### OFF---Privacy [:50]

#### FTC enforcing algorithmic bias now---wins with strong authority and resources

K.C. Halm 21. Partner at Davis Wright Tremaine LLP, with Nancy Libin, 4/26/21. “FTC Warns of Greater Scrutiny Over Biased AI, Offers Best Practices to Mitigate Potential Harm.” https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2021/04/ftc-ai-bias-best-practices-guidance

Building on prior guidance issued in 2020, the Federal Trade Commission (FTC) recently warned in a new blog post that it will use its authority under existing laws to take enforcement action against companies that sell or use algorithms or artificial intelligence (AI) technology that results in discrimination by race or other legally protected classes. The agency urged companies developing or using AI to ensure their AI tools or applications do not result in biased outcomes because a failure to do so may result in "deception, discrimination—and an FTC [] enforcement action." The agency's latest pronouncement leaves no doubt that the FTC will be actively reviewing the market for potential bias or discrimination when AI-enabled applications and services are used to provide access to housing, credit, finance, insurance, or other important services. As our readers know, AI is emerging as a transformative technology that is enabling new systems, tools, applications, and use cases. At the same time, perceived risks arising from potential bias, discrimination, or other negative outcomes is leading regulators to look more closely at both the benefits and potential risks of the technology. To that end, the FTC is moving quickly to assert itself as a leading regulator with authority to oversee a broad range of AI providers, systems, and applications on the market. Basis of Potential AI-related FTC Enforcement Actions Three statutes provide the FTC significant authority to act in this area. Specifically, Section 5 of the FTC Act prohibits unfair or deceptive practices. The FTC's latest statement suggests that the agency believes it can use Section 5 authority, for example, to penalize entities selling or using "racially biased algorithms." Further, the agency also has authority to act under the Fair Credit Reporting Act (FCRA), which could be applied when an algorithm is used in a process that results in the denial of employment, housing, credit, insurance, or other benefits. Similarly, the Equal Credit Opportunity Act (ECOA)—which prohibits a company from using a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance—could be another basis for the agency to act. Thus, for example, if your algorithm results in credit discrimination against a protected class, you could find yourself facing a complaint alleging violations of the FTC Act and ECOA. Notably, the FTC's blog post is framed as both guidance and a reaffirmation that the FTC has been policing issues around AI and big data for many years and sends a clear signal that it intends to do so going forward. This reinforces Acting Chair Rebecca Kelly Slaughter's recent speech on algorithmic discrimination in which she cited a study demonstrating that an algorithm used with good intentions—to target medical interventions to the sickest patients—ended up funneling resources to a healthier, white population, to the detriment of sicker, patients of color. She asked the FTC staff "to actively investigate biased and discriminatory algorithms" and expressed an interest "in further exploring the best ways to address AI-generated consumer harms." Indeed, as we explained in recent blog posts, recent FTC enforcement actions reflect increased scrutiny of companies using algorithms, automated processes, and/or AI-enabled applications. The FTC's recent settlement with Everalbum is instructive in that it illustrates the agency's latest remedial tool: the so-called "disgorgement" of ill-gotten data. In the recent enforcement case, the FTC alleged that Everalbum, an app developer that used photos uploaded by users to train its facial recognition technology, failed to properly obtain users' consent. The agency also alleged that Everalbum made false statements about the users' ability to delete their photos upon deactivating their accounts. On these facts, the FTC secured a settlement and consent decree that required Everalbum to delete algorithms that used the data obtained without consent—a remedy that is akin to the "fruit of the poisonous tree" concept—and obtain consent before using facial recognition technology on user content. The FTC's latest reaffirmation of its authority to act in this area demonstrates that the agency will hold businesses accountable for using AI that may result in biased outcomes or for making promises that the technology cannot deliver. Its message is clear: "Hold yourself accountable – or be ready for the FTC to do it for you."

#### Antitrust undermines privacy enforcement.

David Hyman 19 – Professor at Georgetown University Law Center, with William E. Kovacic, “Implementing Privacy Policy: Who Should Do What?” 29 Fordham Intell. Prop. Media & Ent. L.J. 1117 (2019). https://ir.lawnet.fordham.edu/iplj/vol29/iss4/3

The case for making an enhanced FTC the national privacy regulator is straightforward. Of all U.S. privacy implementation institutions, the FTC has unequaled capacity in the form of expert case handling and policy teams and physical resources (including the development, over the past decade, of an internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort). The agency’s capacity also is the product of extensive experience in applying its UDAP authority and enforcing statutes such as the FCRA and COPPA. The FTC has a broad portfolio of policy instruments (litigation, rulemaking, consumer and business education, data collection, the preparation of reports, the convening of conferences), and it has demonstrated its ability to use all of them to good effect in the privacy domain. The FTC’s stature as an independent agency gives it additional credibility in the eyes of foreign officials, who generally distrust the vesting of privacy powers in an executive department.

Within an enhanced FTC, privacy policy implementation also would be informed by the Commission’s larger experience with consumer protection. The FTC’s privacy unit is one part of its Bureau of Consumer Protection, rather than being a self-contained bureau. This reflected the institution’s reasonable view that the effort to safeguard consumer interests in “privacy” was one dimension of “consumer protection,” rather than a wholly distinct policy realm. Our impression is that many matters that involve privacy issues also raise problems that fit within other areas of the FTC’s consumer protection program. The analysis of the “privacy” issue often benefits from perspectives developed in the course of applying the agency’s deception and unfairness authority in other cases. The intertwining of privacy issues with other consumer protection concerns in many scenarios has important implications for how the mandate of a privacy agency should be defined. In whatever setting one ultimately might place a “privacy” mandate, we would expect that the host agency would have a mandate that incorporates powers that traditionally have been associated with the FTC’s broader consumer protection program.83

The FTC’s expertise in antitrust should also help it develop and enforce privacy policy. Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections. The FTC’s work in both consumer protection and antitrust draws upon a Bureau of Economics with over 80 PhDs in economics.84 The Bureau of Economics has developed considerable skill in sub-disciplines (including behavioral economics) with special application to privacy issues.

Of course, inputs are not the same thing as outputs. The FTC has not always achieved the full integration of perspectives that the combination of these institutional capacities would permit. And, although there are policy complementarities across the domains of antitrust, consumer protection, and privacy, this combination of functions is not an unmixed blessing. An agency with all three functions might seek to use its position as a gatekeeper with respect to one policy domain to leverage concessions from firms over which it exercises oversight in another domain.85 Such temptations have been present when the FTC has applied its antitrust powers to review mergers involving companies in the information services sector.86

Finally, there is the possibility that any one of these functions might be diminished if all three are contained in the same agency. An agency focused solely on privacy will make privacy policy its single concern. An agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### \*OFF---Regs [0:14]

#### The United States federal government should substantially increase prohibitions on domestic export cartels that operate in foreign nations without protections for export cartels through non-antitrust regulations.

#### The counterplan PICs out of anti-trust legislation and the FTC and DOJ as enforcers---other agencies’ regulations solve.

Lawrence Fullerton et al. 08. Joel M Mitnick, William V Reiss, George C Karamanos and Owen H Smith. Sidley Austin LLP. Vertical Agreements The regulation of distribution practices in 34 jurisdictions worldwide. “United States.” https://www.sidley.com/-/media/files/publications/2008/03/getting-the-deal-through--vertical-agreements-2008/files/view-united-states-chapter/fileattachment/united-states-21.pdf

5 What entity or agency is responsible for enforcing prohibitions on anticompetitive vertical restraints? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

#### Regulation through legal channels made for trade disputes solves (non-antitrust regs)

James R. Atwood, 87. Partner, Covington & Burling, Washington, D.C. "Conflicts of jurisdiction in the antitrust field: the example of export cartels." *Law and Contemporary Problems* 50.3 (1987): 153-164.

CONCLUSION

To avoid any misunderstanding, it should be emphasized that a proliferation of export cartels is not desirable. The relevant issue here, however, is what legal rules a nation should seek to apply to its own export cartels and to those of other nations in today's context of interdependent economies, different national procedures and substantive rules, and proliferating jurisdictional disputes. There is no easy answer, but for the reasons given the enforcement officials of the United States should retreat from their long-held position of a right to challenge the pure export cartels of other countries. If a cartel is strictly national in competition, publicly registered with its home country, and operating wholly within that country, **U.S. objections to that cartel should be made through the diplomatic and legal channels established for the resolution of international trade disputes. The United States should not seek to assert antitrust jurisdiction over that cartel's operations.**

### \*OFF---States [0:29]

#### The fifty states and all relevant territories should substantially increase prohibitions on domestic export cartels that operate in foreign nations without protections for export cartels

#### States can pursue autonomous anti-trust enforcement even when conflicting with federal law.

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At the federal level, the U.S. antitrust laws—including the Sherman Act and the Clayton Act, which governs mergers and acquisitions—are enforced by the FTC and DOJ. States also have antitrust laws, which are enforced by state AGs and are often patterned after their federal analogs, but can contain important differences. States frequently collaborate with the federal antitrust agencies and/or other states on merger investigations. However, the Supreme Court has recognized that states are not required to do so, and have the right to make enforcement decisions that differ from other federal and state authorities.[[3]](https://www.jdsupra.com/legalnews/trends-in-state-antitrust-enforcement-42950/#_ftn3) States have sometimes exercised this authority in order to “fill the gap” of perceived under-enforcement at the federal level. For example, in June 2017, the California AG sued to block Valero Energy Partners LP’s acquisition of two petroleum terminals in Northern California, despite the FTC’s decision not to challenge the deal. Several months later, the parties abandoned the transaction. More broadly, in recent years, there has been a growing trend of robust and autonomous state antitrust enforcement, as illustrated by major investigations and enforcement actions by state coalitions in the healthcare, pharmaceutical, telecom, and technology sectors, among others. Consistent with this trend, Colorado AG Phil Weiser—who previously served as Deputy Assistant Attorney General in the DOJ Antitrust Division under the Obama administration—has affirmed his commitment to “protecting all Coloradans from anticompetitive consolidation and practices…whether or not the federal government acts to protect Coloradans.” In keeping with this mandate, the Amendment will bring Colorado increasingly in line with states such as California and New York that have demonstrated an appetite for aggressive, independent antitrust enforcement, even where it may depart (or conflict) with federal action.

### OFF---Cap---Commons [1:32]

#### Anti-trust is a capitalist psy op to pacify the working class, buy time to mystify unsustainable accumulation, and map competition onto subjectivity – homo economicus devalues life---creates crises

Lebow 19 [David Lebow – Lecturer on Social Studies at Harvard University and lawyer, “Trumpism and the Dialectic of Neoliberal Reason,” Perspectives on Politics 18(2):380-398, doi:10.1017/S1537592719000434]

I. Neoliberal Reason

As Michel Foucault and others have argued, neoliberalism entails far more than an economic doctrine favoring deregulated markets.4 It is a novel form of governmentality—a rationality linked to technologies of power that govern conduct, not just through direct state action but through liberty itself.5 Not isolated to the traditionally demarcated sphere of economics, neoliberal society entails a whole economic-juridical order.

The central program of neoliberal **governmentality** is the absolute generalization of competition as a universal behavioral norm. Whereas in liberal thought, the root principle of capitalism was exchange of equivalents, for neoliberal reason it is competition entailing inequality. The key result of market processes goes from specialization to selection. The competitive market is the exclusive site of rationality. It processes information, indicated by price, and is the only mechanism of producing knowledge, defined as what is profitably utilizable. Because consumers are free to refuse inferior goods or services, the price mechanism of the market system ensures optimal solutions and maximal satisfaction of preferences.

Liberal capitalism, as Karl Polanyi argued, required the construction of “fictitious” commodities like land and labor.6 These abstract, exchangeable factors of production had to be disembedded from concrete non-market social relations, norms, and values. Instead of merely disembedding commodities, neoliberalism intervenes to make competitive mechanisms regulate every moment and point in society. It strives to build an empire of market choice that invades every domain of life, and deposes all other social, political and solidaristic institutions and values.

Neoliberalism does not allege that markets are natural; competition must be constructed. Rather than endorsing laissez-faire overseen by a night watchman, it stipulates a strong state engaged in permanent vigilance, activity, and intervention to maintain artificial competition. It must not plan outcomes, which would upset the market’s innate rationality, and must be insulated from political disturbances. Economic interventionism leads down the road to serfdom; fascism and unlimited state power are its necessary results. A “minimum of economic interventionism” on the “mechanisms of the market” must be accompanied by “maximum legal interventionism” on the “conditions of the market.”7 Fixed, formal rules make up an economic constitution that inhibits planning, repulses political disruptions, and impartially safeguards competition. The state is the executor of the market and growth is the basis of public legitimacy. Governance depoliticizes public power, promotes ostensibly post-ideological technical problem-solving by experts, and relies on “best-practices” that dissolve the distinction between public and private organization.8

Unlimited generalization of competition yields an enterprise society in which calculations of supply/demand and cost/benefit become the model of all social relations. Neoliberal reason renders homo economicus, based on this model of the enterprise, the exhaustive figuration of human subjectivity. The center of economic thought shifts from labor and processes of production, exchange, and consumption to human capital and rational decision-making under conditions of scarcity. Capital is everything that can generate future income; wages are reconceived as income from capital. Labor is no longer comprehended as a commodity exchanged for a wage, but as a combination of human capital (the worker’s education and abilities) and the income stream it generates. This neoliberal subject is an aggregate of human capital who invests in his own income-generating abilities.

Neoliberalism replaces the invariant identity of the moral person as a rights-bearing citizen with a formally empty receptacle filled up through enterprising choices. It brushes aside models of freedom as self-rule achieved through moral autonomy or popular sovereignty.9 In the neoliberal “democracy of consumers,” individual consumers together constitute the sovereign that monopolizes the issuance of legitimate commands.10 Sovereign will is expressed not through political channels, but by choices in the “plebiscite of prices.”11 Whereas producers have particular interests like protectionism, consumers have a consensual and common interest; all favor the impartial functioning of market processes. In the neoliberal free society, consumers exercise their right to choose in complete independence.

II. From Keynesian State Capitalism to Neoliberal Deregulation

Situating the 2008 crisis in a historical account of American political and economic development clarifies its broader significance. The early twentieth-century Progressives were disdainful of what they took to be the chaos and waste of fin de siècle laissez-faire society. They strove to build a new American state that would replace the structural and rights-based formalisms of the nineteenth century with direct democracy and expert administration. It took the Great Depression and New Deal to bring into full bloom the Progressive commitment to pragmatic rationality. Thereafter, the “policy state” was authorized to pursue designated social goals and develop the means to accomplish them.12 The slew of New Deal innovations included state oversight of labor negotiations, invigorated antitrust, Keynesian countercyclical deficits to stimulate demand and increase purchasing power, an expansive public sector sheltered from the business cycle, aggressive banking regulation, and social insurance. Regulation and redistribution ensured the conditions necessary for an economic system based on capital accumulation, private property, and corporate profit to endure.

To many, the differences between the New Deal and Nazi political economies appeared less significant than their common response to monopoly capitalism. Both erased boundaries between state and society by politicizing the private sphere and authorizing public bureaucracies to rationalize crisis-prone economies. Frankfurt School member Friedrich Pollock suggested that this common “state capitalism” had solved the contradiction between the forces and relations of production, and thus overcome the economy’s crisis tendencies. It seemed to him that management had become merely technical and “nothing essential” had been “left to the laws of the market.”13 Worries abounded that the private law sphere of property and contract was necessary for individual freedom. Despite salient differences between Nazi and New Deal state capitalism, many feared that intervention into society was a waystation to domination. Unease about the specter of American despotism motivated development of mechanisms to ensure that interventionism did not devolve into arbitrary rule.14 Expertise was one justification and limitation of the policy state. Authority could be safely delegated to a new corps of public-spirited administrators because their scientific knowledge would not only make them effective, but also counsel restraint. Enduring misgivings led later to new laws of administrative process. The procedural state was legitimated by its defenders as being a substantively value-neutral and instrumentally rational machine serving goals set by society. Regulatory decision-making was shunted into the abstruse procedures of courtrooms and bureaucracies. Defenders of the state emphasized that its processes of allocating authority were neutral, impartial, and open to all. The balanced accommodation of all interest groups seeking to exercise influence would yield an equilibrium corresponding to the public interest.15

The intermeshing of state and society through interest groups, agencies, and professionalized parties marginalized the public. The sovereign public opinion that Progressives had hoped would rationalize government gave way to the rationality supposedly inherent in processes of public law, public-private negotiation, and regulated markets. The state was endowed with a diffuse legitimacy in exchange for a growing economy, broad distribution, and ongoing household capacity to consume.16 The Keynesian welfare settlement pacified the working class, protecting the market economy from more radical political pressures. Newly available, mass-produced commodities encouraged leveled-down notions of citizenship as welfare clientelism and privatistic consumption. As the state expanded and routinized, the initial politicization of private property relations through public intervention developed into depoliticized economic management by lawyers and social scientists organized by administrative and judicial processes.

The terms of the social contract preserving the coexistence of capitalism and democracy had been set. In exchange for a pacified citizenry and depoliticized regulatory authority, the policy state promised to deploy instrumental reason to sustain both capital accumulation and widely distributed capacity to consume (supported, always, by the exclusion of African Americans). During the decades of postwar growth, these twin responsibilities seemed attainable and compatible. Capitalism functioned smoothly enough and potentially delegitimating inequality was clipped by inflation, tax-based welfare, and collectively negotiated wages. But in the late 1960s and early 1970s, weakening growth, stagflation, trade deficits, and the collapse of Bretton Woods revealed that state capitalism had not solved the problems of economics. As the Great Depression had enabled construction of the instrumentally rational policy state, economic disturbances in the 1970s opened the breach into which neoliberal reason entered to reconfigure the political economy. Rather than shielding rational policy-making from political pressure and assuring broadly distributed welfare, neoliberalism promised growth driven by depoliticized markets freed from regulation and downwards redistribution. Believing in the optimal rationality of competitive markets, neoliberals sought to reinvigorate capital accumulation through deregulation, lowered taxes, financialization, privatization, and market expansion.

Liberating accumulation from the restrictions and obligations incurred under state capitalism might have imperiled capitalism’s peace treaty with democracy. For deregulation to proceed without impairing the system’s legitimacy, the quid pro quo—depoliticization for consumption—had to continue. Over the ensuing decades, as Wolfgang Streeck explains, the state “bought time” by finding new ways to generate illusions of widely distributed prosperity that prolonged the capacity of the lower and middle classes to consume.17 Each successive attempt exhausted itself, leading to new and escalating disturbances. In the 1970s, inflation safeguarded social peace by compensating workers for inadequate growth until stagflation ended this mode of buying time. A subsequent reliance on public debt enabled the government to pacify conflict with borrowed money. Rising debt and balking creditors delimited this phase, which was brought to a definitive close with the Clinton administration’s social spending cuts and balanced budgets. In a final stage that dawned in the 1980s but grew increasingly paramount over time, debt-based support of purchasing power was privatized. Household spending was financed through mortgages, student loans, and credit cards. This “privatized Keynesianism” buoyed consumption up through 2008, despite cuts to social spending, falling wages, and tightening employment markets.18

Each device for upholding spending maintained the legitimacy of the depoliticized political economy, even as liberalization continued to strip the wage-dependent population of regulatory and redistributive safeguards. The end of the inflation era brought structural unemployment and weakened trade unions. The passing of the public debt regime meant cuts to social rights, privatization of social services, and a trimmed public sector. Growing private debt enabled people to hold on despite lost savings, and rising under- and unemployment. At every step, the neoliberal project was “dressed up” as a consumption project.19 Continuing consumption ensured legitimacy long enough to enact total transformation of the political economy.

The state could not buy time indefinitely. The 1970s had already witnessed the beginning of the transition from a manufacturing, production-oriented economy that exported surpluses to an import-based, finance and services economy focused on consumption. As the United States went from creditor to debtor, a system of “balanced disequilibrium” took hold.20 With impunity granted as the world’s reserve currency, the United States ran mounting budget and trade deficits. To finance them, it absorbed surplus capital from abroad, much of which wended its way to Wall Street. Banks used these profits to extend credit to the working- and middle- classes. Household debt funded consumption of imported goods, returning the surplus capital abroad, and completing the circuit of global trade. This system depended on the unsustainable condition of ever-increasing debt-based consumption. Consumption was notoriously reinforced by secondary markets in what was essentially private money (securitized derivatives and collateralized debt obligation) that was much riskier than assumed. Because increasingly irresponsible lending was integral to continuing the consumption that stabilized the macroeconomic system, it became a sort of vicious collective good that progressively magnified the scale of the inevitable crash.21 When in 2008 the debt finally proved unserviceable and the housing bubble burst, the private money disappeared and the disequilibrated global economic system fell into crisis.

Consumption based on private debt had provided an unstable bridge over the yawning inequality brought about by deregulation, financialization, globalization, and the diminished welfare state. When the 2008 crisis dried up credit, it revealed a divided “dual economy.”22 On one side is the primary sector of elite, highly-educated professionals who are collected in coastal urban centers and tied in to corporate management, technological innovation and oversight of global capital flows. On the other is the secondary sector of low-skilled workers primarily fixed in the heartland, for whom deregulated competition has brought under- or unemployment, job instability, depressed wages, exploding debt, and diminished prospects.

Unable to buy more time, the state’s breach of the postwar social contract has been exposed. The neoliberal system of capital accumulation was entrenched at the expense of broad and sustainable consumption. The results have been the politicization of defrauded citizens and a political economy plunged into legitimation crisis. Time has belied the premature conclusion that contradiction and crisis potential had been overcome by state capitalism. Contradiction was relocated into cross-cutting imperatives for the state to enable capital accumulation and distribute consumption. In hindsight, we find only a window of stabilization of an enduring crisis potential built into capitalist political economy. As Nancy Fraser puts it “on the one hand, legitimate, efficacious public power is a condition of possibility for sustained capital accumulation; on the other hand, capitalism’s drive to endless accumulations tends to destabilize the very public power on which it relies.”23 The political fallout from the 2008 crisis marks the end of the postwar social contract that had established conditions ensuring the continued coexistence of capitalism and democracy.

#### Vote neg for anti-capitalist commons – collectives should refuse commitments to competitive principle and the straitjacket of what’s “realistic”

Rose 21 [Nick. PhD in Political Ecology from RMIT University. Executive Director of Sustain: The Australian Food Network. From the Cancer Stage of Capitalism to the Political Principle of the Common: The Social Immune Response of “Food as Commons.” Int J Health Policy Manag 2021. 3-31-21. DOI: 10.34172/ijhpm.2021.20 //shree]

Silvia Federici provides a longer historical perspective, noting that ‘commoning is the principle by which human beings have organised their existence for thousands of years;’ and that to ‘speak of the principle of the common’ is to speak ‘not only of small-scale experiments [but] of large-scale social formations that in the past were continent-wide.’87 Hence a commons-based society is neither a utopia or reducible to fringe projects, and the commons have persisted despite the many and continuing enclosures, ‘feeding the radical imagination as well as the bodies of many commoners.’87 Federici acknowledges that commons and practices of commoning are diverse, that many are susceptible to cooptation and many are consistent with the persistence of capitalism; indeed some, such as charities providing social services (including foodbanks) during the years of austerity budgets in the United Kingdom (2010-2015), reinforce and stabilise capitalism.87 What matters to Federici is the character and intentionality of the commons as anti-capitalist, as ‘a means to the creation of an egalitarian and cooperative society…no longer built on a competitive principle, but on the principle of collective solidarity [and commitments] to the creation of collective subjects [and] fostering common interests in every aspect of our lives.’87

Federici’s analysis resonates with the political thought and proposals developed by Dardot and Laval in their 2018 work, ‘On Common: Revolution in the 21st century.’11 For Dardot and Laval, the common is likewise understood as a principle of political struggle, a demand for ‘real democracy’ and a major driving force behind the emerging articulation of a political vision and programme that transcends and overcomes the straitjacket logic of neoliberal ideological hegemony and its ‘policy grammar’ which appears to foreclose all alternatives and lock us forever into a capitalist realism in which ‘it is easier to imagine the end of the world than it is to imagine the end of capitalism.’89 Eschewing Bollier’s ‘triarchy’ of a market/state/ commons coexistence, Dardot and Laval argue for a politics of the common based on an engaged citizenry that directly participates and deliberates in all decisions which impact it, and in the process not merely transforms the institutions responsible for the management of services and allocation of resources, but creates new institutions and new ways of being in the world.11

Dardot and Laval describe this form of politics as ‘instituent praxis’: the common, they argue, is ‘not produced but instituted.’11 This acknowledges the conventional understanding of Ostrom, Bollier and others of ‘the commons’ as residing in the rules – the laws – that a community establishes for the collective management and use of shared resources, but extends it much further and in a more radical direction. The essence of the commons, they argue, is not in the goods per se such as land or a forest or a seed bank ‘held in common,’ but rather in the process of their establishment as well as the ongoing negotiation that will surround their use and governance. Hence, Dardot and Laval distinguish the commons from the ‘rights’ tradition of property, arguing that ‘the commons are above all else matters of institution and government…the use of the commons is inseparable from the right of deciding and governing. The practice that institutes the commons is the practice that maintains them and keeps them alive and takes full responsibility for their conflictuality through the coproduction of rules.’90 To ‘institute’ in this context should not be misunderstood as ‘to institutionalise [or] render official;’ rather it is ‘to recreate with, or on the basis of, what already exists.’ 90 This messy, conflictual and evolving process is what Dardot and Laval insist will ultimately bring about a revolution, not in the form of a violent uprising or insurrection, but rather through the ‘reinstitution of society’ via the transformation of politics and economy from its current state of ‘representative oligarchy’ to full participatory and deliberative democracy.11 Such a vision is premised on a mass politicisation of society; in effect a return of mass popular political contestation and a turn away from the postpolitical era of the neoliberal consumer.91-92

### \*OFF---N&C [1:10]

Next off is the rule making counterplan---

#### Text: The United States federal government should delegate antitrust rulemaking authority to a new expert agency. The agency should begin notice-and-comment rulemaking to substantially increase prohibitions on domestic export cartels that operate in foreign nations without protections for export cartels by at least expanding the scope of its core antitrust laws.

#### Solves the case, engages notice and comment.

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Without the informational benefits of expertise and notice-and-comment rulemaking, the Court may be a poor choice to define the broad proscriptions of the Sherman Act. Framed this way, the problem has an obvious solution: give the power to interpret the Act to an expert agency.240 This idea has academic support already, 241 and the case for it is strengthened by this Article's observation that the Court has tried to approximate administrative decision making by relying on amicus briefs. The obvious candidates for reallocation are the two existing antitrust agencies: the Department of Justice's Antitrust Division and the FTC.

A. The Agency Solution

Using agencies to give specific meaning to American antitrust's most important statute means avoiding the problems with the Court's current quasi-administrative process for rulemaking. As adjudicators, agency experts would know what kind of economic evidence is necessary for an efficient solution and would be better able to understand it when it is presented by the parties. Repeat exposure to antitrust cases would only reinforce this advantage, while also giving the administrative judges a broader perspective on what kinds of conflicts commonly arise in competition law, a perspective necessary for efficient policy making in the first instance. A Supreme Court Justice hears about one antitrust case a year, hardly the cross section of controversies necessary to make efficient economic policy writ large.

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes 242 or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking regulates behavior ex ante, while resolution of economic policy through cases is necessarily ex post. Antitrust courts worry obsessively about "chill"--deterring procompetitive behavior with overly broad rules for liability.2 43 In fact, the overruling of Dr. Miles in Leegin implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was Leegin redeemed for breaking the law by effecting a change in the law, and only after Leegin was issued were similar firms, perhaps walking the Colgate line better than Leegin, redeemed for wanting some control over their product's ultimate retail price.24 4 The problem of ex post rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.2 4 5 To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.246

The result of the current ex post scheme is that "antitrust law leaves considerable gaps between what is permissible and what is optimal." 2 47 With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where "optimal" lies, 24 8 laissez-faire is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, laissez-faire may be the only sensible approach. But that is not to say that it is the most sensible approach. An agency could provide firms with the necessary clarity-ex ante-that they need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.24 9 Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

#### Key to democracy and court acquiescence---notice and comment engages participants and creates deference.

Harry First and Spencer Weber Waller 13. Harry First, New York University School of Law. Spencer Weber Waller, Loyola University Chicago School of Law. “Antitrust’s Democracy Deficit”. Fordham Law Review, Volume 81 Issue 5 Article 13. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr

Redressing antitrust’s democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.151 It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.152 The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation of the laws they enforce.153 Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision making and greater democratic legitimacy.

CONCLUSION

Free markets and free people cannot be assured by the efforts of technocrats. Ultimately, both come about through the workings of democratic institutions, respectful of the legislature’s goals and constrained from engaging in arbitrary action. Antitrust has moved too far from democratic institutions and toward technocratic control, in service to a laissez-faire approach to antitrust enforcement. We need to move the needle back. Doing so will strengthen the institutions of antitrust, the market economy, and the democratic branches of government themselves.

#### US democratic retreat causes terrorism, great power war, famine, and poverty.

Garry Kasparov 17. Chairman of the Human Rights Foundation, founded the Renew Democracy Initiative. “Democracy and Human Rights: The Case for U.S. Leadership”. Feb 16 2017. U.S. Senate. 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

### OFF---CWS [0:52]

#### The scope of competition law defines it goals---attempts to meet current goals by banning practice are implementation questions.

ESE No Date. Erasmus School of Economics (as per their website, “The Erasmus Center for Economic and Financial Governance is an international multidisciplinary network of leading researchers and societal stakeholders initiated by researchers from Erasmus School of Economics and Erasmus School of Law. ECEFG conducts interdisciplinary research (law, economics and political science) and contributes to current debates in public and in academia on issues relating to European and global economic and financial governance.”). "Competition Policy". <https://www.eur.nl/en/ese/affiliated/ecefg/research/competition-policy>

Competition Policy

Research in this field consists of two broad areas. The first area – Theory and Implementation of Competition Law and Policy – refers to fundamental and applied research into topics that are traditionally seen as the core of competition policy. The second area – Scope of Competition Law and Policy – refers to all research on the effect and desirability of including new considerations in competition law and policy in order to address the challenges of our time, such as the increasing power of big tech firms, or global warming.

Theory and Implementation of Competition Policy

This covers for instance collusion, abuse of dominance, mergers, market regulation and state aid. Some examples of research topics are:

* the practices firms can use to engage in collusion and its welfare consequences;
* the practices firms can use to abuse a dominant position and its welfare consequences;
* which practices can be considered proof of such activities;
* how to regulate access to a market;
* how to properly assess the effects of a particular practice or merger;
* the practices, by which the state and public authorities distort competition such as subisidies and tax measures
* the interpretation and application of EU and national competition law by Competition Authorities and Courts and the extent to which they achieve the goals of competition policy

Scope of Competition Policy

The effectiveness of European competition law and policy in combination with rapid technological changes have raised questions about its proper scope. Which policy objectives can and should be pursued by means of competition law and policy, and which should be delegated to other legal fields and policies? Some examples of specific research questions include:

* Can and should competition law be used to protect the privacy of consumers on the internet?
* Information gathered by firms can be used to increase their own profits. How does this affect consumers, and what does this depend on? Can and should competition law deal with market power derived from information gathering? For instance, should the big five tech giants be forced to divest activities?
* Should competition policy also include considerations of economic inequality or environmental effects?
* Can competition law remain effective if it is used for more than safeguarding fair competition?

#### That means the aff must replace the consumer welfare standard.

Trevor Wagener 21. "The Curse of Tradeoffs: Neo-Brandeisians vs. Consumers". Disruptive Competition Project. 5-21-2021. https://www.project-disco.org/competition/052121-the-curse-of-tradeoffs-neo-brandeisian-antitrust-versus-consumers/

Neo-Brandeisians seek to replace the longstanding objective and principles-based framework of the consumer welfare standard in antitrust enforcement with an amorphous, process-based framework guided by an ethos one Neo-Brandeisian described as: “Big is bad. Just don’t let big firms merge. The end.” A movement dedicated to replacing a consumer welfare-maximizing approach with an assortment of competing goals has proven unable to offer a quantified, systematic cost-benefit analysis justifying such a radical change, instead relying upon anecdotal evidence and moving prose. The many goals of the Neo-Brandeisian approach are often rhetorically appealing, but the rhetoric hides a simple truth: When you target every variable, you effectively target none. Addressing a wide range of goals through antitrust policy requires de-emphasizing consumer welfare, creating fundamental tradeoffs expected to harm consumers relative to the status quo.

The willingness to sacrifice consumer welfare in order to achieve other ends is a defining characteristic of Neo-Brandeisian antitrust. This is illustrated by concrete Neo-Brandeisian critiques, which typically emphasize perceived harms to businesses rather than harms to consumers. For example, the Neo-Brandeisian activist group American Economic Liberties Project (AELP) published a pair of policy briefs on May 3 that criticize online service operators for a litany of purported inconveniences to businesses over a combined 22 pages, but struggle to quantify any harms to ordinary consumers and users. Those few purported harms to consumers that AELP raised are distinctly qualitative rather than quantitative, consistent with the broader reluctance of prominent Neo-Brandeisian thinkers to conduct a rigorous quantitative cost-benefit analysis of their antitrust policy prescriptions relative to the consumer welfare standard.

#### Vote negative for limits and ground---only “change goals” creates key economy and legal disads over what antitrust should consider---the affs topic races to tiny exemptions and technical changes with no core ground.

## 1AC: Protectionism

#### 1] Protectionism is low now, but the plan sends a protectionist shockwave that shreds global free trade.

Allison Murray 19. JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Winter. “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?” Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Lexis.

INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

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.

#### 2] Plan nukes regulatory certainty AND creates vagueness that monopolists exploit to dodge enforcement

D. Daniel Sokol 9, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “Limiting Anticompetitive Government Interventions That Benefit Special Interests”, George Mason Law Review, 17 Geo. Mason L. Rev. 119, Fall 2009, Lexis

Antitrust litigation produces regulatory uncertainty because different courts may rule inconsistently with the same set of facts. Anecdotal evidence indicates that when courts do not understand complex antitrust issues, they rule based on a highly procedural formalism. 140 These problems of procedural formalism in antitrust decisions create particular concerns in conduct cases or with regard to penalties for conduct, regardless of the origin of the legal system. 141 For example, in New Zealand, telecommunications regulation focused on a general antitrust solution in conjunction with courts rather than with sector regulation. 142 In a case involving interconnection rates within telecommunications between the incumbent provider and a new entrant for access to the local loop, the case took five years to decide, with significant procedural delay. 143 The lack of the New Zealand judicial system's understanding of the complex pricing issues and methodologies for interconnection underlying the case meant that the conflicting court decisions left little certainty-none of the courts came up with a specific interconnection price. This enabled the incumbent Telecom Corporation to maintain its monopoly position, and it left the victims of its anticompetitive behavior without any effective means of redress. 144 A similar problem occurred in Chile, where the Chilean Supreme Court recently overruled the Chilean Competition Tribunal in cases regarding tacit collusion based on procedural rather than substantive grounds, and where it seemed apparent that the Supreme Court did not understand the antitrust issues. 145 [\*148]

#### 3] Alt causes---Ukraine sanctions

The Week 3-4. Staff op-ed. "What is the impact of economic war?". Week UK. 3-4-2022. https://www.theweek.co.uk/news/world-news/russia/955976/what-is-the-impact-of-economic-war

“Tanks are harbingers of financial chaos as well as physical destruction,” said Lex in the FT. Russia knows this well – the first Chechen war drained state coffers so badly that it “precipitated the Russian financial crisis of 1998”. This time, its actions in Ukraine have resulted in a sanctions package that is nothing short of “a declaration of economic war”. This question now is how far the ripples will spread beyond Russia, to a fragile global financial system whose government balance sheets are still debt-laden from the pandemic. No one knows how events will unwind, but war and sanctions will certainly dent economic growth and fuel already high inflation. There’s also scope for the Russian financial crisis – and the sanctions-induced trade squeeze on essential commodities – “to amplify other shocks”, particularly in vulnerable emerging markets. “The subtlest threat is of dislocations we cannot foresee: Lehman moments when panic spreads and markets freeze.” The most ominous sign so far is the collapse of the rouble, said John Stepek on MoneyWeek.com – which has made it “a great deal harder to put a price on Russian assets”. That reminds some of the run-up to the Lehman Brother’s collapse in 2008, when “suddenly no one knew what a large swathe of assets dotted about the financial system was worth”. The difference here is that exposure to Russia has been declining, so a systemic collapse looks unlikely. But “plumbing” issues are certainly a worry. “You can’t yank a country” Russia’s size “out of the global payments network without some payments getting missed and things getting messy as a result”. There has been some “self-congratulation that the exposure of Western banks to Russia is limited”, said Alex Brummer in the Daily Mail. But in a financial world where non-bank operators, such as hedge funds and private equity, are “scale players”, it’s “quite difficult to know where the risk lies”. As we learnt in 2008, it only takes the fall of one institution to set off a chain reaction. Michael Strobaek of Credit Suisse believes this is “the dawn of a new world order”, said The Observer – in which higher inflation and financial volatility are a given. The global currency system could change too, said Ben Wright in The Daily Telegraph. “Going after Russia’s central bank and shutting its lenders out of dollar clearing” may “hasten the adoption of cryptocurrencies by rogue states” – with potentially terrifying results. Outlawing Russia will also accelerate the ongoing retreat of globalisation, said Oliver Shah in The Sunday Times. “Protectionism is the order of the day.” For families, that means more inflation; for corporates, rising risks. “Frontier capitalism” has rarely looked so dangerous.

#### 4] No trade war impact.

Joel **Einstein 17**. Australian National University. 01-17-17. “Economic Interdependence and Conflict – The Case of the US and China.” E-International Relations. <http://www.e-ir.info/2017/01/17/economic-interdependence-and-conflict-the-case-of-the-us-and-china/>

In 1913, Norman Angell declared that the use of military force was now economically futile as international finance and trade had become so interconnected that harming the enemy’s property would equate to harming your own.[1] A year later Europe’s economically interconnected states were embroiled in what would later become known as the First World War. Almost a century later Steven Pinker made a similar claim. Pinker argues, “Though the relationship between America and China is far from warm, we are unlikely to declare war on them or vice versa. Morality aside, they make too much of our stuff and we owe them too much money.”[2] His argument rests upon the liberal assumption that high levels of trade and investment between two states, in this case the US and China, will make war unlikely, if not impossible. It is this assumption that this essay seeks to evaluate. This essay is divided into three sections. The first briefly outlines the theory that economic interdependence results in a reduced likelihood of conflict, breaking the theory down into smaller components that can be examined. In the second section, this essay suggests that the premise ‘more trade equals less conflict’ is simplistic. It does not take into account many of the variables that can influence the strength of economic interdependence’s conflict reducing attributes. Within this section, the essay considers: the extent to which conflict cuts off trade, theories arguing that how and what a state trades matters, Copeland’s theory of trade expectations and the differences between status quo and revisionist states. The final section deals with the realist perspective, concentrating on arguments pertaining to the primacy of strategic interests and arguments that economic interdependence will increase the likelihood of conflict owing to a reduction of deterrence credibility. Each section will be related back to the US-China relationship with a view to assessing Pinker’s claim. The essay will conclude that economic interdependence does reduce the likelihood of conflict but is insufficient on its own to completely prevent it. To calculate the likelihood of conflict correctly one would need to factor in the nature of the economic interdependence alongside the strength of the strategic interests at stake. Economic Interdependence and Conflict The theory that increased economic interdependence reduces conflict rests on three observations: trade benefits states in a manner that decision-makers value; conflict will reduce or completely cut-off trade; and that decision-makers will take the previous two observations into account before choosing to go to war. Based on these observations, one should expect that the higher the benefit of trade, the higher the cost of a potential conflict. After a certain point, the value of trade may become so high that the state in question has become economically dependent on another. Proponents of this theory argue that if two states have reached this point of mutual dependence (interdependence), their decision-makers will value the continuation of trade relations higher than any potential gains to be made through war.[3] It is on this argument that Pinker rests his statement that the economic relationship between the US and China precludes war. One can see evidence of this when analysing US views on China as trade rises. A 2014 Chicago Council on Global Affairs survey indicates that only a minority of Americans see China as a critical threat, compared to a majority in the mid-1990s. This number is even higher when analysing Americans who directly benefit from trade with China.[4] As compelling as this argument may be, high levels of economic interdependence have not always resulted in peace. The decades preceding WW1 saw an unprecedented growth in international trade, communication, and interconnectivity but needless to say, war broke out.[5] This instance alone is not enough to disprove Pinker’s logic. War may become very unlikely but began nonetheless.[6] Let us take two hypothetical scenarios, one in which the chances of war is 80% and the other in which trade has reduced the likelihood of war to 10%. Just knowing that war did indeed take place does not tell us which scenario was in play. Similarly, the fact that WW1 took place gives us no information about whether economic interdependence made war unlikely or not. In fact, evidence even exists to suggest that economic linkages prevented a war from breaking out during the sequence of crises that led up to WW1.[7] However, the fact that a war as detrimental as WW1 could break out despite a supposed reduction of the likelihood of conflict gives us an impetus to examine whether this reduction does take place. Additionally, if this is the case, what variables can weaken this pacifying effect? Does Conflict Cut off Trade? Economic interdependence theory makes the assumption that conflict will reduce or cut-off trade. This assumption appears to be logical, as one would expect that the moment two states are officially adversaries, fear of relative gains would ensure that policy makers want to completely cut-off trade. However, there are many historical examples of trade between warring states carrying on during wartime, including strategic goods that directly affect the ability of the enemy to carry out the war.[8] For example, in the Anglo-Dutch Wars, British insurance companies continued to insure enemy ships and paid to replace ships that were being destroyed by their own army.[9] Even during WW2, there are numerous examples of American firms continuing to trade strategic goods with Nazi Germany.[10] Barbieri and Levy argue that these examples and their own statistical analysis suggest that the outbreak of war does not radically reduce trade between enemies, and when it does, it often quickly returns to pre-war levels after the war has concluded.[11] In response to this result, Anderton and Carter conducted an interrupted time-series study on the effect war has on trade in which they analysed 14 major power wars and 13 non-major power wars. Seven of the non-major power wars negatively impacted trade (although only four of these reductions were significant), but in the major war category, all results bar one showed a reduction of trade during wartime and a quick return to pre-war levels at its conclusion.[12] Accompanying this contradictory finding one must take into account that even if war does not radically reduce trade, if a state believes that it does then potential opportunity cost would still figure in their calculations. Variables that Impact the Pacifying Effect of Economic Interdependence The purpose of this section is to demonstrate that the pacifying effect of economic interdependence is not constant. It achieves this via a discussion of the effect of changes in a number of variables pertaining to how and what a state trades. Once it is established that changes in such variables may alter the effect of economic interdependence on the likelihood of conflict, Pinker’s statement (that the level of trade between the US and China makes conflict unlikely) can be considered to be an over-simplification. One variable is the relative levels of economic dependence. Some argue that asymmetry of trade can increase the chances of conflict if the trade is more important to one state than it is to the other; their resolve would not be reduced by the same degree. The less dependent state would be far more willing than its adversary to initiate a conflict.[13] An example is the possibility of the prevalent idea in China that ‘Japan needs China more than China needs Japan’ leading to China becoming more assertive in Senkaku/Diaoyu islands dispute.[14] It is important to recognize that all trade is asymmetric in one fashion or another. It is radical asymmetry that one has to fear, which at the moment does not appear to be the case in the China-Japan or US-China case. Another variable is the specifics of what is being traded. A study by Dorussen suggests that the pacifying effect of trade is less evident if the trade consists of raw materials and agriculture but stronger if the trade consists of manufactured goods. Even within the category of manufactured goods there are differences in effect. Mass consumer goods yield the strongest pacifying results whilst high-technology sectors such as electronics and highly capital-intensive sectors such as transport and metal industries tend to have a relatively weak effect.[15] If it is a sector with alternative trade avenues then embargos and boycotts as a result of conflict will have far less effect.[16] The rule is that the more inelastic the import demand, the higher the opportunity cost and the smaller the probability of conflict.[17] According to these studies, trade still generally reduces the likelihood of conflict however it is by no means homogeneous in its effects. Additionally, the opportunity costs are not the same for importers and exporters. Dorussen’s study suggests that increased trade in oil tends to make the exporters more hostile and the importers friendlier in relations to their foreign policy.[18] Taking this framework into account, in 2014 China’s top five exports to the US (computers, broadcasting equipment, telephones and office machine parts) all fell under the category of electronics,[19] whilst the US’s top five exports to China (air and/or spacecraft, soybeans, cars, integrated circuits and scrap copper) were all either high-capital intensive sectors or raw materials and agriculture.[20] According to Dorussen’s study, these exports should not yield the strongest possible conflict reducing results, which could impact the validity of Pinker’s statement. Copeland presents another variable, namely expectations of trade. Copeland argues that if a highly dependent state expects future trade to be high, decision makers will behave as many liberals predict and treat war as a less appealing option. However if there are low expectations of future trade, then a highly dependent state will attach a low or even negative value to continued peaceful relations and war would become more likely.[21] As an example, he points out that despite high levels of trade in 1914 German leaders believed that rival great powers would attempt to undermine this trade in the future, so a war to secure control over raw materials was in the interests of German long-term security.[22] Via this framework, if the US began to believe that in future years they would be less dependent on China’s economy, or if it became apparent that a US-China trade war was about to take place, there would be a sharp rise in the probability of conflict. The final variable this essay will discuss relates to the differences between status quo and revisionist states. Most empirical analyses of economic interdependence tend to group together states as different as the United States, Pakistan, Australia, Germany and China and assume that variations in their behaviour would be the same.[23] Papayoanou on the other hand, argues that when analysing the effects of economic interdependence it is useful to differentiate the effects on great power states and states with revisionist aspirations.[24] If a status quo power has strong economic ties with revisionist state there will be interest groups who advocate engagement and who believe that confrontational stances will threaten the political foundation of economic links. This will constrain the response of the status quo state.[25] One can see evidence of such an interest group in the US, a group Friedberg describes as the Shanghai coalition, who he argues advocate engagement with China at the expense of balancing.[26] A study by Fordham and Kleinberg backs up this argument as they find that US business elites who benefit from trade with China tend to see little benefit in limiting the growth of Chinese power.[27] A 21st Century revisionist power is far less likely to be a democracy, and therefore, interest groups will influence the leadership far less. This means an authoritarian revisionist power will be working under fewer constraints and will be able to take a more aggressive stance.[28] This appears to be the case in China where rather than having domestic constraints on taking an aggressive stance against Japan, one of their biggest trading partners, grassroots nationalism has made explicit cooperation a domestically risky option.[29] There are many indicators to suggest that China is a revisionist power willing to wage war. Lemke and Werner argue that an extraordinary growth of military expenditures’ reveals when a state is dissatisfied with the status quo.[30] Data provided by the Stockholm International Peace Research Institute certainly indicates that China qualifies as its military expenditure has nominally increased by 1270% between 1995 and 2015.[31] Additionally, the military modernization appears to be aimed at capabilities to contest US primacy in East Asia.[32] Much like German strategists recognized that Britain was operating under significant domestic constraints, China could realize the same of the US.[33] This is not to say that Chinese decision-makers would be cavalier about making a decision that would be to the detriment its economy. A crash in the Chinese economy due to the loss of exports to the US could potentially undermine the legitimacy of the Chinese Communist party and endanger the regime. However, the view that China is a revisionist power indicates that good trade relations alone will not result in a low probability of conflict. Realist Arguments Pertaining to Dominance of Strategic Interests Having established that if the pacifying effect of trade does exist, it can rise or fall depending on changes in a series of variables this essay proceeds to deal with realist theories arguing that trade has a negligible or even negative effect on the likelihood of conflict. Buzan argues that noneconomic factors contribute far more to major phenomena than liberal theorists usually cite to support their theory.[34] There is evidence of the primacy of strategic interests in Masterson’s 2012 study on the relationship between China’s economic interdependence and political relations with its neighbours. The study concluded that as economic interdependence with neighbouring states increased the likelihood of conflict did indeed decrease, but that the impact was minimal when compared to the impact of relative power capabilities. In other words, political and military issues dominated interstate relations. Growth in power disparities were associated with decreases in dyadic political relations that were greater than the increase caused by economic interdependence.[35] If the pacifying effect of trade can rise and fall so can the provocative effect of strategic interests. It is important to distinguish between the existence of a strategic interest and a situation of unbearable strategic vulnerability. China and the US have many opposing strategic interests, but neither is in a strategically vulnerable position. For example, China shares many borders, but none present the same threat of invasion that Tsarist Russia did to Imperial Germany as none of the current maritime tensions between China, Japan, and the US equate to a matter of national survival.[36] This is crucial as some believe that for a crisis to escalate to a major war an actor who is isolated and believes that history is conspiring against them is needed. Only this actor would take an existential risk to try and offset their strategic vulnerability.[37] Imperial Germany fit this description, but neither China nor the US does. This is largely due to the geography of the region. The tension between the US, China and Japan are over maritime regions. Maritime issues still relate to national interests but, as Krause points out, “Land armies are still the only forces that can conquer and hold territory.”[38] Taking this into account one can argue that the benefits of US-China trade are, for each state, currently greater than the benefits of pursing strategic benefits via force, but this situation will only remain as long as the situation does not become one of unbearable strategic vulnerability. Realist Arguments Pertaining to the Undermining of Deterrence Having established that scenarios exist where strategic interests and vulnerabilities have a greater effect on the likelihood of war than economic interdependence, this essay will now evaluate arguments that economic interdependence can increase the likelihood of conflict through the undermining of deterrence. The argument proceeds as follows: if economic interdependence constrains the ability or willingness of a state to use its military, security is lowered as the state now has a weakened ability to engage in deterrence and defensive alliances. Deterrence relies on the ability of a state to make credible threats and defensive alliances rely on credible promises to protect one’s allies.[39] Credibility is defined as the product of the operational capability to follow through with a threat and the communication of resolve to use force.[40] What is at risk here is that if economic interconnectivity interferes with the communication of resolve to use force then states may end up with a way that neither side expected or wanted. Some argue that it was such a failure to communicate resolve that resulted in the beginning of WW1. Indeed, Jolly claims that: “The Austrians had believed that vigorous actions against Serbia and a promise of German support would deter Russia: the Russians had believed that a show of strength against Austria would both check the Austrians and deter Germany. In both cases, the bluff had been called and the three countries were faced with the military consequences of their actions.”[41] The risk in the US-China case would be that the interest groups described earlier would prevent the US from effectively communicating its resolve to use force if China were to cross a redline. The flaw in this argument lies in the fact that whilst interest groups might push back against public statements outlining redlines; the US has many less overt options available to it to communicate resolve. Modern technology and the forms of interconnectivity have resulted in many more lines of communication between China and the US than adversaries had access to in 1914. Private meetings, electronic communication and numerous other methods of communication have the capability to be candid without being visible to interest groups. It is for this reason that this essay discounts the theory that Sino-American economic interdependence results in a reduction of deterrence and therefore increases the likelihood of conflict. Conclusion This essay has shown that the strength of the pacifying effect of economic interdependence is subject to change depending on a series of dynamic variables. It has also demonstrated that the strength of the conflict provoking effects of strategic interests can change depending on whether the strategic interest amounts to a situation of unbearable strategic vulnerability. It has discounted the theory that interdependence leads to a higher chance of conflict through an erosion of credibility. To sum up, trade does seem to reduce the likelihood of conflict but should not be seen as a deterministic factor as strategic interests, and vulnerabilities also have a large effect. There is no hard rule as to what will be the driving factor as the nature of economic interdependence and of strategic factors impact their relative values. Accordingly, Pinker’s statement that the trade between the US and China makes war exceptionally unlikely is simplistic and misleading because it fails to account for a wide array of variables that can radically change the likelihood of a Sino-American war. An intellectually honest thesis would insist upon a comprehensive approach in which the level of economic activity is simply one of many variables that is required.

## 1AC: Resources

#### 1] Material systems are flexible and can absorb shocks.

Vivek Anand ASOKAN ET AL. 17. \*\*Graduate student, sustainability science, University of Tokyo. \*\*Masaru Yarime, Associate Professor, Energy and Environment, City University of Hong Kong. \*\*Miguel Esteban, Associate Professor Graduate Program in Sustainability Science, University of Tokyo. “Introducing Flexibility to Complex, Resilient Socio-Ecological Systems: A Comparative Analysis of Economics, Flexible Manufacturing Systems, Evolutionary Biology, and Supply Chain Management.” *Sustainability* 9: 1091. Emory Libraries.

6. Conclusions

Flexibility refers to the property of a system to change, and a system which can actively change can be robust under both stress and shock. Flexibility allows immediate deployment of resources where they are needed and hence will lead to less damage and quick recovery. The present research looked into a dynamic conceptual approach required to appreciate the importance of flexibility in creating systems that are resilient and sustainable. It is important for a system to be both robust and transformative, just like an organism has to balance between robustness and transformation in response to changing conditions in the environment. Similarly, a system has to balance between the extremes of robustness and transformation, and flexibility characteristics, if embedded in a system, can allow for such a balance between extremes. Flexibility has a vital role to play in such a system and can be used as a lens to study it. Adopting such a perspective of studying flexibility in itself can allow the development of systems that are both robust and transformative in nature and open a different way to study resilience within the field of sustainability science.

In this paper, a framework incorporating flexibility as a characteristic is proposed for designing complex, resilient socio-ecological systems. In an interconnected complex system, flexibility allows the prompt deployment of resources where they are needed and is crucial for both innovation and robustness in a resilient system. A comparative analysis of flexible manufacturing systems, economics, evolutionary biology, and supply chain management is conducted to identify the most important characteristics of flexibility. Evolutionary biology emphasises overlapping functions and multi-functionality, which allow a system with structurally different elements to perform the same function, enhancing resilience. In economics, marginal cost and marginal expected profit are considered essential in incorporating flexibility while making changes to the system. In flexible manufacturing systems, the size of choice sets is important in creating flexibility, as initial actions preserve more options for future actions that will enhance resilience. We illustrate two cases of this, namely the knowledge intensive services and multifunctional landscapes to elucidate the role of flexibility thinking. The features of flexibility are prescribed as toolkits which should be used based on the context of the systems or the problem analysed. Given the dynamic nature of flexibility, identifying the characteristics that can lead to flexibility will introduce a crucial dimension to designing resilient and sustainable systems from a long-term perspective.

2]

#### 2] Warming’s not existential---framing it as such undermines solvency.

Zeke Hausfather & Glen P. Peters 20. \*Director of climate and energy at the Breakthrough Institute in Oakland, California. \*\*Research director at the CICERO Center for International Climate Research in Oslo, Norway. "Emissions – the ‘business as usual’ story is misleading". Nature. 1-29-2020. https://www.nature.com/articles/d41586-020-00177-3

In the lead-up to the 2014 IPCC Fifth Assessment Report (AR5), researchers developed four scenarios for what might happen to greenhouse-gas emissions and climate warming by 2100. They gave these scenarios a catchy title: Representative Concentration Pathways (RCPs)1. One describes a world in which global warming is kept well below 2 °C relative to pre-industrial temperatures (as nations later pledged to do under the Paris climate agreement in 2015); it is called RCP2.6. Another paints a dystopian future that is fossil-fuel intensive and excludes any climate mitigation policies, leading to nearly 5 °C of warming by the end of the century2,3. That one is named RCP8.5.

RCP8.5 was intended to explore an unlikely high-risk future2. But it has been widely used by some experts, policymakers and the media as something else entirely: as a likely ‘business as usual’ outcome. A sizeable portion of the literature on climate impacts refers to RCP8.5 as business as usual, implying that it is probable in the absence of stringent climate mitigation. The media then often amplifies this message, sometimes without communicating the nuances. This results in further confusion regarding probable emissions outcomes, because many climate researchers are not familiar with the details of these scenarios in the energy-modelling literature.

This is particularly problematic when the worst-case scenario is contrasted with the most optimistic one, especially in high-profile scholarly work. This includes studies by the IPCC, such as AR5 and last year’s special report on the impact of climate change on the ocean and cryosphere4. The focus becomes the extremes, rather than the multitude of more likely pathways in between.

Happily — and that’s a word we climatologists rarely get to use — the world imagined in RCP8.5 is one that, in our view, becomes increasingly implausible with every passing year5. Emission pathways to get to RCP8.5 generally require an unprecedented fivefold increase in coal use by the end of the century, an amount larger than some estimates of recoverable coal reserves6. It is thought that global coal use peaked in 2013, and although increases are still possible, many energy forecasts expect it to flatline over the next few decades7. Furthermore, the falling cost of clean energy sources is a trend that is unlikely to reverse, even in the absence of new climate policies7.

Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century — still a catastrophic outcome, but a long way from 5 °C7,8. We cannot settle for 3 °C; nor should we dismiss progress.

Plan for progress

Some researchers argue that RCP8.5 could be more likely than was originally proposed. This is because some important feedback effects — such as the release of greenhouse gases from thawing permafrost9,10 — might be much larger than has been estimated by current climate models. These researchers point out that current emissions are in line with such a worst-case scenario11. Yet, in our view, reports of emissions over the past decade suggest that they are actually closer to those in the median scenarios7. We contend that these critics are looking at the extremes and assuming that all the dice are loaded with the worst outcomes.

Asking ‘what’s the worst that could happen?’ is a helpful exercise. It flags potential risks that emerge only at the extremes. RCP8.5 was a useful way to benchmark climate models over an extended period of time, by keeping future scenarios consistent. Perhaps it is for these reasons that the climate-modelling community suggested RCP8.5 “should be considered the highest priority”12.

We must all — from physical scientists and climate-impact modellers to communicators and policymakers — stop presenting the worst-case scenario as the most likely one. Overstating the likelihood of extreme climate impacts can make mitigation seem harder than it actually is. This could lead to defeatism, because the problem is perceived as being out of control and unsolvable. Pressingly, it might result in poor planning, whereas a more realistic range of baseline scenarios will strengthen the assessment of climate risk.

#### 3] No wars over energy

Tertrais, Foundation for Strategic Research senior research fellow, 2012

(Bruno, “The Demise of Ares: The End of War as We Know It?”, Summer, <http://csis.org/files/publication/twq12SummerTertrais.pdf>)

**Future resource wars are unlikely. There are fewer and fewer conquest wars**. Between the Westphalia peace and the end of World War II, nearly half of conflicts were fought over territory. **Since the end of the Cold War, it has been** **less than 30 percent**.61 The invasion of Kuwait a nationwide bank robbery may go down in history as being the last great resource war. The U.S.-led intervention of 1991 was partly driven by the need to maintain the free flow of oil, but not by the temptation to capture it. (Nor was the 2003 war against Iraq motivated by oil.) As for the current tensions between the two Sudans over oil, they are the remnants of a civil war and an offshoot of a botched secession process, not a desire to control new resources. China’s and India’s energy needs are sometimes seen with apprehension: **in** **light of growing oil and gas scarcity, is there not a risk of military clashes over the** **control of such resources? This seemingly consensual idea rests on two fallacies.** **One is that there is such a thing as oil and gas scarcity**, a notion challenged by many energy experts.62 As prices rise, previously untapped reserves and non-conventional hydrocarbons become economically attractive. **The other is that spilling blood is a rational way to access resources**. As shown by the work of historians and political scientists such as QuincyWright, the economic rationale for war has always been overstated. And because of globalization, it has become cheaper to buy than to steal. We no longer live in the world of 1941, when fear of lacking oil and raw materials was a key motivation for Japan’s decision to go to war. In an era of liberalizing trade, many natural resources are fungible goods. (Here, Beijing behaves as any other actor: 90 percent of the oil its companies produce outside of China goes to the global market, not to the domestic one.)63 There may be clashes or conflicts in regions in maritime resource-rich areas such as the South China and East China seas or the Mediterranean, but they will be driven by nationalist passions, not the desperate hunger for hydrocarbons**.** Only in civil wars does the question of resources such as oil**, diamonds,** **minerals, and the like** play a significant role; this was especially true as ColdWar superpowers stopped their financial patronage of local actors.64 Indeed, as Mueller puts it in his appropriately titled The Remnants of War, ‘‘Many [existing wars] have been labeled ‘new war,’ ‘ethnic conflict,’ or, most grandly ‘clashes of civilization.’ But in fact, most. . .are more nearly opportunistic predation by packs, often remarkably small ones, of criminals, bandits, and thugs.’’65 It is the abundance of resources, not their scarcity, which fuels such conflicts. The risk is particularly high when the export of natural resources represents at least a third of the country’s GDP.66

#### 4] Independent colony is impossible.

**Levchenko et al. 19**. Professors in the Plasma Sources and Applications Centre/Space Propulsion Centre, NIE, Nanyang Technological University. 2019. “Mars Colonization: Beyond Getting There.” Global Challenges, vol. 3, no. 1.

Settlement of Mars—is it a dream or a necessity? From scientific publications to public forms, there is certainly little consensus on whether colonization of Mars is necessary or even possible, with a rich diversity of opinions that range from categorical It is a necessity!20 to equally categorical Should Humans Colonize Other Planets? No.21 A strong proponent of the idea, Orwig puts forward five reasons for Mars colonization, implicitly stating that establishing a permanent colony of humans on Mars is no longer an option but a real necessity.20 Specifically, these arguments are: Survival of humans as a species; Exploring the potential of life on Mars to sustain humans; Using space technology to positively contribute to our quality of life, from health to minimizing and reversing negative aspects of anthropogenic activity of humans on Earth; Developing as a species; Gaining political and economic leadership. The first argument captures the essence of what most space colonization proponents feel—our ever growing environmental footprint threatens the survival of human race on Earth. Indeed, a large body of evidence points to human activity as the main cause of extinction of many species, with shrinking biodiversity and depleting resources threatening the very survival of humans on this planet. Colonization of other planets could potentially increase the probability of our survival. While being at the core of such ambitious projects as Mars One, a self‐sustained colony of any size on Mars is hardly feasible in the foreseeable future. Indeed, sustaining even a small number of colonists would require a continuous supply of food, oxygen, water and basic materials. At this stage, it is not clear whether it would be possible to establish a system that would generate these resources locally, or whether it would at least in part rely on the delivery of these resources (or essential components necessary for their local production) from Earth. Beyond the supply of these very basic resources, it would be quite challenging if not impossible for the colonists to independently produce hi‐tech but vitally important assets such as medicines, electronics and robotics systems, or advanced materials that provide us with a decent quality of life. In this case, would their existence become little more than the jogtrot of life, as compared with the standards expected at the Earth?22

## 1AC: Outreach

#### 1] The plan offends allies---turns case

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Today few of us are sympathetic with the view that the common law exists apart from and somehow transcends the jurisdiction of the courts that make it. Nevertheless, there is a powerful sense in which the rules of antitrust law are regarded as "natural," while explicitly regulatory rules are considered to be purely local, territorial, or political. This view is given considerable support by a powerful neoclassical economic model that views markets as natural, in the sense that they exist separate and apart from state policy making. 32

Within this model antitrust law is a kind of background umpire that does not make first instance choices about price, quantity, quality, new entry and the like, but that does limit the anticompetitive exercise of market power. Antitrust operates as a kind of "macro" version of contract law. The common law of contracts is designed to facilitate and protect the utility of individual private bargains; antitrust is designed to do much the same thing, but for markets as a whole. Under this conception a well defined set of antitrust principles always operates in the background, so to speak, permitting private bargaining to proceed without interference in the great majority of instances, but intervening when competitive processes go awry. Further, widespread agreement exists both inside and outside the United States on a set of core principles pertaining to such things as naked price fixing, market division agreements, and the like. Within this core, problems of extraterritoriality have largely been limited to the technical ones of devising appropriate jurisdictional rules and remedies.

In contrast, the power to regulate is different. Under the traditional view of regulation the power to set price, quantity, quality, or the right to enter a market emanates in the first instance from the government. Further, although there is widespread economic agreement on fundamental principles, regulatory design is much more specific to the sovereign-more likely to reflect the demographics, industrial or employment base, or politics of the particular state imposing the regulation.

For example, nearly all of the 50 states of the United States have an antitrust law. With relatively few exceptions, however, the substantive coverage of these antitrust laws is the same, and mimics federal law. Many states have court decisions or even legislative enactments stating that federal antitrust law should govern the interpretation of that particular state's antitrust law as well. 33 The result is that the coverage of state antitrust law is remarkably similar from one state to the next. But one can hardly say the same thing about each state's regulation of land use, power generation and distribution, taxicabs, liquor pricing, and the like. Whatever homogeneity regulatory theory might produce, the politics of regulation virtually guarantees jurisdiction-specific outcomes.

But homogeneity in antitrust policy also begins to break down when antitrust law moves beyond its fundamental neoclassical concern with cartels or well-defined exclusionary practices, and into areas where its role is more controversial or marginal. This is often the case when the antitrust laws are applied in recently deregulated markets. For example, a common antitrust problem that arises in deregulated industries falls under the general rubric of unilateral refusals to deal. In order to encourage competition, newly deregulated firms may be forced to share their facilities, information, intellectual property, or other assets with new rivals. Devising reasonable "nonregulatory" rules governing refusals to deal in such markets has always extended the antitrust laws to the margin of their competence.

Increasingly, American courts seem willing to apply antitrust law to markets regulated by foreign nations under circumstances where regulatory laws themselves would never reach. For example, neither Congress nor a state legislature would very likely attempt to regulate the customer service or information provision practices of a foreign national's telephone company. But both federal and state courts have done precisely that under the guise of antitrust enforcement.3 4

Antitrust policy makes this thinkable as a result of the confluence of two sets of doctrines. First is the expansive reach of our antitrust laws to practices that have a substantial effect on United States commerce. Second is the very narrow conception of comity that applies in antitrust cases.

As a general matter, comity concerns in the international conflict of laws requires the court to consider the competing interests of domestic and foreign sovereigns. 35 After a half century of debate over the meaning of comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an extraordinarily narrow meaning in the Hartford Fire case.36 That case involved an alleged insurance boycott in which Lloyd's of London participated as reinsurer. Lloyd's conduct-agreeing with some United States insurers not to write reinsurance policies for other United States insurers who wanted to write policies with broader coverage-was neither forbidden nor compelled by British law. To the defendant's claim of comity the Supreme Court replied that the provisions of the Sherman Act governing jurisdiction over transactions in foreign commerce were mandatory. As a result, a federal court could not simply decline jurisdiction on the basis of some general balancing of interests. 37 Rather, "comity" permits a federal court to decline jurisdiction only when there was a "conflict" between the law of the foreign sovereign and United States law. Further, "conflict" was defined not under choice of law principles, but more absolutely, as occurring only when the foreign law compelled the conduct at issue. 38

Perhaps significantly, the activity of the London reinsurers was very likely reachable under United States antitrust law even under ordinary interest analysis principles. British law was found by the Supreme Court to be indifferent to what the London reinsurers were doing. Further, what they were doing was agreeing not to insure against liability for particular toxic pollution risks in the United States, and risk of liability is of course measured in relation to the physical environment and legal regime in which the injury occurs. 39 As a result, the London reinsurers were selling a product especially targeted for United States markets and allegedly participating in a boycott designed to keep broader coverage insurance policies out of that market.

But Hartford Fire's definition of comity is significantly problematic under deregulation. To the extent a foreign sovereign deregulates a public utility or common carrier, that firm enjoys greater discretion to make its own decisions. As a result, considerations of comity may no longer preclude a Sherman Act suit. What makes this especially problematic is the way that the Sherman Act has been used in the United States as a kind of replacement for the regulatory agency. Under comprehensive agency regulation a filed tariff plus regulatory oversight would have governed numerous acts by regulated firms, including pricing, entry into new markets, interconnection obligations and other duties to deal.40 Government relaxation of regulatory restrictions has given firms some discretion over these things but in the process has substituted the antitrust courts as governmental supervisor. In some situations this causes little difficulty because regulation may have been misapplied to a competitively structured industry to begin with.41 In other situations, such as long-distance telecommunication, a competitive environment has developed because of changes in technology, and topto-bottom price and product regulation is no longer necessary.42

But in a third class of situations the application of the antitrust laws is much more "regulatory" and more difficult to defend. These are the cases where unilateral conduct of the kind that was historically supervised by the regulatory agency now comes under antitrust jurisdiction. For example, under the essential facility doctrine a federal court of general jurisdiction may be asked to apply antitrust law to determine the scope of a formerly regulated firm's duty to interconnect with rivals. The circuit courts have applied the doctrine frequently in the telecommunications industry,43 but also to railroads" and natural gas pipelines.4 5 Problematically, supervising interconnection requirements involves the court in highly technical questions about the scope of the duty to deal and perhaps even about the price at which the deal must be made. In these cases we have not really "deregulated" at all; rather, we have simply substituted regulation by a government agency for regulation by a court, often through the highly inefficient and uncertain process of a jury trial. To do that in a purely domestic situation is ill-advised enough, but to do it abroad by taking advantage of the expansive jurisdictional reach of the Sherman Act is completely unjustified.

IV. Extraterritorial antitrust and foreign deregulation

As expansive as the regulatory power asserted by the United States sometimes becomes, it does not generally interfere directly into foreign governments' regulation of their own highly regulated industries. But to a large extent modem antitrust has inherited the regulatory attitude expressed by the Western Union decision discussed above. For several reasons, the idea that the United States Antitrust laws are jurisdictionally exceptional can produce overreaching that is offensive to foreign prerogatives. First, the United States antitrust laws are extremely general and make no distinction between ordinary competitive firms and public utilities or common carriers; the same rules purport to apply to all business firms. Second, the jurisdictional language of the antitrust laws is both mandatory and general to the same extent-that is, the "affecting foreign commerce" language of the basic Sherman Act and the export commerce language of the Foreign Trade Antitrust Improvement Act 6 do not distinguish between regulated and ordinary competitive firms. And third, the limiting doctrines of international law-namely Act of State, foreign sovereign compulsion, foreign sovereign immunity, and comity-do not distinguish among types of firms or types of antitrust complaints. They apply equally to both price fixing, which is at the core of antitrust concern, and to the essential facility doctrine, which lies at or outside its margin.

### Regs

#### A] Regs solve better --- empirically more effective than antitrust at achieving economic outcomes

Sumit K. Majumdar 21. Sumit K. Majumdar Ph. D. is Professor in the Jindal School of Management at the University of Texas at Dallas. “Stick Versus Carrot: Comparing Structural Antitrust and Behavioral Regulation Outcomes.” The Antitrust Bulletin. June 2021. DOI:[10.1177/0003603X211023463](https://doi.org/10.1177/0003603X211023463)

A. Evaluation of Structural Versus Behavioral Remedy Outcomes

The issue is which method works better, the antitrust (structural) or the regulatory (behavioral)? Using a standard test of differences in magnitude between two variables, as natural experiment 3 I evaluate if the antitrust (structural) approach or the regulatory (behavioral) remedy has had a greater impact in enhancing efficiency. Results are in Table 4. Column (A) relates to the performance outcome variable comparatively evaluated. Column (B) reports if the antitrust (structural) impact is less than that of the regulatory (behavioral) measures, on performance, and column (C) reports if the difference has been statistically significant.

**For the productive efficiency score, the regulatory (behavioral) remedy has statistically had a greater impact than the antitrust (structural) method in enhancing efficiency.** (Recollect that Tables 2 and 3 reported results on how the structural vs. behavioral remedies impacted efficiency scores. The impacts were 2.23% for the structural remedy (column [A] in panel [B] of Table 2) and 4.33% (column [A] in panel [B] of Table 3) for the behavioral remedy.)

B. Robustness Check

An evaluation of why price caps, as endogenous phenomena,64 were implemented would depend on firm-level factors, such as past performance; these would have influenced the implementation of price cap regulatory schemes for specific firms. As a robustness check, controlling for inclusion of endogenous factors, past performance variables have been included as price caps determinants for each observation, in a selection equation with the price cap variable then determining performance in an outcome equation. The results show the price cap estimates to be of relatively the same magnitude (in fact, they are larger), sign, and significance as the estimate values already reported in this article.65

C. Summary

**Overall, significantly larger positive outcomes have emerged from sector-specific regulatory (behavioral) remedy applications** vis-`a-vis the concurrent antitrust (structural) remedy application. The use of further performance variables to comparatively test the ideas has yielded very similar results. Such additional results are available on request.

#### B] Regs CP solves export cartels

Daniel Sokol, 08. University of Florida, Levin College of Law. "What do we really know about export cartels and what is the Appropriate Solution?." Journal of Competition Law and Economics 4, no. 4 (2008): 967-982.

IV. CONCLUSION

There is much that remains unknown about the frequency of and actual harm that export cartels cause. To create a more effective policy to combat this potential problem requires a solution that reduces the information costs associated with understanding export cartels. In a departure from previous approaches, such an approach should focus on increasing transparency on export cartels. A transparency regime is a lower cost solution than that proposed by Becker and has greater potential benefits than a solution based merely on increased coordination

#### C] Regs CP solves cartels disruptions in mineral markets – Emory reads blue

1ac Preston 14 (\*Jaakko Kooroshy \*\*Felix Preston and \*\*\*Siân Bradley \*Head of Data & Methodologies & Sustainable Investing @ FTSE Russell, Research Fellow @ Chatham House, Executive Director @ Goldman Sachs \*\*senior research fellow and deputy research director in the Energy, Environment and Resources Department @ Chatham House \*\*\*Senior Research Fellow in the Energy, Environment and Resources Department @ Chatham House; December 2014, Chatham House, The Royal Institute for International Affairs, " Cartels and Competition in Minerals Markets: Challenges for Global Governance," doa: 6-9-2021) url: https://www.chathamhouse.org/sites/default/files/field/field\_document/20141219CartelsCompetitionMineralsMarketsKooroshyPrestonBradleyFinal.pdf

Working together, there are significant opportunities for large consuming countries to exert joint leverage in global markets and international institutions to catalyse reform in key areas. Costs and inefficiencies resulting from anti-competitive practices ultimately affect companies and consumers in all countries, but it is the major mineral importers, such as the EU and China, which are worst affected. Enhanced cooperation among these actors would, however, require looking beyond existing raw materials-related trade tensions, particularly around steel and speciality metals such as rare earths.

Working together, there are significant opportunities for large consuming countries to exert joint leverage in global markets and international institutions to catalyse reform in key areas. Costs and inefficiencies resulting from anti-competitive practices ultimately affect companies and consumers in all countries, but it is the major mineral importers, such as the EU and China, which are worst affected. Enhanced cooperation among these actors would, however, require looking beyond existing raw materials-related trade tensions, particularly around steel and speciality metals such as rare earths. Finding the right avenues to bring these issues onto the global policy agenda is part of the challenge. International coordination mechanisms that exist for other types of resources – for example the IEA for energy and the AMIS for food – are largely absent for metals and minerals. An informal mechanism promoting the joint collection and sharing of data and information could help enhance early warning, provide a forum for the negotiation and resolution of public cartels, and support early action against private market manipulation. This section sets out policy options on how best to address four major challenges that have been identified throughout the paper: dealing with the last remnants of producer-country cartels; preventing damaging export restrictions; improving the governance of global market platforms and pricing mechanisms; and strengthening cooperation among regulators on clandestine private cartels and other anti-competitive practices.

#### “Do both” is antitrust duplication---the disputes collapse resources, effectiveness, and signaling.

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Disputes over clearance can have tangible adverse effects on enforcement. First, some have commented that delays caused by clearance disputes can narrow the efficacy of remedial options, particularly with mergers. As Sen. Richard Blumenthal has commented, “The Big Tech companies are not waiting for the agencies to finish their cases. They are structuring their companies so that you can’t unscramble the egg.” Structural remedies are favored by Delrahim, who has commented that alternative, behavioral remedies should be used sparingly: “The division has a strong preference for structural remedies over behavioral ones. … The Antitrust Division is a law enforcer and, even where regulation is appropriate, it is not equipped to be the ongoing regulator.”

Second, disputes over clearance and, more so, duplicative investigations waste agency resources, threaten to blunt their effectiveness, and can lead to inconsistent and confusing governmental positions. In the Sept. 17 oversight hearing, Simons and Delrahim were both criticized for requesting an increase in funding: “As you both acknowledged, both of you could use, and desperately need, more resources. That being the case, it makes no sense to me that we should have duplication of effort, when that has a tendency inevitably to undermine the effectiveness of what you’re doing.” Duplicative investigations dilute the specialization that is a principal goal of the agencies’ clearance agreement and raise the risk that one agency will take legal positions that undercut the other. No doubt the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

So how will the FTC and DOJ resolve their latest turf war? Perhaps they will revisit their clearance agreement and decide to split their authority by company or the business practice being investigated, based on prior agency experience, rather than by industry as Appendix A currently does. Or maybe Congress will decide to consolidate civil antitrust enforcement jurisdiction under one agency. That seems like a long shot considering the political implications. However, during the Senate’s antitrust oversight hearing, Sen. Josh Hawley proposed “cleaning up the overlap in jurisdiction by removing it from one agency” and “clearly designating enforcement authority to one agency.” One thing is sure—the agencies should not be duplicating civil antitrust investigations. Stay tuned.

#### “Expanding the scope” of “anti-trust laws” must be the DOJ and FTC.

Jarod Bona 21. Bona Law PC. "Five U.S. Antitrust Law Tips for Foreign Companies". Antitrust Attorney Blog. 1-16-2021. https://www.theantitrustattorney.com/five-u-s-antitrust-tips-foreign-companies/

1. Two federal and many state agencies enforce antitrust laws in the United States

The United States government has two separate antitrust agencies—the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The FTC is an independent federal agency controlled by several Commissioners, while the Antitrust Division of the DOJ is part of the Executive Branch, under the President.

Both of them enforce federal antitrust laws (among other laws). Their jurisdictions technically overlaps, but they tend to have informal agreements between each other for one or the other to handle certain industries or subjects. If you are part of a major industry, your antitrust lawyer may be able to tell you whether the DOJ or FTC is likely to oversee competition issues in your field.

#### Jurisdiction: the plan expands the DOJ and FTC role.

Babette E. Boliek 11. Associate Professor of Law at Pepperdine University School of Law. J.D., Columbia University School of Law; Ph.D., Economics University of California, Davis. FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries, 52 B.C.L. Rev. 1627 (2011). <http://lawdigitalcommons.bc.edu/bclr/vol52/iss5/2>

There is a crucial battle playing out in the world of Internet access provision. While the Internet is the natural home of competing business giants and warring digital avatars, the contest that will have the most sweeping ramifications for the future of the Internet is the turf war being waged between the Federal Communications Commission (FCC), on the one hand, and the Federal Trade Commission (FTC) and the Department of Justice (DOJ), on the other.1 Nothing less than jurisdiction over the development of the Internet is at stake.

Jurisdiction over Internet access provision is not the first confrontation between these particular government agencies; in fact, they have clashed many times.2 But it is the current iteration of the FCC’s “net neutrality” regulations that has generated the latest contest. Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.3 For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service for certain application providers (e.g., guaranteed speeds of transmission), even if those application providers can freely choose their desired quality of service.4 Net neutrality has reinvigorated what may be described as an underlying interagency tug of war that reaches deep within, and far beyond, the communications industry.

Although the two regimes share a commonality of purpose—to protect consumers and to promote allocative efficiencies in production—the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws “typically aim at similar goals—i.e., low and economically efficient prices, innovation, and efficient production methods” —regulation looks to achieve these goals directly “through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.”5 The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?6

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets— regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures.7 Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly.8 In the vast major- ity of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

This Article sets forth a framework to identify the boundaries between FCC regulatory power and antitrust authority. The goal is to pinpoint for Congress the problematic use of regulatory discretion in defining, or redefining, those boundaries and to propose the standard by which Congress may address inappropriate use of existing FCC jurisdiction. Specifically, this Article creates a new categorization of “procedural opportunism” and “substantive opportunism” to identify problematic, regulatory assertions of jurisdiction. The central issue examined in this Article is to posit what is (or should be) the boundaries of antitrust law in relation to the FCC’s regulatory authority. This important issue has reached a point of public crises in the current net neutrality debate.9 Rather than act reflexively, this is an opportunity for Congress to act clearly to redefine the boundaries between the two regimes that have otherwise been blurred by regulatory overreach.

#### FTC creates uncertainty over the scope and extent of deference.

Alexander Paul Okuliar et al. 21. Morrison & Foerster LLP. "FTC Lays Groundwork For Rulemakings: Are New Substantive Competition Rules Coming?". No Publication. 3-25-2021. https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1067906/ftc-lays-groundwork-for-rulemakings-are-new-substantive-competition-rules-coming

The FTC's foray into rulemaking could lead to a period of uncertainty and legal challenges in those areas touched by a new agency rule. There is likely to be significant debate over the scope of the FTC's authority, the particulars of the rulemaking process, the substance of any proposed rules, and, when tested in court, the extent of Chevron deference to which the agency is entitled. Substantive FTC competition rules could also create potential divergence in enforcement policy or activity between the DOJ and FTC brought about by the new rules.

#### CP causes follow on---plan doesn’t

1ac Spencer Waller 92. John Paul Stevens Chair in Competition Law, Director of the Institute for Consumer Antitrust Studies, and Professor @ Loyola University Chicago School of Law; Spring 1992, UNC School of Law, North Carolina Journal of International Law Vol. 17, Number 2, "The Failure of the Export Trading Company Program," doa: 6-8-2021. https://scholarship.law.unc.edu/ncilj/vol17/iss2/1

The problem of export cartels can also be attacked as an international trade problem under the auspices of the General Agreement on Tariffs and Trade ("GATT").1 7' The close relationship between international trade and antitrust policy suggests that competition issues may well be the next non-tariff barrier addressed in multilateral trade negotiations.' 72 The promotion of export cartels to alter the terms of international trade to a country's mercantilistic advantage is as much a non-tariff barrier to free trade as the use of 'unfair' trade practices such as dumping and subsidies.173 The development of interpretive side agreements under the GATT governing dumping and subsidies could serve as a model for a similar agreements regarding export cartels. 174 Although the GATT Antidumping and Subsidies Codes do not address the abolition of these practices, both Codes define the trade practices deemed unfair, provide detailed procedures for countermeasures by nations injured by the practices, and establish dispute resolution procedures at the international level. 175

### Protectionism

#### Anticompetitive---courts interpret it to mean global---regs are particular.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

III. Extraterritoriality and the core concerns of competition policy

The principle that regulation of public utilities or common carriers is strictly territorial is well established in American law. The United States Supreme Court enforced it with a vengeance in the second half of the 19th century. However, the Court also recognized some room for extraterritorial regulation when courts were applying market principles regarded as "universal" in some sense, as opposed to the specific, highly political and often idiosyncratic provisions of a regulatory statute. Within this framework basic competition rules were thought of as natural, global, and more or less self-defining. In pre-Realist parlance, they were said to be recognized rather than created by the courts. By contrast, specific regulatory provisions were strictly local, or "municipal," and their enforcement was limited to the territory of the sovereign that created them. The result of this dichotomy was more expansive jurisdictional assertions when the policy being enforced was thought to protect general market competition rather than merely enforcing the regulatory mandate of a particular sovereign.

#### Intent is irrelevant---extraterritorial application is a consequence of the plan.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Increasingly, American courts have been willing to entertain claims of the nature that the allocation of landing slots at Heathrow Airport or the pricing of connecting flights by British airlines fall within the control of the United States antitrust laws;22 or claims that a foreign telephone company violated the essential facility doctrine by refusing to share its subscriber list with an intending competitor.23

Congress clearly never intended these results. For example, it certainly has never articulated a goal of regulating the customer selection or rate-making policies of foreign telephone companies. Rather application of United States antitrust law is an unforeseen consequence of the coalescence of several doctrines. First is the expansive extraterritorial jurisdiction of the antitrust laws to all activities with a significant impact on United States commerce, and a very narrow definition of comity limited to actions that are actually compelled by foreign law. Second is the fact of foreign deregulation, that takes many activities that had previously been either sovereign in nature or closely supervised by a foreign government agency, and places them under the discretion of the private firm. Just as domestic deregulation has led to greater domestic intervention under the United States antitrust laws, so to it has produced more intervention in foreign markets, with United States courts stepping into the shoes of foreign as well as domestic regulatory agencies. When the regulatory authority shifts to the antitrust courts, the power to regulate extraterritoriality seems to ride along as a matter of course.

#### DOJ and private plaintiffs will bring cases---threat alone collapses relations.

Stephen D. Piraino 12. J.D. Candidate, 2013; Hofstra University School of Law; B.A, 2010; Boston College. "A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act," Hofstra Law Review: Vol. 40: Iss. 4, Article 10. Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol40/iss4/10

The United States aggressively pursues antitrust violations perpetrated by foreign defendants.' Of the fines collected by the Department of Justice ("DOJ") for Sherman Act violations, eighteen of the twenty largest fines have been levied against foreign corporations.2 Private plaintiffs, too, are able to bring private rights of action against foreign corporations under the Sherman Act.3 Courts adjudicate these matters involving wholly foreign conduct and parties by applying the Sherman Act extraterritorially.4

The extraterritorial application of the Sherman Act has vexed courts for decades.5 There has been sharp disagreement among jurists as to how U.S. courts ought to apply U.S. antitrust laws abroad.6 As a general matter, the Sherman Act can apply extraterritorially to foreign conduct if that conduct produces substantial effects inside the United States.7 The Supreme Court has established judicial rules about the extraterritorial application of the Sherman Act that do not provide predictive guidance or protection for foreign defendants. The result is that foreign defendants cannot know with sufficient certainty whether their wholly foreign actions will lead either to a civil lawsuit or criminal prosecution in U.S. courts. 9 Further, the extraterritorial application of the Sherman Act has negatively impacted foreign relations between the United States and its closest trading partners.10

#### Trade doesn’t solve war---commerce just re-routes.

Joanne Gowa & Raymond Hicks 17. \*\*William P. Boswell Professor of World Politics of Peace and War, Princeton. \*\*Statistical Programmer, Niehaus Center for Globalization and Governance; PhD in political science, Emory. “Commerce and Conflict: New Data about the Great War.” *British Journal of Political Science* 47(3): 653-74. Emory Libraries.

The findings we report show that the Great War led to a **rerouting**, rather than a wholesale breakdown, of trade. This did not come as a surprise to states: the historical record shows that states anticipated wartime shifts in their trade channels. Most belligerents nonetheless incurred efficiency losses as a consequence of the shifts, but the losses pale in light of the aggregate costs the war imposed on them. These findings suggest that neglecting wartime trade channels can **overstate** the deterrent power of ex ante trade. It is reasonable to question the extent to which wartime trade can, in general, substitute for its ex ante counterpart. This depends, as we noted above, on the composition of trade. The dominance of homogenous products in trade at the time of World War I made substitution a feasible option. For the same reason, other wars that occurred during the first half of the twentieth century seem likely to have precipitated the same trade dynamics as did the Great War. Preliminary empirical analyses are consistent with this argument. 95 After World War II, however, intra-industry trade – that is, trade in differentiated products between countries with similar factor endowments – came to account for a much larger share of commerce. Krugman notes, for example, that intra-industry rose from about 22 per cent of trade between the industrialized countries in 1962 to about 50 per cent in 2006. 96 This trade tends to involve ‘highly specialized imported varieties for which domestic imports are hard to find’, 97 raising the estimated gains from trade that accrue to countries shifting from autarky to free trade. Trade in these products can magnify wartime trade costs to the extent that trade across enemy lines engages imports that cannot easily be obtained from other trading partners. Production networks also spread more widely across countries over time. This implies that conflicts in the more recent past might indeed have wreaked havoc on trade, raising the deterrent power of ex ante trade. But the composition of conflicts also shifted over time. After 1945, no war would ever again split the major trading states. As we noted above, the advent of the Cold War transformed them into each other’s sturdiest allies. Because the advanced industrialized countries account for a large share of **intra-industry trade**, post-World War II conflicts **did not endanger** the exchange of differentiated products. The same is true of foreign direct investment: for most of the twentieth century, it was largely the major developed country trading partners that were both its home and host countries. 98 The **changing composition of warring dyads** after World War II may help explain the findings in the empirical literature on this period that conflict and ex ante trade are inversely related. The effects of conflicts on wartime commerce in this period have yet to be examined, however. Conclusion That the First World War unleashed tremendous destruction is indisputable. It marked the inception of what has been described as the long European civil war. It resulted in sixteen million deaths and twenty million wounded and destroyed large amounts of physical capital. 99 In its wake, the great powers never established anything remotely similar to the Concert of Europe that succeeded the Napoleonic Wars. Their best efforts produced a League of Nations that was unable to resolve the conflicts of interest that stymied co-operation among them. They could agree neither on the enforcement of the Versailles Treaty nor on a collective response to the Great Depression, which set the stage for the outbreak of the Second World War. The Great War also reputedly destroyed the large trade flows that existed during the first golden age of globalization. For this reason, it has become central to debates about the liberal peace. Its outbreak seemed to destroy any hope that leaders had internalized the idea that war had become a ‘great illusion’, more likely to impose costs than benefits because of the concomitant destruction of the trade that had become integral to the growth of national power. 100 Because its belligerents had been each other’s major trading partners ex ante, the Great War seemed to destroy hopes that economic linkages would secure peace. Yet, the evidence we present here suggests that one of the largest wars in history did not induce a breakdown of trade. Instead, large shifts occurred in interstate commerce, privileging trade between allies, penalizing commerce between adversaries and increasing trade with neutrals. The composition of early twentieth-century trade helped to mitigate the welfare losses these shifts imposed, as it enabled states to switch trading partners and transit routes more easily than might seem possible later in the twentieth century. Because ex ante commerce between belligerents is not necessarily a good indicator of their ex post trade, estimates of the deterrent power of trade need to take both into account.

### Resources

#### No extinction---new studies.

Nordhaus 20**.** Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816)

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is **a real climate debate** bubbling along in **scientific journals**, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But **most pessimists** do not believe that **runaway climate change** or **a hothouse earth** are plausible scenarios, **much less** that **human extinction** is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. **A richer world** will also likely be **more technologically advanced**, which means that energy consumption should be **less carbon-intensive** than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that **global economic growth** over the last decade has **reduced** climate mortality by **a factor of five**, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But **recent forecasts** also suggest that many of **the worst-case climate scenarios** produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also **very unlikely**. There is **still substantial uncertainty** about how sensitive global temperatures will be to higher emissions over the long-term. But **the best estimates** now suggest that the world is on track for **3 degrees of warming** by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

#### Any colony would be dependent on earth for resources---human society is too complex to survive without support.

Adam Morton 18. Visiting Emeritus Professor of Philosophy at the University of British Columbia. 10/15/2018. “Three: Problems with Colonies” Should We Colonize Other Planets?, John Wiley & Sons.

Worries about refuges To be refuges where humans can survive catastrophe on Earth, colonies on other planets must of course contain and sustain humans. That is the point. They must also be highly technological: surviving in an environment less hospitable than anywhere on Earth would need powerful resources. Mars does not have an atmosphere that we can breathe, does not support plants that we can eat, is very cold, has little usable water, and receives much less solar energy. It is hard to make an analogy with anywhere on Earth: combine the light levels of the deep ocean with the cold of the Antarctic, add radiation, and then exaggerate. (The pictures from the Martian Rovers are accurate as far as colour and illumination go, but we tend to project familiarity onto them, taking the atmosphere to be like air on Earth and reading the absence of snow and ice as warmth rather than the frozen desert that it really is. I know this is my own tendency until I catch myself.) The colony must from early on produce all its own food, water, and oxygen. This is not at all impossible, given sophisticated equipment, which has been tried out under desert and arctic conditions on Earth. But these conditions are not really that much like Mars, especially with respect to cold, dark, and radiation. The equipment must continue to function, indefinitely. So it must be possible to repair it without using supplies brought from Earth. So, until local manufacturing can take over, repair equipment and spare parts must be added to the list of things that must be sent with the colonists in the first place. And, easy to overlook, it adds to the number of people who must be sent. A modern technological society of a kind that can create and repair the kind of equipment we are talking about involves thousands of specialized skills. Some combinations of these can be compressed into a smaller number of people, but many are still needed. Robinson Crusoe would not last long on Mars. Questions about the number of people in a colony are crucial. Selfsufficiency requires a large number of people – say several hundred at the least. And long-term survival requires genetic diversity. If population sizes are too small, then inbreeding makes hereditary defects and infectious diseases more common. Moreover, with a small population size, random fluctuations can result in imbalanced numbers of males and females, leading to both a smaller number in the following generation and yet more reduced diversity. (A shortage of females is obviously more serious. A bias towards females would have obvious advantages. Perhaps in fact an ideal colony should be all female plus a genetically diverse sperm bank.) It has been estimated that in wild quadrupeds a population size of 500 to 1,000 is needed for long-term survival of a species, while the crews for the simulated Mars habitats on Earth have typically had six people! Humans already have a very low genetic diversity: pairs of chimpanzees in the same troops have on average more genetic diversity than pairs of humans on Earth. The crews would have to be carefully chosen. A very special psychological makeup is needed. Crew members must endure close quarters with a small number of others, a very basic life, the knowledge that one has left one's family and friends behind, and a high risk of death. They must also be chosen so that there is a range of technical knowledge, improvisational skills, and the emotional and cultural makeup needed for something like Earth civilization to continue. And this must reproduce itself for generations. It is unlikely that, even if an optimum mix of people were achieved in the initial crew, the same mix would be preserved in subsequent generations. This too argues for larger population sizes. But the more people there are, the greater the expense and resources needed to establish the colony in the first place. A disturbing fact about the production of food on Mars has recently emerged. The soil on Mars is rich in compounds called perchlorates. They react with ultraviolet light, to which the Martian atmosphere is largely transparent, in a way that is fatal to many cells. There is thus a lot of doubt whether plant crops, and the symbiotic bacteria that many of them need, can survive in Martian soil. This complicates ambitions for indoor farming considerably. Because of the effects on both living cells and human health, perchlorate contamination is regarded as pollution on Earth. Perchlorates also have a risk of explosion when they are heated, complicating plans to produce oxygen by heating the Martian soil. They are, however, a source of oxygen and of other basic chemicals; although dangerous they could have their uses. There are surely high-tech solutions to this problem, but equally surely they raise the stakes for transport and technology and increase the danger. The complexity of technological society There is a fundamental fact behind many of these problems: the large scale and interdependence of our society, with its complex web of manufacturing techniques and expertise held in the minds of many people. It is extremely hard to duplicate this in a small population with restricted resources, especially in a hostile and unfamiliar environment. So dependence on the mother culture is hard to avoid. (This was true in the past, also. The early European colonies in North America did not make their own muskets until they had grown quite large, and European agricultural styles took a lot of adapting. This may not seem advanced technology. But could you make a musket? For that matter, could you make a stone axe?) This means that the high-tech devices needed to survive in the Martian environment are not going to be designed there. The designs are going to come from home. And it is likely that at least a proportion of the devices themselves will also. 3D printing from transmitted designs may solve some problems, though, if the raw materials can be obtained and refined on Mars. (I would imagine that supplies of direct and indirect biological material, such as the petroleum and oil products that are used to make plastics, might pose a serious problem.) If imported equipment is unsuitable or does not work because of some unexpected quirk of the faraway environment, much of it will have to be redesigned and manufactured not where it is needed but where the techniques and expertise are to be found. The more advanced the apparatus (the higher the tech), the more will need to be transported to the colony, adding to the transport costs and creating a need for spares. For all these reasons I am extremely sceptical that a colony of the size that we could send to Mars in the next decades, perhaps in the next century, could sustain itself without frequent supplies and reinforcements from Earth. The obvious reply to this is to drop the requirement that the colony be able to survive without the supplies and reinforcements. But this would undercut one of the main purposes – that of providing a remnant of humanity on Mars with a reasonable chance of surviving an earthly catastrophe. The colony would then be a scientific expedition and the beginning of a preparatory project that might take centuries.

#### Reproduction impossible.

Steven Lerner 18. Staff writer @ Tech Times. 5-31-2018. "Having Sex On Mars Could Be Challenging And It Might Lead To A New Species." Tech Times. https://www.techtimes.com/articles/229073/20180531/having-sex-on-mars-could-be-challenging-and-it-might-lead-to-a-new-species.htm

"Unfortunately, such an endeavour comes with titanic challenges in various disciplines, from space travel technology to medical, biological, social and ethical challenges," the researchers wrote. "We assume that human reproduction in a Mars settlement will be necessary for the long-term success of an outer-space mission." The researchers hypothesized that if humans were to successfully conceive and give birth in space, it could potentially be a new species because of all of the unique circumstances outside of Earth. Challenges Of Reproducing On Mars Although the researchers are optimistic about reproducing on Mars, there could be numerous challenges that might make sex nearly impossible. The biggest challenge is with the gravity. Mars has roughly one-third the gravity of Earth, which could endanger the likelihood of getting pregnant. It is well-documented that prolonged time in space could alter a human's biological makeup and it could change the shape of a person's brain. This is how a new species might get created. Lower gravity could lower a person's blood pressure, which is needed for engaging in sexual intercourse. Scientists also know that low gravity can cause vision problems and lead to a weakened immune system, which would be dangerous for pregnant women. In addition to the lack of gravity, there are also other complications. There is more solar radiation on Mars, which would reduce a man's sperm count. More importantly, there is no documented evidence that a woman could have a full term pregnancy without any problems. The researchers wrote that these challenges could increase "the risks of infection-induced abortions and facilitate the dissemination of diseases among pregnant and non-pregnant individuals."

### Outreach

#### The plan’s unilateral approach breaks the Japan antitrust agreement---courts and agencies apply case law extraterritorially.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

Bilateral approach. The OECD has played a leading role in international efforts to avoid international conflicts over the extraterritorial application of competition law through the decades, “recognizing that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective sphere of sovereignty of countries concerned” and that “anticompetitive practices, investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries.”41 Since 1967, the OECD has adopted and revised a series of recommendations concerning cooperation between member countries that aim for two goals: more effective law enforcement and avoiding jurisdictional conflicts. In the context of the OECD recommendations, the concept of comity describes a voluntary policy calling for a country to give full and sympathetic consideration of other countries’ important interests while deciding the enforcement of its own competition law. Comity involves two aspects: first, a country’s consideration of how it may prevent its law enforcement actions from harming another country’s important interests, and second, a country’s consideration of another country’s request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting that country’s interest. These aspects have come to be referred to as “negative comity” and “positive comity,” respectively. 42

Following the OECD recommendations, bilateral cooperation agreements have been concluded between the United States and several other industrialized states such as Australia, Canada, and Germany to avoid friction in competition law enforcement.43 The milestone would be the U.S. and E.U. agreement of 1991 that set forth, inter alia, positive comity as well as negative comity for the first time in a bilateral agreement. This agreement was supplemented by a more detailed agreement on positive comity in 1998, which even provides for the deferral of enforcement proceedings by the requesting side under certain conditions. Although enforcement cooperation has been strengthened, the European Commission has explained that eliminating the jurisdictional “imbalance” was one of the main reasons the E.C. negotiated the positive comity provisions in the supplement agreement.44 In the Commission’s view, “it is clearly preferable … that the United States avail itself of the principle of positive comity when considering anticompetitive behavior taking place within the European Community rather than seeking to apply U.S. competition law. Through positive comity the Commission can retain control, where it wishes, of enforcement procedures addressing such behaviour.”45

Bilateral conflicts have frequently arisen between Japan and the United States over the latter’s extraterritorial application of antitrust laws, as the two countries hold divergent positions with regard to state jurisdiction under international law and against the background of increasingly expanding trade between the two countries. The Japan-U.S. Agreement, which was concluded in October 1999, should be the test case as to how effective a bilateral agreement could work for avoiding or mitigating potential bilateral conflicts. Several points should be elaborated upon here.

First, Article II stipulates the obligation of the competition authority of each party to “notify the competition authority of the other party with respect to enforcement activities” that may “affect the important interests of the other party. ” This notification procedure is the foundation of cooperation and coordination in the agreement and “important interests” are interpreted to include not only interests concerning competition law enforcement but also interests concerning sovereignty and other legal or policy matters.46

Second, Article VI stipulates that “each party shall give full consideration to the important interests of the other party throughout all phases of its enforcement activities.” In seeking an appropriate accommodation of competing interests, such factors as the conduct’s relative significance to the anticompetitive activities, the relative impact of the anticompetitive activities on the important interests, etc., should be considered. These provisions represent so-called “negative comity” and are expected to work toward avoiding jurisdictional conflicts, which may be caused, for instance, by the extraterritorial application of U.S. antitrust law, through such consideration for balancing interests tests. However, the fundamental gap with regard to their respective positions on jurisdictional justification or sovereignty, as shown in the Nippon Paper case, could not be bridged by this provision of (negative) comity itself.

Although an unilateral attempt to extend the application of domestic legislation extraterritorially violates the basic principle of territoriality in international law, the need for regulatory measures to be applied across national borders has also become a reality with the growth of transnational economic and social relations and the consequent emergence of a borderless society on a global basis. In this respect, the position of Japan is too rigid in resisting to accept the need for the extraterritorial adjustment of national competence, as evidenced in the negotiations between Japan and the United States for regulating transnational activities involving unfair competition across national borders.47

As seen above, the Government of Japan still formally rejects the effects doctrine; however, adjustment of extraterritorial jurisdiction that justifies extending jurisdiction with respect to foreign companies’ conduct abroad could be based on (a modified version of) the objective territorial principle, as has been applied in the Wood Pulp cases by the European Court. This justification could be compatible with the recent practice of the JFTC on the Nordion case and on the Exxon Mobil merger review.

Third, Article V stipulates that if the competition authority of a party believes that anticompetitive activities “in the other country adversely affect the important interests of the former party … [it] may request that the competition authority of the other party initiate the appropriate enforcement activities.” The requested competition authority shall carefully consider whether to initiate enforcement activities. These provisions represent the so-called “positive comity” and the requested competition authority is expected to take into account “the importance of avoiding conflicts regarding jurisdiction,” which is explicitly set forth in the article.

Positive comity may play an important role in export restrains (market access) cases where the requesting country’s interest is protection of its exporters’ interests.48 It has been observed that the Soda Ash case has positive comity aspects, where after U.S. trade officials complained that U.S. soda ash producers faced barriers to access in Japan, the JFTC conducted an investigation and issued a cease and desist order against Japanese producers.49 In such cases as the Fuji Kodak case, the United States could have invoked positive comity; however, U.S. enforcement agencies would have had to consider the similar position of Kodak in the U.S. market as that of Fuji in the Japanese market. Positive comity’s role may be limited in certain categories of export cartel cases because of the exemptions under the Export Trade Act in Japan and under the Webb Pomerene Act, etc., in the United States.

Positive comity under the Agreement raised concerns that it would further intensify U.S. demands for more vigorous law enforcement against anticompetitive conduct relating to market access while requests of positive comity from Japan to the United States would be rare. Nevertheless, such concerns seem off the mark. Apart from the voluntary nature of positive comity, the alleged conduct’s illegality under the requested state is a prerequisite to invocation of positive comity, and if any complaint is filed on an alleged illegal conduct, the JFTC would consider the possibility of enforcement in any case. Furthermore, Japan may request positive comity in such cases as alleged abuse of antidumping procedures against Japanese exporters by a U.S. company in the United States, even though Japanese competition law does not apply to protect Japanese exporters’ interests. Again, if Japan considers that a U.S. film maker’s conduct in the United States is anticompetitive, it may request positive comity to the United States, regardless of the fact that Japan claims to have no extraterritorial jurisdictional reach over the film maker’s conduct in the United States. In these situations, jurisdictional “imbalance” between the two countries could, to some extent, be eliminated.

The effectiveness of this agreement in terms of avoiding conflicts remains to be judged from how it will be applied in practice. Although this agreement is an executive agreement that is to be implemented within the framework of existing laws and regulations of the two states, the obligation to consider negative and positive comity will facilitate cooperation and coordination with a view to reducing conflicts. Comity is essentially voluntary but its flexibility may work better in solving a potential conflict, which ultimately depends on good working relations between the two governments, especially between the enforcement agencies, based on mutual trust. At the same time, it must be remembered that U.S. courts will not be bound by this agreement; therefore, effectiveness of both negative and positive comity under this agreement has significant institutional limitations with respect to U.S. case law.

#### Japan would hate the plan

Masako Wakui, 19. Wakui is a Specially Appointed Professor at Osaka City University Faculty of Law, in Osaka, Japan. "Liner shipping antitrust exemptions in the Pacific rim regions: cartelized markets and the need for international coordination." *Journal of Antitrust Enforcement* 7.1 (2019): 54-74.

Choice of regulatory model

The block exemption model differs from sector specific legislation in that it is the competition authority that makes assessments. The exemption may be accompanied by a time limit while sector specific legislation does not expire unless the legislature decides to abolish the exemption. The block exemption system also differs in that the onus to prove the necessity of, and justification for, the exemption is placed on the liner shipping companies, while the need to abolish the sector specific legislation must be presented by those seeking it (typically the competition authority). The competition authorities attentive to the anti-competitive effect of certain types of agreements may view the same evidence yet arrive at different outcomes; nonapproval of the overreaching application and thus no exemption under the block exemption model on the one hand as in Hong Kong110 and failure to convince the legislature to change the sector specific legislation regime and perpetual exemption on the other as in Japan.111 Some may argue that sector specific legislation may be enforced in line with competition law as demonstrated by the USFMC; however, as discussed previously, this scenario is **unrealistic in Japan**. Furthermore, even leaving aside the issue as to whether the USFMC is truly acting in line with competition policy,112 it should be noted that no major international ocean shipping company is based in the country and thus protecting the national interest tends to mean protecting the shipper’s interests. Sector specific government agencies in countries with many shipping companies to protect, including **Japan, should not be expected to behave like the USFMC**.

#### Japan would hate the plan

Gage Whirley, 18. J.D. candidate 2019, Tulane University Law School; B.A., Political Science, 2016, Virginia Polytechnic Institute and State University. "A Forgotten Agreement: A Comparative Analysis of Tramp Pooling Agreements in American Antitrust Law." *Tulane Maritime Law Journal* 43 (2018): 211-237.

**Japan stands out in the world as the country permitting** tramp **conference agreements to be exempted under their antitrust law**-The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (AMA).' Under the Japanese system, the Marine Transportation Law (MTL) makes no distinction between liner and tramp shipping companies so far as their eligibility as "ship operators."' 09 Thus, both tramp and liner shipping companies can engage in activities such as setting freight rates and vessel sharing so long as the proper procedure is followed."o The antitrust exemption in Japanese law evolved from both **international custom and a belief that the Japanese shipping industry would not grow** if the conferences were not permitted to exist."' Of the twenty-one conferences in Japan, there is a general mix of liner and tramp car shipping.1 2 Interestingly, surveys conducted by the Japan Fair Trade Commission concluded that, on average, the **feeling of "necessity" for** car carrier **shipping conferences was higher** at 12-35% than liner conferences at 8-11%.1 13 Additionally, the "do not favor conferences" sentiment in the car carrier trade was lower at 11-15% as compared to 23-26% in the liner shipping trade.1 14 On its face, the major difference when discussing Japanese antitrust law is the measure of whether a shipping company can fall within antitrust exemption. Japan focuses on whether a shipping company is a ship operator and has a uniform exception for this broad category."' By comparison, U.S. law focuses on common carriers and is, thus, much more restricted."'6 Tramp conferences, however, seem to be better perceived than liner conferences, at least in the "necessity" category.1 7 While tramp conferences are not the subject of this Comment, they serve as a useful tool in analyzing tramp pools-as they share many of the same characteristics of horizontal cooperation."'

#### Japan hates US extraterritorial application---assumes Japanese extraterritorial issues of the AMA

Thanh Cong Phan 18. PhD Diss. Master of Laws, Nagoya University, 2013. Bachelor of Laws, Hanoi Law University, 2004. “Competition Law and the Possibility of Private Transnational Governance”. https://dspace.library.uvic.ca/bitstream/handle/1828/10033/Thanh\_Phan\_PhD\_2018.pdf?sequence=1&isAllowed=y

In contrast to its willingness to apply the AMA to anticompetitive conduct abroad, the Japanese government does not recognize the exercise of foreign competition law in Japan. On 18 November 1996 in United States of America v. Nippon Paper Industries Co., the government of Japan filed a brief in the U.S. Court of Appeal for the First Circuit in which it asserted that, following principles of international law, “anticompetitive activities occurring within Japanese territory by Japanese corporations fall primarily under the scope of Japanese jurisdiction and are regulated by Japanese legislation.”280 The Japanese government continued that the application American antitrust laws to such activities would be invalid “in the absence of a substantial link between the activities and the source of jurisdiction.”281 The Japanese government also argued that “[o]ne nation’s unilateral adjudication or extraterritorial application of its national laws is not, however, an appropriate means of resolving international differences.”282 The government of Japan urged the court to hold that U.S. courts should not exercise American jurisdiction over business activities conducted in Japan by Japanese companies.283

The government of Japan made the same argument in 2004 in F. Hoffman-La Roche v. Empagran S.A.284 In that case, the Japanese government submitted an amicus curiae brief in support of petitioners to the Court of Appeal for the District of Columbia Circuit.285 The Japanese government argued that the FTAIA sought to clarify the limits of U.S. antitrust jurisdiction in U.S. foreign commerce, not expand that jurisdiction.286 The brief cited the statement of the U.S. Congress that “[t]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets under their competition laws.”287 The government of Japan asserted that nothing in the FTAIA’s legislative history suggests that it was intended to expand American antitrust jurisdiction to foreign firms in foreign markets and if the legislature had intended such an expansion, “there would have been a storm of criticism by foreign governments.”288

In sum, Japan’s approach to the extraterritorial application of competition law is inconsistent. On the one hand, the JFTC has applied the AMA extraterritorially, apparently based on an effects doctrine, but it fails to provide a clear limit on the AMA’s extraterritorial jurisdiction. On the other hand, the Japanese government strongly opposes the extraterritorial application of foreign competition law to transactions conducted by Japanese corporations in Japan. These conflicting views suggest that Japan has a double standard when it comes to the extraterritorial application of competition law.

#### No modelling---divergences in implementation inevitable, especially with an arbitrary standard.

Ma. Joy V. Abrenica 18. Professor, School of Economics, University of the Philippines Diliman. BALANCING CONSUMER WELFARE AND PUBLIC INTEREST IN COMPETITION LAW. 13:2 Asian J WTO & Int'l Health L & Pol'y 443. 2018. Pg 448-449

The economic approach to antitrust enforcement has been embraced not only by the U.S. and European Commission (hereinafter "EC"), but also by developing countries whose antitrust laws were very much influenced by these two regimes. The OECD describes the convergence among antitrust regimes as follows: There is general consensus that the basic objective of competition law is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources . . . in free market economies. While countries differ somewhat in defining efficient market outcomes, there is general agreement that the concept is manifested by lower consumer prices, higher quality products and better product choice. 22 But the adoption of a common framework has not resulted in uniform implementation of competition principles. This is because most competition regimes are still conditioned by the zeitgeist of their own competition law, as well as by social and political realities in the domestic front. Two opposing philosophies are driving antitrust enforcement in different directions. One perspective presumes that unencumbered markets are vulnerable to abuse of dominance and collusion among competing producers; thus vigorous enforcement is necessary to preserve competition. Another perspective holds that market competition is robust and could prevail upon any private attempt to suppress it; therefore, rigid enforcement is counterproductive as it could undermine rivalry, hinder innovation and thus harm consumers in the long term. Most regimes would strive for the middle ground, i.e., neither intransigent nor too lenient. However, the effects of and intent behind market behavior are rarely apparent and often difficult to discern. This could result in a finding of infringement when in fact the conduct is a legitimate response to competitive pressure (type 1 error), or a failure to foil an anticompetitive conduct as it is mistaken for an innocuous pursuit of efficiency (type 2 error). Both types of error could ruin competition. Indeed, striking the right balance in enforcement is arduous and mature jurisdictions are not exempted from the challenge. One observes notable disagreements between the U.S. and EC on such issues as refusal to deal and reverse patent payments, for example, as well as flip-flopping of decisions on various forms of vertical restraints. The divergence in views and inconsistencies in decision is probably inevitable as the understanding of economic behavior and market processes continue to evolve. Boudreaux explained: Almost all of the original bases for antitrust intervention have been shattered by sound economics. Price-cutting is no longer an obvious means of monopolizing; bigness is no longer believed to be inevitable, inevitably harmful, or perpetual; and the myriad contracting arrangements devised by actual market participants are increasingly understood to enhance competition despite having been ignored by authors of textbooks. The advances that have occurred in economic theorizing are generally abstruse demonstrations of theoretical possibilities. Only when these theories have been supported by solid empirical findings should they serve as the basis for policy . . .. (emphases added)23 Against this perplexed environment in the backdrop, the meshing of public interest and competition objectives adds further complication, uncertainty and unpredictability in competition enforcement.