. Penetrating markets with cartels becomes difficult as cartelists will lower prices when they detect prospective entry, making inward investment costly and causing the exit of struggling firms. This in turn concentrates job creation in a sector among the cartel members. Cartels affect the objectives of regional trade integration and free movement of goods (e.g., customer and market allocation), as cartel members may create barriers to entry and frustrate the entry and growth of competitors. Cartels do not grow markets; they stagnate market growth.

Cartel enforcement in South Africa

# 1NR

### Clog DA

#### Democracy – independent of the midterm election, partisan gerrymandering nukes democracy promotion, encourages backsliding, and undermines America as a global model – it’s existential – that’s 1NC Funes *and*

Kasparov 17 [Garry Kasparov, Chairman of the Human Rights Foundation, 2/16/2017. “Democracy and Human Rights: The Case for U.S. Leadership” http://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf]

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress against the modern world order. Terrorist movements in the Middle East, extremist parties across Europe, a paranoid tyrant in North Korea threatening nuclear blackmail, and, at the center of the web, an aggressive KGB dictator in Russia. They all want to turn the world back to a dark past because their survival is threatened by the values of the free world, epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership begins at home, right here. America cannot lead the world on democracy and human rights if there is no unity on the meaning and importance of these things. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great. The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of strategic stability that is the great strength of democracies. Strong institutions that outlast politicians allow for long-range planning. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers, but cannot afford to think beyond their own survival. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news. The fear of making things worse has paralyzed the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism–all are generated and exacerbated by authoritarian regimes. A policy of America First inevitably puts American security last. American leadership is required because there is no one else, and because it is good for America. There is no weapon or wall that is more powerful for security than America being envied, imitated, and admired around the world. Admired not for being perfect, but for having the exceptional courage to always try to be better. Thank you

Didn’t read any d or anything about the state of dems means its game set match

#### And it causes stripping

Marx 21 [Claude Marx, Mlex Insights. “Lawmakers could strip FTC powers in response to Khan’s activist agenda.” 11/22/21. <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/lawmakers-could-strip-ftc-powers-in-response-to-khans-activist-agenda>]

Federal Trade Commission Chair Lina Khan’s bold attempts to reshape the agency’s enforcement priorities could cause pushback from her adversaries on Capitol Hill.

Several prominent Republicans advocate stripping the agency of its antitrust powers and their efforts could gain momentum if the party seizes control of one or both chambers of Congress in next November’s mid-term elections. There’s little chance of this occurring as long as the Democrats are in control.

#### Private claims skyrocket

LW 21 [Latham & Watkins Antitrust and Competition Practice. "US Senate Bill Would Reshape Antitrust Enforcement and Litigation." 2/18/21. https://www.lw.com/thoughtLeadership/US-Senate-Bill-Would-Reshape-Antitrust-Enforcement-and-Litigation]

CALERA would increase antitrust enforcement and private actions

Widen scope of anticompetitive conduct

In addition to broadening the definition of market power and lowering the standard for prohibited mergers, CALERA would add a new prohibition on “exclusionary conduct that presents an appreciable risk of harming competition.” “Exclusionary conduct” is defined by CALERA as conduct that “materially disadvantages one or more actual or potential competitors,” or “tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete.” This prohibition would lead to an increase in claims, and novel allegations of anticompetitive conduct, as litigants would likely try to take advantage of these broad and undefined terms and shape the precedent.

#### They go after state courts – evidence advantages

Holt 21 [Benjamin Holt, Partner at Hogan Lovells, “United States Q+A.” 11/22/21. https://globalcompetitionreview.com/guide/private-litigation-guide/third-edition/article/united-states-qa]

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have any evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers’ decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

The Clayton Act provides that final judgments entered against a defendant in a civil or criminal antitrust proceeding brought by the government may be used as prima facie evidence against the defendant in a later private suit arising out of the same facts. The Clayton Act also gives collateral estoppel effect to judgments in prior actions brought by the Antitrust Division in federal court but not to findings made by the FTC in administrative proceedings. Under the doctrine of collateral estoppel, a judgment as to matters actually litigated in an earlier suit is binding in a subsequent suit against the same party involving a different cause of action.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

Yes. Although leniency applicants can still be sued in private litigation, they are not subject to joint and several liability or triple damages if the court presiding over the private action determines that the applicant has satisfied its cooperation obligations. This means that a private damages recovery from a leniency applicant is limited to the actual damages resulting from the anticompetitive conduct. Despite this beneficial treatment, an applicant’s criminal plea or conviction following a government action may be used as prima facie evidence of the violation in a subsequent private action.

7 Can plaintiffs obtain access to competition authority or prosecutors’ files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

The files of a competition authority are often deemed protected by various exceptions to the discovery rules and, thus, are not accessible in private lawsuits. Similarly, there is no general right to access the materials used in a grand jury proceeding. But Rule 6(e) of the Federal Rules of Criminal Procedure provides that grand jury minutes and transcripts from a criminal antitrust proceeding may be disclosed in a separate judicial proceeding pursuant to court order if a litigant demonstrates a ‘particularized need’ for the materials, such as a need to impeach a witness or refresh recollection. See Illinois v. Abbott & Assocs., Inc., 460 US 557, 567 (1983) (collecting cases that set forth the standard of ‘particularized need’). Courts differ on whether they permit disclosure in a private suit of documents submitted to the grand jury.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

The Antitrust Division does not disclose the identity of leniency applicants nor the materials or statements created or made in connection with a leniency application, unless required to do so by court order in connection with litigation.

9 Is information submitted in a cartel settlement protected from disclosure?

Information submitted as part of a federal criminal investigation is protected from disclosure under Rule 6(e) of the Federal Rules of Criminal Procedure, which limits the disclosure of grand-jury materials, and the exemptions to the Freedom of Information Act (FOIA). The FOIA exemptions prevent disclosure of certain types of documents, including those that are trade secrets, confidential commercial information, work product created in anticipation of litigation, files whose disclosure would constitute an unwarranted invasion of personal privacy, and law enforcement records or information whose disclosure could cause an invasion of personal privacy or the disclosure of a confidential source.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

The FOIA provides a process whereby private individuals, including parties to private antitrust suits, may request disclosure of federal agency records, including those of the FTC and the Antitrust Division. The FOIA, however, exempts from disclosure certain types of documents, including those listed in response to question 9. In addition, Section 6(f) of the FTC Act protects from disclosure trade secrets as well as confidential, privileged or financial information submitted to the FTC.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

Section 4 of the Clayton Act (15 U.S.C. § 15(a)) provides a private cause of action for suits brought pursuant to ‘the antitrust laws’, which includes Sections 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2), Section 7 of the Clayton Act (15 U.S.C. § 18) and Section 2 of the Robinson Patman Act (15 U.S.C. § 13). Broadly speaking, Section 1 of the Sherman Act prohibits agreements in restraint of trade such as price-fixing, group boycotts, market allocation, bid rigging and tying. Section 2 of the Sherman Act prohibits unlawful monopolisation. Section 7 of the Clayton Act prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly. The Robinson Patman Act prohibits price discrimination in the sale of products to similarly situated buyers. Many states’ antitrust laws also provide for private rights of action.

12 What forms of monetary relief may private claimants seek?

Under Section 4 of the Clayton Act (15 U.S.C. § 15(a)), claimants can obtain treble damages, or three times the amount of damages sustained because of the plaintiff’s antitrust violation, plus costs of suit, reasonable attorney’s fees and post-judgment interest.

13 What forms of non-monetary relief may private claimants seek?

Under Section 16 of the Clayton Act (15 U.S.C. § 26), private claimants may obtain injunctive relief to prevent or terminate unlawful conduct or, in rare cases, divestiture.

14 Who has standing to bring claims?

A plaintiff has standing to seek relief in federal court if (1) there is an actual case or controversy related to an alleged violation of the federal antitrust laws, the resolution of which directly impacts the plaintiff; (2) the plaintiff is not too removed from the violation; and (3) the plaintiff can demonstrate that it suffered an ‘antitrust injury’. Antitrust injury is ‘injury of the type the antitrust laws were intended to prevent’. Atlantic Richfield Co. v. USA Petroleum Co., 495 US 328, 334 (1990). Although plaintiffs who purchased products or services indirectly from the defendants can bring antitrust damages under many state laws, they are not permitted do so under federal law.

15 In what forums can private antitrust claims be brought in your country?

Private antitrust claims may be brought in state or federal courts.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

Generally speaking, a claimant has the choice of filing a claim in any forum that has jurisdiction over the antitrust claim and the defendant. Antitrust claims that allege a violation of any federal antitrust law may be filed in any federal district court where either: the defendant resides; substantial parts of the events arose; or – if there is no other appropriate forum – the defendant can be served. A defendant must live in or have sufficient minimum contact with the state in which the federal district court sits for that court to have jurisdiction over the defendant. Although laws vary by state, most state courts have jurisdiction to adjudicate the federal antitrust claims if the federal court in that state would also have jurisdiction. Through a process called ‘removal’, a defendant can transfer a case initially filed in state court to a federal court if the case otherwise meets the federal jurisdiction requirements.

#### Indirect purchasers ONLY recourse is state courts – guarantees litigation

Lande 93—(Associate Professor, University of Baltimore School of Law). Robert H. Lande. 1993. “Are Antitrust "Treble" Damages Really Single Damages?”. 54 Ohio St. L.J. 115 (1993). <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1365&context=all_fac>.

Second, there is a controversy over whether indirect purchasers should be given standing to sue for damages. As a result of Illinois Brick~ only direct purchasers can now recover treble damages under the federal antitrust laws. Many states, however, have passed "Illinois Brick repealers" that allow certain indirect purchasers to sue,s and federal repeal legislation has been repeatedly introduced. 6 One argument repeatedly raised against Illinois Brick repealers is that they can result in sixfold or greater damages because treble damages might be awarded to two or more levels of plaintiffs.7 Violations of state antitrust8 or business tort9 law can lead to the same consequences.1o

#### Intra-state conduct can ONLY be prosecuted in state courts – it’s directly modeled

Nimmons 96 [John T. Nimmons, J.D. John Nimmons and Associates. Kelso Starrs & Associates Thomas J. Starrs, J.D. Bellevue, Washington, Energy & Environmental Economics Ren Orans, Ph.D. San Francisco, California Joel Swisher, Ph.D., P.E. Boulder, Colorado Awad & Singer Joel Singer, M.A., J.D. Oakland, California. “LEGAL, REGULATORY & INSTITUTIONAL ISSUES FACING DISTRIBUTED RESOURCES DEVELOPMENT.” 1996. https://www.nrel.gov/docs/legosti/old/21791.pdf]

Most state antitrust laws are based on analogous federal statutes. The state -laws, in fact, are often referred to informally as 'Baby Sherman Acts' or 'Little FTC Acts.' Typically, these states simply extend antitrust jurisdiction to encompass intra-state conduct that cannot be reached by federal statutes because federal jurisdiction is limited to actions affecting interstate commerce.

#### And strengthening antitrust law encourages frivolous litigation---crushes the courts

R. Hewitt Pate & Paul S. Hates 6, R. Hewitt Pate, Counsel of Record, Paul S. Hayes, Hunton & Williams LLP, “Brief of Amici Curiae Economists in Support of Petitioners,” BELL ATLANTIC CORPORATION, et al., Petitioners, v. William TWOMBLY, et al., Individually and on behalf of all others similarly situated, Respondents, 2006 WL 2506633, WestLaw

Economists have long recognized that conspiracies to restrain trade can cause significant economic losses through higher prices and reduced output.7 Although agreements among competitors may promote economic efficiency, conspiracies, in which the members have suppressed the existence of an agreement among themselves, seldom, if ever, serve any competitive and efficiency-enhancing purpose. Conspiracies can also impose significant costs on society and are, by design, secret and hard to detect. Hence, there are sound economic reasons to impose substantial penalties to discourage firms from conspiring to restrain trade. The undersigned believe that antitrust law - and the courts - should be tough on cartels.

Economists have also recognized, however, that the legal system can impose significant costs on businesses, reduce economic efficiency, and ultimately harm consumers through higher prices and poorer products.8 Unfortunately, some lawyers - or the plaintiffs they represent - abuse the legal system by filing cases that ultimately lack merit but impose significant costs and risks on business defendants.9 Research \*12 indicates that private antitrust enforcement efforts already involve many claims that appear to be without merit.10 This underscores the problem noted by the Second Circuit. See Twombly, 425 F.3d at 114-17. Some plaintiffs’ lawyers use litigation to extract money from businesses that find it is cheaper and less risky to settle than to litigate.11 Class certification litigation is sometimes used to extort companies into writing large checks that often inure to the benefit of the lawyers.

In determining the appropriate standard for dismissal of a claim of conspiracy to restrain trade, society faces a tradeoff, as do the courts. On the one hand, making it easier for plaintiffs to pursue claims and obtain discovery will increase the likelihood that plaintiffs will uncover conspiracies in restraint of trade. An easier standard will, more importantly, discourage conspiracies in the first place because they are more likely to be detected and punished. On the other hand, making it easier for plaintiffs to file claims and pursue discovery will encourage plaintiffs to bring cases that lack merit in the hope of a settlement or verdict and, in the process, consume judicial and business resources. Moreover, firms would face a disincentive to engage in parallel behavior \*13 with their rivals because that behavior will make it more likely that they will be embroiled in litigation. Therefore, they will engage in less parallel behavior even when this behavior is efficient.

IV. THE “PARALLEL BEHAVIOR IS ENOUGH” STANDARD WOULD RESULT IN GREATER EXPENDITURE OF JUDICIAL AND BUSINESS RESOURCES

The “parallel behavior is enough” standard would encourage plaintiffs to file and pursue claims that companies have engaged in restraints of trade in violation of Section 1 of the Sherman Act. This likely would include plaintiffs adding gratuitous conspiracy charges to complaints in unrelated matters (breach of contract cases for example) to increase the costs of the litigation to defendants and put additional pressure on the defendants to settle. The direct cost of this standard and the behavior it would encourage includes costs to the judiciary as well as to businesses.

Additional judicial resources would be spent handling cases with conspiracy claims that meet the “parallel behavior is enough” standard. These include expenditures for personnel and other judicial resources. They also include the opportunity cost of the federal judiciary’s time. Assuming the federal courts (and their facilities and staff’) cannot expand to meet the additional litigation that would result under the “parallel behavior is enough” standard, the federal court dockets would become more congested. Other matters would receive less attention from the courts. The litigants in these other matters, and ultimately society, would suffer from the diversion of judicial resources to unmeritorious conspiracy claims. Businesses would also spend resources defending unfounded conspiracy claims. These costs would include direct litigation expenses such as hiring lawyers and handling document production. More importantly, they would include \*14 the opportunity cost of management and staff time spent on litigation rather than on business matters.12

#### Ambiguous antitrust rules discourage settling case---that increases judicial congestion.

Jesse W. Markham Jr. 12, Marshall P. Madison Professor of Law, University of San Francisco School of Law, “SAILING A SEA OF DOUBT: A CRITIQUE OF THE RULE OF REASON IN U.S. ANTITRUST LAW,” 17 Fordham J. Corp. & Fin. L. 591, WestLaw

5. Impairment of Settlements

Settlement is more difficult under uncertainty about what “enquiry is meet for the case.” The substantive law of antitrust should facilitate reasonable settlements because they avoid the high costs of litigation, through trial and appeal, while vindicating the objectives of antitrust law. Most antitrust cases settle,211 but that does not mean that they settle early, or that the terms of settlement are reasonable. Indeed, the Supreme Court has expressed frustration that the huge exposures defendants face in antitrust cases can force them to pay extortionate amounts to settle weak cases just to keep them from heading into the unpredictable waters of a jury trial.212

However, what the Supreme Court has not addressed are the reasons why defendants might regard those waters as riddled with reefs and shoals.213 The unpredictability of antitrust litigation under the rule of reason is at least a contributor to this phenomenon.214 In rule of reason cases counsel for each side have only a relatively weak basis for predicting how elaborate and costly the litigation will be and what outcome is most likely -- both of which are much clearer in per se cases. Although plaintiffs may only rarely win rule of reason cases, that is cold \*627 comfort to a defendant faced with a small but unpredictable risk of enormous liability exposure. So the defendant-friendly rule of reason is in tension with one of its very objectives, leaving defendants with unpredictable outcomes and large exposures and thus actually promoting so-called extortionate settlements and prolonging litigation.

#### Single suits don’t produce panic.

Alex Wilhelm 20, Senior Editor at TechCrunch, “Investors appear to shrug at antitrust lawsuit aimed at Google,” Tech Crunch, 10/20/20, https://techcrunch.com/2020/10/20/investors-appear-to-shrug-at-antitrust-lawsuit-aimed-at-google/

Investors do not seem concerned that the Department of Justice filed an antitrust suit against Google earlier today.

The suit, seen by some as a stunt near the election, is one of a multi-part push to change the face of the technology industry, which has seen its wealth and power expand in recent years. For example, technology companies now constitute nearly 40% of the value of the S&P 500, ahead of a 1999-era 37% share, according to The Wall Street Journal.

At the same time, the rising tide lifting many tech boats has provided huge gains to its largest players as well. Alphabet, Microsoft, Amazon and Apple are each worth north of $1 trillion apiece, making them historically valuable companies even amidst an economic downturn.

Those market caps do not appear to be in danger.

Today after lunch during regular trading hours the tech-heavy Nasdaq Composite index is up 0.86%, while Alphabet is up 0.91%, directly in line with broader trading. Shares of Alphabet initially rose this morning before giving back their gains. However, since those morning lows, shares of the tech giant have recovered to edge ahead of the market.

Investor reaction could shift regarding Google’s antitrust liabilities in time. The Department of Justice suit is hardly the only legal issue that the search giant is currently grappling with. But not today.

#### Nothing can happen without congressional change, which is DOA.

Bradley Guichard 8/16/21, finance blogger, “Amazon: Worried About Antitrust? 3 Scenarios To Ease Your Mind,” Seeking Alpha, https://seekingalpha.com/article/4449605-amazon-bigtech-antitrust-ease-your-mind

Scenario 1: Congress stalemates, the FTC is outmuscled and the status quo continues.

Antitrust laws are enforced by the Federal Trade Commission (FTC) and the laws date back to the Sherman Act of 1890. The Sherman Act outlaws unreasonable combinations and conspiracies that restrain trade and actual or attempted monopolization. Next, the Federal Trade Commission Act and Clayton Act were passed in 1914. The FTC Act bans unfair methods of competition, and the Clayton Act prohibits mergers and acquisitions (M&A) which "lessen competition...and tend to create a monopoly." The laws have been updated since, however these same acts are the basis of applicable law today. The case with which most are familiar was Standard Oil, which was split into more than 30 companies in 1911. After decades of M&A activity and name changes the results of this are mainly Chevron (CVX), Exxon Mobil (XOM), and BP p.l.c. (BP) all of which, along with their predecessor parts, have provided substantial returns to shareholders for decades.

From these baseline descriptions of the laws it is clear why Big Tech is on the hot seat, however this does not spell doom for shareholders. First, while the house judiciary has moved 6 bills forward aimed at Big Tech, they face an uncertain future in the house and an uphill battle in the senate where the bills would need a filibuster-proof majority. Often these lofty promises by politicians get bogged down in Washington as lobbyists get involved and political realities, like fundraising, come into play. For example, as these house bills were being praised by many in a bipartisan manner, politicians from both parties in California, home of Silicon Valley, were expressing concerns with certain language in the packages. Still others were expressed that they are in favor of limiting the reach of Big Tech just "not in this manner." The collective muscle of Amazon, Apple, Facebook, and Google is substantial. The senate is headed towards a budget reconciliation showdown this fall and next year is another election year. Time is short. There is one bill that has been introduced in the Senate; however, it does not have republican backing. Given congress's polarization, ineptness, the effect of lobbying, and other factors I consider it a reasonable chance that no meaningful legislation ever reaches the President's desk.

You may be asking, as I was, why does the FTC need new legislation in the first place? Aren't the existing laws in place for this purpose? The issue appears to be that the existing laws were mainly written to target Big Oil and thus are difficult to apply to Big Tech in court. Judges are known to view the laws through a narrow lens. Recently, in a major victory for Facebook that has ramification across the industry, a federal judge tossed two cases which the FTC, and 48 attorneys general, had launched against Facebook. In June 2021, the judge said the government failed to prove their main theme: that Facebook holds a monopoly on social networking. To the claim that Facebook prevents interoperability of competition the judge said the government's case "fails to state a claim under current antitrust law, as there is nothing unlawful about having such a policy." The judge also noted that the government had waited too long to challenge the purchases of Instagram and WhatsApp. This may cramp future M&A activities, however without new laws it seems the prior acquisitions are safe across Big Tech. Without congressional action the FTC seems massively outgunned by Big Tech and will likely not win meaningful changes. If congress fails to act, the status quo likely continues. And the status quo has been lucrative for shareholders

#### Government suits are a drop in the bucket—private suits are what matter.

Lande 8—(Venable Professor of Law, University of Baltimore, JD from Harvard). Robert H. Lande & Joshua P. Davis. Spring 2008. “Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases”. 42 U.S.F. L. Rev. 879. <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1723&context=all_fac>. Accessed 11/6/21

While these criticisms are longstanding and widespread, they have been made without any systematic substantive or empirical basis.35 Those who point to the perceived flaws of private antitrust enforcement typically offer only anecdotes, some of which are questionable, rather than provide reliable and rigorous data to support their arguments.36 Indeed, the same point applies to attacks on private litigation generally-critics tend to make factual assertions without an adequate empirical basis. We emphasize that we are not disputing that the anecdotes the critics use may raise important concerns about abuses in particular cases. Private antitrust enforcement certainly is not perfectP The contention of this Study is, however, that a valid assessment of the net efficacy of private antitrust enforcement, which accounts in most years for more than ninety percent of filed antitrust cases,38

[Begin Footnote 38]

38. See Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online: Antitrust Cases filed in United States District Courts by Type of Case, 1975-2006, http:// www.albany.edu/sourcebook/pdf/t5412006.pdf (last visited Apr. 7, 2008). For the most recent reported year, 96.3% of all antitrust cases filed were private cases. In only nine out of thirty-two years reported did the percentage of private cases fall below ninety percent. The lowest reported percentage was 83.4. Id.

[End Footnote 38]

is possible only by also systematically considering its benefits to victimized consumers and businesses, and to the economy and the public interest more generally.

#### Courts block expansions.

Andrew Goudsward 1/31/22, reporter based in Washington covering the Justice Department and regulatory affairs at the National Law Journal, “DOJ Criticizes Apple, Facebook Rulings that Could Undercut Its Antitrust Strategy,” Law.com, https://www.law.com/nationallawjournal/2022/01/31/doj-criticizes-apple-facebook-rulings-that-could-undercut-its-antitrust-strategy/

The U.S. Justice Department’s antitrust division took issue in recent days with court rulings in two high-profile cases challenging the market dominance of major technology companies that did not directly involve DOJ.

The Justice Department filed amicus briefs supporting appeals of lower court rulings that favored tech giants Apple and Facebook. The first case, which is now before the U.S. Court Appeals for the Ninth Circuit, was brought by the video game company Epic Games challenging Apple’s App Store policies. The second brief supported an appeal by state attorneys general contesting Facebook’s alleged social networking monopoly.

In both cases, DOJ argued that lower courts conducted flawed legal analyses, wrongly constraining the country’s landmark anti-monopoly law, the Sherman Act, in ways that could hamper antitrust enforcement in other cases. The move comes as the antitrust division, under its new leader Jonathan Kanter, seeks to modernize DOJ’s enforcement regime and more aggressively counter alleged anti-competitive behavior.

“When I look at the current state of antitrust law, the most charitable explanation is that we are stuck fighting the last generation’s war, with precedent that bears little or no resemblance to today or the future,” Kanter said last week in a speech to the New York State Bar Association’s antitrust section.

In the Apple case, DOJ criticized U.S. District Judge Yvonne Gonzalez Rogers’ decision last year that dismissed all federal antitrust claims brought by Epic Games, the maker of the hit game Fortnite. Epic accused Apple of monopolizing the market for mobile apps by requiring all apps on its iOS system to be purchased through the Apple App Store. Gonzalez Rogers, of the Northern District of California, did find Apple violated state law by requiring that all in-app purchases be conducted through its own system.

Epic is appealing the decision to the U.S. Court of Appeals for the Ninth Circuit.

“The district court committed several legal errors that could imperil effective antitrust enforcement, especially in the digital economy,” DOJ’s amicus brief read. “The court read Sections 1 and 2 of the Sherman Act narrowly and wrongly, in ways that would leave many anticompetitive agreements and practices outside their protections.”

DOJ took issue with Gonzalez Rogers’ finding that Apple’s written agreements with app developers are not “contracts” under the meaning of the statute because developers must accept their terms. The amicus brief also argued that Gonzalez Rogers did not appropriately balance the benefits and harms of Apple’s policies to determine their overall competitive effect.

The Justice Department also backed an appeal by state attorneys general to the D.C. Circuit, challenging a lower court decision to toss out their antitrust complaint against Facebook.

In that case, DOJ said U.S. District Judge James Boasberg “fundamentally misapplied” section 2 of the Sherman Act when he dismissed the states’ claims against Facebook before the suit reached the discovery phase. Boasberg also initially tossed out a companion lawsuit brought by the Federal Trade Commission, but he gave the FTC the opportunity to refile and has allowed much of the commission’s amended complaint to move forward.

The brief objected to Boasberg’s decision to break up the states’ two central claims: that Facebook had acquired a monopoly by buying up nascent rivals and had prevented its platforms from interacting with apps that had the potential to challenge its dominance.

“Whereas, the law calls for evaluating the course of conduct alleged in the monopolization claim as a whole, the court disaggregated the claim into parts that it never reassembled,” the brief states. “Meanwhile, the court erroneously treated Facebook’s alleged use of anticompetitive conditions in deals with app developers as unconditional, unilateral refusals to deal. The court then compounded these errors by applying a rigid checklist for unilateral refusal to-deal liability that departs from established precedent and takes no account of the market realities of Facebook’s platform, which generates value by encouraging participation from developers and users.”

Both cases illustrated the challenges facing antitrust enforcers as they confront a judiciary that generally subscribes to a conservative view of antitrust law that has prevailed for decades.

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### Clog DA

#### Gerrymandering nukes democracy and precedes alt causes

**Klaas,** Washington Post, **2017**

Brian, “Gerrymandering is the biggest obstacle to genuine democracy in the United States. So why is no one protesting?” <https://www.washingtonpost.com/news/democracy-post/wp/2017/02/10/gerrymandering-is-the-biggest-obstacle-to-genuine-democracy-in-the-united-states-so-why-is-no-one-protesting/?utm_term=.6fd9378f36a8>

There is an **enormous paradox** at the heart of American democracy. Congress is deeply and stubbornly unpopular. On average, between 10 and 15 percent of Americans approve of Congress – on a par with public support for traffic jams and cockroaches. And yet, in the 2016 election, only eight incumbents – eight out of a body of 435 representatives – were defeated at the polls. If there is **one silver bullet** that could **fix American democracy**, it’s getting **rid of gerrymandering** – the now commonplace practice of drawing electoral districts in a distorted way for partisan gain. It’s also one of a dwindling number of issues that principled citizens – Democrat and Republican – should be able to agree on. Indeed, polls confirm that an overwhelming majority of Americans of all stripes oppose gerrymandering. In the 2016 elections for the House of Representatives, the average electoral margin of victory was 37.1 percent. That’s a figure you’d expect from North Korea, Russia or Zimbabwe – not the United States. But the shocking reality is that the typical race ended with a Democrat or a Republican winning nearly 70 percent of the vote, while their challenger won just 30 percent. Last year, only 17 seats out of 435 races were decided by a margin of 5 percent or less. Just 33 seats in total were decided by a margin of 10 percent or less. In other words, more than 9 out of 10 House races were landslides where the campaign was a foregone conclusion before ballots were even cast. In 2016, there were no truly competitive Congressional races in 42 of the 50 states. That is not healthy for a system of government that, at its core, is defined by political competition. **Gerrymandering, in a word, is why American democracy is broken.**The word “gerrymander” comes from an 1812 political cartoon drawn to parody Massachusetts Governor Elbridge Gerry’s re-drawn senate districts. The cartoon depicts one of the bizarrely shaped districts in the contorted form of a fork-tongued salamander. Since 1812, gerrymandering has been increasingly used as a tool to divide and distort the electorate. More often than not, state legislatures are tasked with drawing district maps, allowing the electoral foxes to draw and defend their henhouse districts. While no party is innocent when it comes to gerrymandering, a Washington Post analysis in 2014 found that eight of the ten most gerrymandered districts in the United States were drawn by Republicans. As a result, districts from the Illinois 4th to the North Carolina 12th often look like spilled inkblots rather than coherent voting blocs. They are anything but accidental. The Illinois 4th, for example, is nicknamed “the Latin Earmuffs,” because it connects two predominantly Latino areas by a thin line that is effectively just one road. In so doing, it packs Democrats into a contorted district, ensuring that those voters cast ballots in a safely Democratic preserve. The net result is a weakening of the power of Latino votes and more Republican districts than the electoral math should reasonably yield. Because Democrats are packed together as tightly as possible in one district, Republicans have a chance to win surrounding districts even though they are vastly outnumbered geographically. These uncompetitive districts have a seriously **corrosive effect on the integrity of democracy**. If you’re elected to represent a district that is 80 percent Republican or 80 percent Democratic, there is absolutely **no incentive to compromise. Ever**. In fact, there is a strong disincentive to collaboration, because working across the aisle almost certainly means the risk of a primary challenge from the far right or far left of the party. For the overwhelming majority of Congressional representatives, **there is no real risk to losing a general election –**but there is a very real threat of losing a fiercely contested primary election. Over time, this causes sane people to pursue insane pandering and **extreme positions**. It is a key, but often overlooked, **source of contemporary gridlock and endless bickering.**Moreover, gerrymandering also disempowers and distorts citizen votes – which leads to decreased turnout and a sense of powerlessness. In 2010, droves of tea party activists eager to have their voices heard quickly realized that their own representative was either a solidly liberal Democrat in an overwhelmingly blue district or a solidly conservative Republican in an overwhelmingly red district. Those representatives would not listen because the electoral map meant that they didn’t need to. Those who now oppose President Trump are quickly learning **the same lesson about the electoral calculations** made by their representatives as they make calls or write letters to congressional representatives who seem about as likely to be swayed as granite. This helps to explain why 2014 turnout sagged to just 36.4 percent, the lowest turnout rate since World War II. Why bother showing up when the result already seems preordained? There are two pieces of good news. First, several court rulings in state and federal courts have dealt a blow to gerrymandered districts. Several court rulings objected to districts that clearly were drawn along racial lines. Perhaps **the most important is a Wisconsin case** (Whitford v. Gill) that ruled that districts could not be drawn for deliberate partisan gain. The Supreme Court will rule on partisan gerrymandering in 2017, and it’s a case that **could transform – and reinvigorate – American democracy** at a time **when a positive shock is sorely needed**. (This may hold true even if Neil Gorsuch is confirmed to the Supreme Court, as Justices **Kennedy and Roberts could side with the liberal minority).**Second, fixing gerrymandering is getting easier. Given the right parameters, computer models can fairly apportion citizens into districts that are diverse, competitive and geographically sensible – ensuring that minorities are not used as pawns in a national political game. These efforts can be bolstered by stripping district drawing powers from partisan legislators and putting them into the hands of citizen-led commissions that are comprised by an equal number of Democrat- and Republican-leaning voters. Partisan politics is to be exercised within the districts, not during their formation. But gerrymandering intensifies every decade regardless, because it’s not a politically “sexy” issue. When’s the last time you saw a march against skewed districting? Even if the marches do come someday, the last stubborn barrier to getting reform right is human nature. Many people prefer to be surrounded by like-minded citizens, rather than feeling like a lonely red oasis in a sea of blue or vice versa. Rooting out gerrymandering won’t make San Francisco or rural Texas districts more competitive no matter the computer model used. And, as the urban/rural divide in American politics intensifies, competitive districts will be harder and harder to draw. The more we cluster, the less we find common ground and compromise. Ultimately, though, we must remember that what truly differentiates democracy from despotism is political competition. The longer we allow our districts to be hijacked by partisans, blue or red, the further we gravitate away from the founding ideals of our republic and **the closer we inch toward the death of American democracy**.