# Wake Round 3 Wiki

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### T

#### Interp—“Expand the scope” requires broadening the range of claims that can be brought

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### Violation—the plan clarifies the comity test for whether the Sherman act applies abroad—it does NOT *necessarily* result in the Sherman Act applying to MORE cases and may result in it applying to FEWER.

#### Prefer that

#### Neg ground—the minimum condition for negative debating is that the aff results in topical action.

#### Limits – allows an explosion of affs that shift and add new legal tests which skew out of core DAs

### K Anti-domination

#### Antitrust intervention adopts neoliberal assumptions of politics and economics where the role of the government is to get out of the markets way

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

ii. antitrust law is not and cannot be “apolitical”

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the basic questions of whom the law benefits and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a “spontaneous order” is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile.24 This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the sub- stratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally con- ducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short- term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different con- figurations of state action and different sets of beneficiaries.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is qualitatively different from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this goal of decentralization, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a rightward shift in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions curtailed the reach of antitrust law, scaling back its objectives39 and rewriting legal doctrine to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the meaning of consumer welfare is still not settled. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic sur- plus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42 C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an “apolitical” antitrust jurisprudence is futile at best and a cynical effort to conceal political choices at worst. The choice is not be- tween “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

This congressional indifference to antitrust is not inevitable. Despite pro- longed quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

iii. the consumer welfare model is not anchored in congressional intent and reflects a narrow conception of monopoly and oligopoly

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not “above politics.” It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress’s original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society.

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that eco- nomics and politics are inseparable. Congress originally sought to structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers. Consumer welfare antitrust reflects, at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58 Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the anti- trust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an emaciated conception of corporate power. With its foundation in neoclassical economics, the consumer welfare model privileges short- term consumer interests. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and does not account for long-term dynamics. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, prizes short-term price harms to consumers and sellers and discounts longer-term injuries.62

Furthermore, the consumer welfare model legitimizes the existing distribution of resources by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A wealthy consumer commands power in the market; a poor consumer, in comparison, has little or no clout in the market.63

The consumer welfare model, moreover, affords little or no importance to corporations’ ability to dictate the development of entire markets. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to exclude rivals and strangle economic opportunity so long as this exclusion is not likely to injure consumers. In practical terms, consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory de- cisions.69 The ongoing—and frenzied—contest between states and cities to at- tract Amazon’s second headquarters is indicative of a giant business’s weight. In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and man- aged to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the me- dia,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a product of big business’s reaction against the relatively vigorous antitrust pro- gram of the postwar decades.77

With its narrow analytical frame, the consumer welfare model of antitrust accepts and legitimizes many forms of state-supported corporate power. Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try or die for putting political and economic power in the hands of the citizenry.

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

#### Focusing on a politics of anti-domination reorients power to the people which allows collective mobilizing against existential threats

Jackson 21 – DeOlazarra Fellow at the Program in Political Philosophy, Policy & Law at the University of Virginia. She received her Ph.D. with distinction in political theory at Columbia University.

Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than four urgent crises: an ongoing pandemic1; racial injustice and its consequent civil unrest2; an economic depression approaching the pain inflicted in 1929; and the accumulating, existential threat of climate change.4 Citizens must rely on their state to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of agent to carry out collective solutions, these perils may very well proceed unabated.

Pushing an anti-administravist agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this multi-pronged anti-administravist attack stands upon shaky conceptual foundations. Each builds atop a theory of constitutionalism that embraces a too-literal conception of popular sovereignty.33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

Critics commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they incorrectly posit two separate, autonomous processes: the collective formation of ends (lawmaking) and the implementation (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore political, judgments.39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that administration does indeed carry constitutional liberal democratic credentials – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a system of representative democracy that aims to set the conditions by which citizens can relate to each other as political equals, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal participants in the collective decision-making process.

This essay will proceed as follows. Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that (A) eschews outmoded notions of popular sovereignty and (B) natural law. It will then (C) explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as indefeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory’s representative turn. It will first (A) define this important intellectual development and then (B) explain how administrative agencies might fit comfortably within a representative system. The essay (C) concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of “we the people.”48 Democratic citizens, possessing inalienable rights, are to come together, deliberate,49 and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory lawmaking.50 At least as early as 1798, Congress has delegated coercive rule-making power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans’ pensions, mail delivery, intellectual property, and the payment of public debts.51 In McCullough v. Maryland,52 the U.S. Supreme Court interpreted the “necessary and proper” clause53 to anticipate Congress’ desire to create such agencies – in this case, a national bank. Bruce Ackerman,54 in his seminal work, argues that our contemporary agencies carry Constitutional credentials. Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts. Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.55 The Administrative Procedure Act56 (“APA”), for example, imposes upon agencies principles of due process and the rule of law.57

Regardless, if democratic lawmaking is to shape the community of those that make it, there must be some kind of agent or instrumentality to carry it out.58 A Congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.59 Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.60 Lawmaking is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential Lochner v. New York61 dissent, “decide concrete cases.” The required elaboration almost always imports values that are not clearly and unambiguously identified in any statutory text.62 The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many objections to agency power presume antiquated conceptions of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign63 against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress64 as the commissioned agent (or embodiment?) of the popular sovereign. To preserve citizens’ natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc. – each policed by independent courts capable of identifying and enforcing citizens’ inalienable liberties.65 If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress – and so their policymaking cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

A. The Mind and Body of the Democratic Sovereign

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a specific body: the one wearing the crown.66 To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”67 i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.68 During the democratic revolutions, radical69 theorists merged the monarch with her subjects.70 They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s volonté générale71 serves as a model for this kind of logic.72 Montesquieu, whose thinking influenced the American founders,73 likewise held that the “people as a body have sovereign power” in a republic.74 Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”75 It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”76 come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor - with homogenizing and fascist implications.77 For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.78 Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.79 Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.80 Just as the contractual “meeting of the minds” is a legal fiction of private law,81 a popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.82 In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,83 even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.84 Some (body) would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.85 Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.86

Lawmaking under constitutional liberal democracy is thus not a question of ascertaining the existence of some non-existent popular “will” to be left in the hands of loyal fiduciaries in government87 to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.88 Instead, it a question of developing transparent and accessible collective decision- making procedures that ensure that all citizens can understand themselves as equal participants in their collective ordering; that ordinary people are involved in public life and have a say in their collective destiny.89 They do not rule. Rather, they are equal players in the game of representative democracy.90

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one – at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative idea intended to depersonalize and distribute public power in a way that serves the entire community.91 It is a Kantian “as if” principle.92 Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity, human equality and the public good.93 Because if the sovereign is a “we,” then governing involves more than the interests and preferences of single individuals. We will therefore demand that political institutions remain accountable and accessible to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.94

This figurative idea of popular sovereignty also unlocks the closed doors of power and forces the inclusion of voices previously ignored.95 Whosoever happens to be governing at any given time, that person is not “the people” precisely because “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort96 notes, that this place of power remain an empty one – or at least one with a revolving door – where no body at all is permitted to rule permanently. For to fill that void would allow for a part to speak on behalf of the whole. “We the People” might become, as political theorist Nadia Urbinati notes, “Me the People.”97 It would thus force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a fictional popular sovereign and, importantly, the rule of law and not of men.98 If the place of power remains empty because all citizens contribute in some way to lawmaking, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if we take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.99 Thus, insofar as theories of non-delegation and legislative primacy rely on an organ-body theory of popular sovereignty,100 they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared – and found wanting. Indeed, it is at least possible that administrative agencies can be made consistent with the requirements of constitutional popular sovereignty.101 Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as co-equal participants in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.102 It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

### CP Comity Rule

**The United States federal government should increase prohibitions on anticompetitive business practices by establishing a prescriptive comity rule that expands the extraterritorial scope of its antitrust laws.**

#### The CP creates an international comity RULE instead of an balancing TEST – prescriptive rules are based on objective factors that do not invite judicial discretion

Stephen D. Piraino, Hofstra Law, A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act, 2012, Hofstra Law Review, Vol. 40, Iss. 4

In order to solve the problem created by Hartford Fire's majority, courts must first recognize the importance of prescriptive comity in deciding whether the Sherman Act reaches foreign conduct. When foreign conduct causes effects in the United States, the court must then perform an analysis based on prescriptive comity. 330 As seen in Empagran, foreign conduct with foreign effects will not allow for an extraterritorial application of the Sherman Act. 331 Therefore, the Supreme Court has used prescriptive comity in the past when it declined to allow U.S. law to intrude on the sovereignty of another nation.332 There is no need for any type of analysis in these situations because case law firmly establishes that these types of cases involve no justiciable claim.333 There are two situations where courts would have to perform a comity analysis. The first situation is when conduct is legal-but not required-in the country where it occurred, but proscribed under the Sherman Act.334 The second situation is when conduct is illegal under both the Sherman Act and the laws of the country where it occurred.335

1. The Hartford Fire-Type Situation

To properly use prescriptive comity, courts must look beyond whether conduct is simply legal in another country. They must look to how the industry in which the alleged anticompetitive conduct is regulated by the foreign country where it occurred. If the conduct is regulated under a comprehensive regulatory scheme, such as the reinsurance industry in Hartford Fire, a court should decline to exercise the Sherman Act extraterritorially in order to respect that nation's right 336 to regulate its own industries.

In Hartford Fire, the foreign defendants who challenged jurisdiction based on principles of comity were reinsurers based in London.337 The London reinsurance market alone has a thirty percent market share.338As a result, the United Kingdom has developed a comprehensive regulatory structure for the reinsurance market.339 Therefore, the United Kingdom wanted the United States to respect its own ability to regulate an industry of national importance.34 ° It did not want U.S. antitrust laws to dictate changes to its historic policy, especially when the extraterritorial application of the Sherman Act in Hartford Fire would have done so without any input from the United Kingdom.341

Using prescriptive comity to decline jurisdiction over foreign conduct in this way is consistent with the principles of the Member States of the Organization of Economic Cooperation and Development ("OECD") in that member states "respect[] ... the interests of other Member Countries. 342 If a court finds that a country has a comprehensive regulatory scheme in place for a certain industry, the court must decline to apply the Sherman Act extraterritorially to that conduct. This approach is grounded in prescriptive comity because the United States would be limiting the reach of its laws so as to respect the sovereignty of another nation.343 That respect comes from acknowledging that the United States cannot regulate the economic activity in every country solely based on effects felt within the United States. 3"

The analysis into a country's regulation of an industry would be objective because it would be "based on externally verifiable phenomena, as opposed to individual's perceptions., 345 History of regulation and a country's market share in an industry are objective factors.346 Market share is data-based, which is clearly an objective factor.347 A history of regulation is also an objective factor because it is based on fact, instead of a judge's opinion about national interests.348 U.S. courts can make active inquiries into foreign law.349 Federal Rule of Civil Procedure 44.1 grants courts broad authority to decide issues of foreign law.35° Once a party has raised an issue about foreign law, "the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. '351 The court's decision on foreign law is treated as a matter of law, instead of as a matter of fact.352 The Federal Rules of Criminal Procedure provides a nearly identical rule for using foreign law in criminal proceedings. 353

#### Balancing tests are bad—they leave critical sovereignty issues to judicial discretion—CP solves

--assumes aff updated comity analysis

Stephen D. Piraino, Hofstra Law, A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act, 2012, Hofstra Law Review, Vol. 40, Iss. 4

An objective analysis avoids the problems inherent in balancing tests. 354 Balancing tests are ill-suited to determine the extraterritorial application of the Sherman Act.355 These types of tests do not operate well in practice and become problematic for judges.356 Courts cannot properly judge and balance the political factors inherent in balancing tests. 357 Further, these balancing tests-which do not represent rules of international law-have not adequately addressed the comity concerns raised by foreign nations. 358 Given the open-ended nature of balancing tests, there can either be multiple answers or no answer.3 59 Judges who cannot properly balance national interests will inevitably assert jurisdiction, which does nothing to further international relations. 360 However, an objective analysis grounded in prescriptive comity would solve many of the international relations issues because a nation's sovereignty is adequately protected.

One proposed solution to the extraterritorial application of the Sherman Act is modifying the Restatement (Third) of Foreign Relations Law.36 1 In its current form, the Restatement provides a list of factors for courts to balance when deciding if they ought to apply laws extraterritorially. 362 This new Restatement would use the locus of principle effects and principle contacts as an important factor.363 Courts would also look at the "combined overall welfare of the communities affected. 364 Instead of including the list of factors to be weighed from the current form in the new Restatement, the revised Restatement would include factors in a comment that could possibly be used when deciding whether to apply a law extraterritorially. 365 This approach recognizes that the current Restatement factors are not applicable in all circumstances and are outdated.3 66 Even though this new approach would include a comity-type analysis by acknowledging the effects of enforcement in a foreign country, it still leads to a balancing test of interests.367 Further, this new approach continues to reinforce the effects as the most important factor for application of a law extraterritorially and not the place of the conduct.368 This would not be consistent with prescriptive comity because it ignores the sovereignty of the nation where the conduct occurred.

#### Invading the sovereignty of foreign countries spurs efforts to destabilize the international application of U.S. antitrust law – that turns case.

McNeill 98 – B.S. (Business Administration), M.S. (Business Administration), San Diego State University, J.D., California Western School of Law

James S. McNeill, “Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction,” California Western International Law Journal, Vol. 28, No. 2, 1998, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1316&context=cwilj

The history of court opinions, enforcement policies, and antitrust statutes clarifies the reason behind international mistrust of United States antitrust enforcement: inconsistency.237 One significant result of this confusion is the suspicion of United States antitrust actions by the international community.238 Foreign states take various measures specifically to defeat the effect of United States enforcement, allowing those foreign governments to give their resident trading entities predictability in their United States commercial interactions.239 Allowing avoidance of treble damage awards240 via "claw-back" provisions241 and discovery or judgment blocking242 are just a few examples of how governments have hindered United States antitrust enforcement. At the root of these efforts is resentment of what is perceived as an invasion of sovereignty, namely the United States extending its law to adjudicate foreign commerce disputes affecting foreign interests.243

#### Flexible extraterritorial regulation solves existential risks.

**Kent 16**

Dr. Randolph Kent, Director of the Humanitarian Futures programme at King’s College London, Senior Research Associate of the International Policy Institute, Fellow at The Policy Lab, long-time senior UN official, Joanne Burke, and Amanda Taylor, King’s College London, EXPLORING ALTERNATIVE WAYS OF UNDERSTANDING HUMANITARIAN CRISES AND SOLUTIONS, http://www.humanitarianfutures.org/wp-content/uploads/2017/10/Alternative-Humanitarian-Paradigm-Final-4-July-2016s.pdf

Never before have we been able to **disrupt the fundamental processes of Earth’s ecology**, and never before have we created **social, economic and technological systems** – from **continent-wide industrial agriculture** to the **international financial system** – with today’s **enormous** complexity, **connectedness** and **speed of operation**. Whether the issue is **drug resistant diseases** or **shiploads of migrants** dumped on our shores, our problems **spill across geographical** and intellectual **boundaries**, their complexity often exceeds our wildest imaginations, and they **converge and intertwine** in totally unexpected ways. The **real danger of the 21st century** is ‘**synchronous failure**.’1

Introduction: The Copernican challenge Nicholas Copernicus at the beginning of the 16th Century announced his theory that the earth was not at the centre of the universe, but actually rotated around the sun. This proposition, though resisted initially by the establishment, ultimately formed an alternative basis of knowledge and understanding about our universe that continues today. 1 Presentation by Dr. Thomas Homer-Dixon, of the University of Toronto’s Center for the Study of Peace and Conflict, ‘Synchronous Failure: the Real Danger of the 21st Century’, for the US Congressional bi-partisan study group on ‘Security for a New Generation’, 5 December 2002, US Capital, Washington, DC. The underlying assumptions upon which knowledge and the search for knowledge are based are generally referred to as paradigms. The search for alternative paradigms is intended to improve both understanding and explanations by challenging the assumptions that underpin present conceptual constructs. It is not about improving understanding and explanation by building upon existing assumptions, but rather by proposing alternative assumptions that might provide different frameworks for ordering evidence that leads to knowledge.2 This note comes at a time when there is growing concern that the present humanitarian sector may not be adequate to meet the crises – the disasters and emergencies -- of the present, let alone the future. Directly and indirectly a series of global consultations and meetings, including the World Humanitarian Summit, have been seeking ways to make humanitarian action more relevant to ever growing types, dimensions and dynamics of humanitarian threats. And, while there has been a wide spectrum of suggestions aimed at improving the sector, this spectrum is nevertheless sustained by a traditional set of assumptions that might be described 2 Two key figures in the understanding of paradigms and the assumptions that sustain or challenge them are Thomas Kuhn, The Structure of Scientific Revolutions, University of Chicago Press, 1962 and Imre Lakatos, Proofs and Refutations: The Logic of Mathematical Discovery, Cambridge University Press, 1976. 2 as ‘the Western hegemonic’ paradigm.3 Is there an emerging alternative? This exploration of alternative ways of understanding the contexts and factors which underpin crisis threats and their solutions is closely tied to the Planning from the Future [PFF] project. The PFF is primarily concerned with the loosely defined ‘humanitarian sector’s capacities to deal with ever more complex and uncertain humanitarian crises, or, disasters and emergencies. Towards that end, the PFF partnership, consisting of King’s College London, the Overseas Development Institute and Tufts University, will in the first instance explore the present landscape of the humanitarian sector, how that sector responds to ‘game changers’ that confront it with unanticipated challenges and the extent to which that sector is fit for the future. 4 In that context, if the sector is not fit for the future, plausible solutions may emerge for improving it through institutional change and methodologies that reflect our present understanding of the nature of crisis threats and mitigation. Or, alternatively, the assumptions that are made about crisis threats and appropriate action may stem from a paradigm which by analogue might be Copernican in consequence, and may well lead not only to different understandings about the nature of crises, but also to different approach to solutions. This exploration began with extensive research about the nature of paradigms and the assumptions that underpin humanitarian action. The concepts incorporated in the paper were frequently the result of seven meetings with humanitarian experts, and at the end with a major consultation that brought together all of those who had helped in the past. 3 See, for example, the forthcoming Planning from the Future report (Chapter 1). www.planningfromthefuture.org The result is Exploring alternative ways of understanding humanitarian crises and solutions. The paper is divided into three man sections: Section 1 suggests five assumptions that might serve as guideposts on the journey for alternative perspectives. In Section 2, the three key elements of the emerging paradigm are considered, each with a set of reflections about what will be described as their ‘normal life’ implications. Finally, Section 3 draws specific conclusions about what might be considered as the humanitarian implications that can be drawn from this emerging paradigm. In its totality, the paper links directly into what is called the Synthesis Report, or, Planning from the Future: Humanitarian spectres, a PFF product intended to make futures real for humanitarian practitioners. Exploring alternative ways has been designed to suggest different approaches for understanding the nature and drivers of risk as well as new ways to understand alternative solutions. The Synthesis Report is intended to incorporate these new perspectives into broad but practical approaches to planning and decisionmaking. I Hypotheses guiding the paradigmatic exploration There are five hypotheses that guide this effort to identify the possibility of an emerging alternative humanitarian paradigm: [1] Humanitarian crises are reflections of the ways that societies structure themselves and allocate their resources. They are not aberrant phenomena, divorced from ‘normal life,’ but rather a reflection of it,5 everything 4 See the forthcoming Planning from the Future report (Chapter 2). www.planningfromthefuture.org 5 ‘Normal life’ in this context refers to the fact that disasters and emergencies are an integral 3 from governance and leadership to human security and socio-economic opportunities; 6 [2] Humanitarian crisis drivers, their dimensions and dynamics are directly linked to human progress and related change, including technological advance;7 [3] Except for existential crises, e.g., asteroid impact8 , the types of humanitarian crisis drivers, their dimensions and dynamics, have increased exponentially over the past 200 years, and continue to do so even more intensely. This latest phase of exponential increase is due to a rapidly changing, interconnected and globalised world, one in which technology will continue to act as a major driver of change and determinant of human progress; [4] Increasing extra-terrestrial, or, outer space involvement by humankind is but one dramatic example of highly plausible change in the nature of vulnerability and the perception of what and who is vulnerable. The prospect of existential risk that have potential global impacts are increasing, all in one way or another underscoring the part of environmental abuse and economic and social exploitation. Rather than the assumption that disasters and emergencies foster vulnerability, the ways in which human beings organise their social and economic lives do. Randolph C. Kent, Anatomy of Disaster Relief: The International Network in Action, Pinter Publishers Ltd, London, 1987, p.4ff 6 See the forthcoming Planning from the Future: Humanitarian spectres for specific discussions on governance and human security and human agency. 7 Linked to societal structure and resource allocation is the impact of technological advance, which over the past 200 years has bent the curve of human history – of populations and social development – by almost 90 degrees. See Eric Brynjolfsson and Andrew McAfee, The Second Machine Age: Work, Progress and Prosperity in a Time of Brilliant Technologies, W.W. Norton & Co., New York. 2014, p.6 8 The Cretaceous–Paleogene (K–Pg) extinction event was a mass extinction of some threequarters of plant and animal species on earth increasing speed of global vulnerability9 ; [5] As suggested in #1, above, humanitarian crises are reflections of the ways that societies structure themselves and allocate their resources. This is what was referred to above as the ‘normal life proposition’, and is based upon the dynamics of complex systems. Such systems are open, dynamic, non-linear and in a state of perpetual disequilibrium. This, therefore, suggests that ‘…in many of the pressing issues for our future welfare as well as for the management of our everyday life, [we] will need such a systemic complex system and multidisciplinary approach’10 to be adequately prepared to deal with ever more complex and uncertain threats. II An exploration of paradigmatic assumptions The search for the possibility of an emerging alternative paradigm might begin with the ‘normal life’ proposition that suggests that all societal phenomena, including disasters and emergencies, reflect highly complex that occurred over a geologically short period of time, 66 million years ago 9 The University of Cambridge’s Centre for Study of Existential Risk is but one of a growing number of interdisciplinary research centres focused on the study of human extinction-level risks that may emerge from amongst other things technological advances. Examples include M. Rees, Our Final Century: Will the human race survive the 21st century?; J.F.Richard, High Noon: 20 global problems, 20 years to solve them, New York – Basic Books, 2002, Nick Bostrom, “Existential Risks: Analysing human extinction scenarios and related hazards,” Journal of Evolution and Technology, Vol.9, No.1, 2002 10 D. Sornette, “Dragon-Kings, Black Swans and the Prediction of Crises,’ International Journal of Terraspace Science and Engineering, 2(1): 1-18, p.1, 2009 as quoted in Ben Ramalingam, Aid on the Edge of Chaos: Rethinking International Cooperation in a Complex World, Oxford University Press, 2013, p.138 4 messes, 11 and that such ‘messes’ are not restricted in either space or time. They perpetually evolve. This runs contrary to standard assumptions underlying the term, ‘humanitarian’. That term is principally concerned with systems failures, and reflects a belief that such failures have finite beginnings and ends. An emerging paradigm might be based upon the assumption that humanitarian crises from a whole of society perspective are not bound by clearly defined space and time dimensions. And, emerging from this perspective are three interconnected sets of propositions that form the basis of the proposed alternative humanitarian paradigm: [1] Reflections of normal life – The proposition that humanitarian crises are reflections of normal life is on the one hand generally accepted.12 Yet, on the other, ‘disasters are still predominantly seen as exogenous and unforeseen shocks that affect supposedly normally functioning economic systems and societies.’13 However, what all too often have not been appreciated are the full implications of ‘the normal life’ proposition. In this regard, a more comprehensive societal focus changes 11 In defining the use of the term, ‘messes’, Alpaslan and Mitroff state that problems ‘resist our attempt to confine them and rein them in by reducing them to a single discipline or point of view. For example, different stakeholders rarely have the same definition of the individual problems that constitute a mess and of the entire mess itself. Indeed the fact that different stakeholders have different perceptions of a mess is itself one of the keys defining attributes of messes! As a result “problem negotiation” is one of the most important aspects of managing messes. Before one can “solve” a problem one first has to agree on the nature of the problem. And if agreement is arrived at all, it should be reached only at the end of an intense debate about the “nature” of the problem instead of the all–too-common pressure to get a quick consensus.’ Can M. Alpaslan and Ian I. Mitroff, Swans, Swine and Swindlers: Coping with the growing threat of mega-crises and megamesses, Stanford University Press, Stanford, 2011, pp xx ff. 12 Op cit. #5 See, for example, Randolph C. Kent, Anatomy of Disaster Relief: The the ways that crisis threats are defined and solutions posited. This focus in turn suggests the following: n humanitarian crises consist of complex systems of changing problems that interact with each other. No crisis driver is in itself the sole explanatory factor for a crisis event or its consequences. People ‘are not confronted with problems that are independent of each other, but with dynamic situations that consist of complex systems of changing problems that interact with each other’.14 These are defined as ‘messes’, and this concept is an important starting point for understanding and explaining humanitarian crises. The need to understand and prepare for humanitarian threats and actions in terms of complex systems and interacting problems will become increasingly evident as such ‘messes’ reflect ever more fluid manifestations of vulnerability. Accepting the concept of ‘messes’ should narrow the perceived bifurcation between so-called natural disasters and man-made emergencies.15 And, International Network in Action, Pinter Publishers Ltd, London, 1987, p.4ff 13 Allan Lavell and Andrew Maskrey, The Future of Disaster Risk Management: An Ongoing Discussion 14 Russell L. Ackoff, Re-creating the Corporation, Oxford University Press, New York, 1999, p.324 15 The definition of ‘emergency’ within a humanitarian context has various interpretations. Quarantelli sees ‘emergency’ as one of a threshold of events, each depending upon resource requirements, from accidents to emergencies to disasters and finally to catastrophes. The OCHA orientation handbook sees emergencies as ‘a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency.’ The IFRC views a complex emergency ‘as a reflection of disasters [which] can result from several different hazards or, 5 yet, while there are perceptible moves towards recognising the interconnectedness between certain types of humanitarian crises (e.g., natural hazards and technological failures), there continues to be resistance in the humanitarian world to accepting the interdependent nature of most if not all crisis events, including natural events and conflict. In that sense, ‘some of the greatest mistakes are made when dealing with a complex mess, by not seeing its dimensions in their entirety, carving off a part, and dealing with this part as if it were a complicated problem, and then solving it as if it were a simple puzzle, all the while ignoring the linkages and other connections to other dimensions of the mess.’16 This tendency to accept if not reinforce the dichotomy and to ignore basic causation and solutions can also be perceived as a convenience. Not unlike the reactions of the establishment in the time of Copernicus, politicians, policymakers and planners resist alternative perspectives because it goes against the inherent ‘short-termism’ of most institutions and their incremental approach to problem solving.17 n humanitarian response is underpinned by contending and not universal principles, the former reflecting cultural, local more often, to a complex combination of both natural and man-made causes and different causes of vulnerability. Food insecurity, epidemics, conflicts and displaced populations are examples.’ 16 Ben Ramalingam and H. Jones with T. Reba and J. Young, ‘Exploring the Science of Complexity: Ideas and Implications for Development and Humanitarian Efforts’, Working Paper 285, ODI, London, 2008, p.11 17 As described by one analyst, in crises, ‘political stakes logically increase….Disasters overload political systems, catastrophes can bring down regimes.’ Richard Stuart Olson, ‘Towards a Politics of Disaster: Losses, Values, Agendas and Blame, International Journal of Mass Emergencies, August 2000, Volume 18 #2. and regional perspectives and values. One prevailing assumption underpinning the predominant humanitarian paradigm is that there is an inherent human motivation that explains why human beings respond to the plight of other human beings, namely, an overarching moral sense of responsibility, benevolence and empathy that is universal. This abiding motivation in turn justifies what are regarded as universal humanitarian principles. Morality as motivation and universal principles, however, ignore the relationship between crises and the ways that they test and reinforce basic values – religious, spiritual, philosophical. There are profound differences in the ways that societies explain and interpret their respective worlds.18 Increasingly, ‘we will have to deal with “contending” and not “universal principles,” suggests the renowned anthropologist, Arjun Appadurai. In a world in which different power structures will emerge, with their concomitant local and regional perspectives and values, the presumption of common principles will be less and less relevant. More and more, perceptions of self-interest and possible mutual self-interest will be at the heart of humanitarian action.19 18 ‘Thank you for explaining your principles,’ said a member of a Middle Eastern group that had come to hear an ICRC delegate’s explanation of the organisation’s humanitarian role. ‘However, we, too, have our own principles,’ he continued, ‘Ours begins with justice. To what extent do your principles incorporate the concept of justice?’ In so many ways, the avowedly universal principles presented by humanitarians reflect a Western hegemony that can be traced to the age of discovery in the 15th and 16th centuries, to the age of industrialisation, colonialism and economic dominance of the 18th and 19th centuries – past Solferino – and clearly into the 20th century in the post 1945 world. 19 Students of humanitarian affairs will have ‘to deal with “tactical humanism” – a humanism that is prepared to see universals as 6 n humanitarian crises always have transformative consequences that go well beyond the geopolitical and socio-economic boundaries of the event, itself. As in physics, so, too, in the nature of ‘normal life’, dynamics are not constrained by fixed time and space. Their effects continue in various forms over time and across spatial boundaries. While these dynamics are inherent in all matter, they are becoming increasingly evident in a world that is overtly more interconnected, through trade and through movements of capital, people and information. ‘What we call “flows”’.20

The ‘normal life’ dimension of humanitarian crises means that the drivers of such crises are part of systems that are in constant flux, driven by a ‘persistent need for energy’.21 They are in a state of ‘non-equilibrium’. In that sense, as suggested below in the technological paradox, humanitarian crises also reflect the ever-fluctuating boundaries of ‘normal life’, and those boundaries are moving in myriad directions, including beyond the earth’s atmosphere. Hence, another assumption underpinning the alternative paradigm is that a growing number of crisis drivers and ways to mitigate them will become extraterrestrial. **Extraterritoriality** will emerge as a **major factor** in what we continue to call ‘humanitarian response’, and will fundamentally change many aspects of what is a crisis driver and who and what is a ‘humanitarian actor’.22

[Footnote 22] An example is ‘asteroid impact avoidance’ where technology enables human intervention to divert asteroids. Hence, the ‘humanitarian actor’ might well be someone who has the capacity to **prepare for** and **prevent** potentially **existential threats**. This could well be the humanitarian actor of the future. [End Footnote 22]

### CP Private Action

Public Enforcement Counterplan---

#### Text: The United States federal government should allow relevant agencies to sue to enjoin anticompetitive business practices in accordance with a comity balancing test and recover single damages.

#### Counterplan avoids private enforcement---private suits are an inextricable part of antitrust liability---public enforcement is sufficient

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.3 The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.4 If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.5 In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.6 Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs[’] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.7 But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.8 Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.9

The Clayton Act’s treble damages provision is not without its critics.10 Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.11 Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in Kristian v Comcast Corp12 that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.13

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.14 Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.15 If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.16

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.17 Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests18 as well as answers to questions through written interrogatories.19 Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.20 Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.21

Armed with such easy access to a defendant’s or non-party’s documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on ‘fishing expeditions’ to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs’ attorneys demand 33 per cent of the recovery as the fee.22 The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs’ attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.23 Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.24 In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.25 The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is “so numerous that joinder of all members is impracticable”, that there are “questions of law or fact common to the class”, that the “claims or defenses of the representative parties are typical of the claims or defenses of the class” and that the proposed class representatives “will fairly and adequately protect the interests of the class”.26 In addition, in most antitrust cases, the court must determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”27 Under rule 23, proposed class members are afforded the opportunity to decline to join or to ‘opt out’ of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs’ lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In Illinois Brick Co v Illinois,28 the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were ‘passed through’ from the defendant down the chain of distribution in the form of overcharges. In direct response to Illinois Brick, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.29 In these ‘Illinois Brick repealer’ states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In Conwood v US Tobacco, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.30

The jury awarded plaintiffs approximately US$350 million in damages, which, when trebled, resulted in an award that exceeded US$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.31

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in In re NASDAQ Market-Makers Antitrust Litigation, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US$1.027 billion.34 And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in In re Visa Check/Mastermoney Antitrust Litigation, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US$2 billion. Two days later, defendant MasterCard settled for approximately US$1 billion. The combined US$3.05 billion settlement has been described as “the largest antitrust settlement ever”.35 Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,36 plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of “total underdevelopment” due to various obstacles in bringing such lawsuits.37

To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.38 Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.39 In Courage v Crehan, the ECJ held that these rights include the right to damages,40 and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.41 Moreover, with the adoption of Regulation 1/2003,42 the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.43 More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a USstyle system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.44 For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.45 Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.46 The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.47 To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.48 On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).49

#### Expanding liability to private plaintiffs is bad---turns case and undermines solvency

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

### CP States

#### The 50 states and all relevant subnational entities should establish a balancing test that expands the extraterritorial scope of its antitrust laws.

#### State courts enforce comity principals—precedent for uniformity in this instance

Dodge, Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law, ‘15

(William S., “INTERNATIONAL COMITY IN AMERICAN LAW,” Columbia Law Review, Vol. 115, No. 8, <https://columbialawreview.org/wp-content/uploads/2016/03/Dodge-William-S..pdf>)

Comity served not just as the basis for enforcing foreign laws in American courts, but also as the basis for recognizing foreign judgments,99 most famously in Hilton v. Guyot. 100 Justice Gray began by restating the traditional rule of strictly territorial sovereignty: “No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.” 101 Thus, the effect not just of an executive order or legislative act but also of a judicial decree “depends upon what our greatest jurists have been content to call ‘the comity of nations.’” 102 Like Huber and Story, Gray noted the territorial sovereign’s discretion not to enforce foreign law against its own interests. Comity was “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” 103 Despite its slippery definition of comity,104 Hilton articulated clear rules for the enforcement of foreign judgments in the United States:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . . 105

These rules were generally followed by state courts, and have been codified in two uniform state acts that govern the enforcement of most foreign judgments in the United States today.106

### DA FTC

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Declining amount of health organizations collapses rural healthcare

Alemian 16

David Alemian, Vice President of Capital Crest Financial Group, Rural Healthcare Is a Matter of National Security, NOVEMBER 08, 2016, <http://www.mdmag.com/physicians-money-digest/contributor/david-alemian-/2016/11/rural-healthcare-is-a-matter-of-national-security>

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why:

In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country.

What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### Nuclear war

FDI 12, Future Directions International, a Research institute providing strategic analysis of Australia’s global interests; citing Lindsay Falvery, PhD in Agricultural Science and former Professor at the University of Melbourne’s Institute of Land and Environment, “Food and Water Insecurity: International Conflict Triggers & Potential Conflict Points,” <http://www.futuredirections.org.au/workshop-papers/537-international-conflict-triggers-and-potential-conflict-points-resulting-from-food-and-water-insecurity.html>

There is a growing appreciation that the conflicts in the next century will most likely be fought over a lack of resources. Yet, in a sense, this is not new. Researchers point to the French and Russian revolutions as conflicts induced by a lack of food. More recently, Germany’s World War Two efforts are said to have been inspired, at least in part, by its perceived need to gain access to more food. Yet the general sense among those that attended FDI’s recent workshops, was that the scale of the problem in the future could be significantly greater as a result of population pressures, changing weather, urbanisation, migration, loss of arable land and other farm inputs, and increased affluence in the developing world. In his book, Small Farmers Secure Food, Lindsay Falvey, a participant in FDI’s March 2012 workshop on the issue of food and conflict, clearly expresses the problem and why countries across the globe are starting to take note. . He writes (p.36), “…if people are hungry, especially in cities, the state is not stable – riots, violence, breakdown of law and order and migration result.” “Hunger feeds anarchy.” This view is also shared by Julian Cribb, who in his book, The Coming Famine, writes that if “large regions of the world run short of food, land or water in the decades that lie ahead, then wholesale, bloody wars are liable to follow.” He continues: “An increasingly credible scenario for World War 3 is not so much a confrontation of super powers and their allies, as a festering, self-perpetuating chain of resource conflicts.” He also says: “The wars of the 21st Century are less likely to be global conflicts with sharply defined sides and huge armies, than a scrappy mass of failed states, rebellions, civil strife, insurgencies, terrorism and genocides, sparked by bloody competition over dwindling resources.” As another workshop participant put it, people do not go to war to kill; they go to war over resources, either to protect or to gain the resources for themselves. Another observed that hunger results in passivity not conflict. Conflict is over resources, not because people are going hungry. A study by the [IPRI] International Peace Research Institute indicates that where food security is an issue, it is more likely to result in some form of conflict. Darfur, Rwanda, Eritrea and the Balkans experienced such wars. Governments, especially in developed countries, are increasingly aware of this phenomenon. The UK Ministry of Defence, the CIA, the [CSIS] US Center for Strategic and International Studies and the [OPRI] Oslo Peace Research Institute, all identify famine as a potential trigger for conflicts and possibly even nuclear war.

### DA Innovation

#### There’s a wave of M&A now – companies doubt rule changes will affect them now

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

#### Expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

#### Failure to beat China in tech incentivizes escalatory nuclear postures that make extinction inevitable

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

### Cartels Adv

#### Cartels are deterred – most recent evidence prices in aff arguments and concludes that cartels are on the decline.

Verbeke & Buts 08-17 – Professor of International Business and Strategy, McCaig Chair in Management, University of Calgary; Professor at the department of applied economics of the Vrije Universiteit Brussel

Alain Verbeke, Caroline Buts, “The Not So Brilliant Future of International Cartels,” Management and Organization Review, Cambridge University Press, August 2021, https://www.cambridge.org/core/journals/management-and-organization-review/article/not-so-brilliant-future-of-international-cartels/363CC718A5FD54F8BB390B9AB22150B7

A NOT SO BRILLIANT FUTURE OF INTERNATIONAL CARTELS?

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

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

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

Third, cartel investigations have also become more sophisticated. Leniency policies – providing immunity from fines for the first player who admits to the existence of a cartel and discloses information on its functioning – are on the rise. This powerful tool serves both detection and deterrence purposes in the realm of anticompetitive behavior (Margrethe & Halvorsen, 2020; Marvão & Spagnolo, 2018; Miller, 2009). It incentivizes cartel members to become whistle blowers. Companies will be less likely to join a cartel if they know that its members may be enticed to disclose cartel operations, (Brenner, 2009; Vanhaverbeke & Buts, 2020).

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

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

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

#### AND, the aff can’t solve – simply increasing the likelihood of penalization cannot establish deterrence – every empiric goes neg.

Violante 17 – Bachelor of Criminology (Florida State University), Juris Doctor (American University, Washington College of Law) Attorney at Nelson, Bryan, and Jones

Keith Violante, “Making Deal with the Devil: Are Current Antitrust Sanctions Deterring Cartel Behaviour,” International Trade and Business Law Review, Vol. 20, 2017, HeinOnline

There is no indication that the drastic increase in criminal and civil penalties under the ACPERA has caused a significant decline in antitrust violations.92 Civil fines are unlikely to effectively deter antitrust violations committed by an individual when the corporation is able to completely internalise the entire fine imposed against the business.93

According to a recent study, average antitrust conspiracies last six years.94 This study suggests that these conspiracies persist for so long because price-fixing is more profitable than was previously thought,95 which in turn suggests the need for greater sanctions. Put simply, this study argues that the decision to commit antitrust violations is driven by a rational cost/benefit analysis. Under this theory, a business will continue to commit antitrust violations so long as it remains profitable.

Critics of this argument suggest that sanctions exist that can prevent antitrust violations.96 Judge Richard Posner proposed that price-fixing is ultimately punished exclusively through corporate fines, and 'only when a company is unable to pay an optimal fine should imprisonment be imposed as a last resort and only if the individuals are unable to pay the fine'. Other practitioners argue that criminalisation of price-fixing offences would be a better deterrence. One argument suggests the 'publicity about severe sentences for price fixing may help educate other corporate executives about the true individual and corporate legal risks of being caught while also contributing to the effectiveness and cost of corporate antitrust compliance programs'.98

However, civil fines, or at least the implementation of them, do not seem to adequately deter antitrust violations. The fluctuation of a corporation's stock price after a firm is indicted for committing an antitrust violation also suggests civil fines provide an inadequate deterrence.99 A well documented empirical regularity is that share values in indicted firms initially fall significantly but the stock price of an overwhelming majority of indicted firms returns to preindictment levels within one year.100 These results are consistent with firms indicted between 1962 and 2000.101 Given the substantially greater corporate fines that were imposed during the latter half of that period, the consistency of the stock price recovery across that time suggests increased sanctions do not significantly deter antitrust violations.102

#### A number of issues make deterrence structurally impossible in antitrust – even after altering what is considered anticompetitive, effective enforcement is impossible.

Baer et al. 20 – Visiting fellow in governance studies at The Brookings Institution, former assistant attorney general of the Antitrust Division, former acting associate attorney general of the U.S. Department of Justice, former director of the Bureau of Competition at the Federal Trade Commission

Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro, Tim Wu, “Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress,” Washington Center for Equitable Growth, November 2020, https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/

Antitrust enforcement faces a serious deterrence problem, if not a crisis. Deterrence is central to most civil and criminal law enforcement programs because catching every lawbreaker is either implausible or would require an immense enforcement apparatus. The antitrust laws, by their very nature, will always lack some of the deterrent clarity characteristics of other legal regimes.30 Yet there is reason to fear we have reached an extreme. Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.31

Antitrust enforcement’s current reactive posture has contributed to this problem. Enforcers typically respond to cases and complaints that come before them.32 Reactive enforcement works well when anticompetitive conduct is rare and is the exception across the U.S. economy.33

But reactive enforcement is unlikely to address wide-ranging competition problems, and may even exacerbate them, when it spreads limited resources broadly, making it difficult to tackle major competitive problems when powerful interests will expend substantial resources to defend their actions. A reactive approach also may largely accept existing legal precedents and try to operate within that reality. The combination can create a ratchet: Court decisions that limit enforcement tend to circumscribe later enforcement. There are no countervailing forces to convince courts to develop rules based on sound economics that will strengthen enforcement.

#### Squo solves supply chain risks

**Suzuki 21** – Visiting fellow with the Japan Chair at the Center for Strategic and International Studies

Hiroyuki Suzuki, “Building Resilient Global Supply Chains: The Geopolitics of the Indo-Pacific Region,” CSIS, February 2021, https://www.csis.org/analysis/building-resilient-global-supply-chains-geopolitics-indo-pacific-region

Covid-19 Has Accelerated Supply Chain Restructuring

During the era of globalization over the last two decades, companies of all sizes have been building domestic and international supply chains that prioritize efficiency. However, rising labor costs in emerging economies, including China, and growing geopolitical uncertainty due to U.S.-China strategic rivalry, including the strengthening of protectionist policies in the United States, forced a reassessment of global business models—such as multinational corporations announcing plans to relocate their manufacturing operations to Vietnam and Mexico in 2018–19. The Covid-19 pandemic has greatly accelerated this trend and reaffirmed the importance of protecting citizens’ livelihoods by strengthening supply chains. In particular, the impact on essential commodities such as food and medicines and on social infrastructure, coupled with political tensions, provided an opportunity to promote policies of homeland security in many countries.

In response to an increasingly complex global economic environment, global corporations are taking the following measures to reduce supply chain risk:

▪ Reshoring

In short, this is a strategy to redirect manufacturing operations back to the home market. This trend has been evident since 2019, particularly in the United States due to tariff increases in the wake of the U.S.-China trade conflict that have caused the U.S. manufacturing import ratio (imports as a percentage of total domestic manufacturing output) to fall for the first time in almost a decade. In addition, the Covid-19 pandemic has increased awareness in the United States of the vulnerability of supply chains for critical items such as health care products and food, further encouraging policies that allow companies to repatriate their supply chains back to their home countries. However, in the case of developed countries, reshoring entire supply chains is not practical due to additional labor and overhead costs, so it is important to focus on strategic sectors for reshoring from a national security and industrial policy viewpoint.

#### No grid impact

Clark 14

Meagan Clark, Aging US Power Grid Blacks Out More Than Any Other Developed Nation, 2014, <http://www.ibtimes.com/aging-us-power-grid-blacks-out-more-any-other-developed-nation-1631086>

The United States endures more blackouts than any other developed nation as the number of U.S. power outages lasting more than an hour have increased steadily for the past decade, according to federal databases at the Department of Energy (DOE) and the North American Electric Reliability Corp. (NERC). According to federal data, the U.S. electric grid loses power 285 percent more often than in 1984, when the data collection effort on blackouts began. That’s costing American businesses as much as $150 billion per year, the DOE reported, with weather-related disruptions costing the most per event. “Each one of these [blackouts] costs tens of hundreds of millions, up to billions, of dollars in economic losses per event,” said Massoud Amin, director of the Technological Leadership Institute at the University of Minnesota, who has analyzed U.S. power grid data since it became available in the '80s. “The root causes" of the increasing number of blackouts are aging infrastructure and a lack of investment and clear policy to modernize the grid. The situation is worsened by gaps in the policies of federal and local commissioners. And now there are new risks to the grid from terrorism and climate change's extreme impacts, Amin said. Also, demand for electricity has grown 10 percent over the last decade, even though there are more energy-efficient products and buildings than ever. And as Americans rely increasingly on digital devices, summers get hotter (particularly in the southern regions of the U.S.) and seasonal demand for air conditioning grows, the problem is only getting worse. While customers in Japan lose power for an average 4 minutes per year, customers in the American upper Midwest lose power for an average 92 minutes per year, and customers in the upper Northwest lose power for an average 214 minutes per year, according to Amin’s analysis. Those estimates exclude extreme events like severe storms and fires, though those have been increasing the past two decades. “We used to have two to five major weather events per year [that knocked out power], from the ‘50s to the ‘80s,” Amin said. “Between 2008 and 2012, major outages caused by weather increased to 70 to 130 outages per year. Weather used to account for about 17 to 21 percent of all root causes. Now, in the last five years, it’s accounting for 68 to 73 percent of all major outages.” The power grid, which could be considered the largest machine on earth, was built after World War II from designs dating back to Thomas Edison, using technology that primarily dates back to the '60s and '70s. Its 7,000 power plants are connected by power lines that combined total more than 5 million miles, all managed by 3,300 utilities serving 150 million customers, according to industry group Edison Electric Institute.

### Indigenous Development Adv

#### Thesis of adv is wrong—US antitrust is isolated

Waller, John Paul Stevens Chair in Competition Law, Loyola University School of Law, ‘18

(Spencer W., “The Omega Man or The Isolation of U.S. Antitrust Law,” December 4, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295988>)

Some of the enduring and increasing isolation of United States antitrust in the world community also is a function of ideology. As Professor Eleanor Fox has noted:

In the matter of single-firm conduct, the U.S., especially as recited in the Trinko case, is laissez faire; it makes assumptions that the EU does not make. The default presumptions are very powerful. For example: if you are acting as a single firm (not in conspiracy with competitors), you’re probably going to do what’s best for the market if government leaves you alone. That is because (the assumptions go) markets work well and will punish you if you try to harm competition.415

Taking the U.S. agencies and courts at their word, the sole or principal objective of U.S. antitrust is the promotion of consumer welfare defined in a narrow price theory fashion.416 While many commentators dispute whether this is true historically or desirable normatively, this is the gospel that the U.S. agencies preach in their dealings with other jurisdictions.

The United States has pursued a policy of promoting its view of best practices to other jurisdictions in a variety of fora. First, the United States worked to oppose the inclusion of competition rules in the WTO negotiations because of concern that binding rules would be adopted that differed from U.S. practice and interests.417 Instead, the United States promoted the creation of the International Competition Network (ICN), a virtual organization that would be voluntary, consensus driven and focused on development of best practices.418 The United States has worked through both government agency personnel and non-governmental advisers to promote its view of best practices to varying degrees of success since the creation of the ICN over both Republican and Democratic administrations.

From this perspective, the ICN report card is mixed. As noted throughout this paper, the ICN often has documented the diversity of competition law practice rather than promote the substantive convergence of competition hoped for by U.S. interests. The ICN has been very valuable as a teaching tool and as a forum for the sharing of information and practice among diverse jurisdictions but it has not resulted in most jurisdictions becoming a mirror for the United States. More often than not, other jurisdictions enforce their own competition laws knowledgeably and effectively, but do not do so by adopting the existing U.S. approach.

A similar pattern existing in the other U.S. interactions in international organizations, regional trade arrangements, and bilateral relationships in the competition sphere. This is the case at the OECD where most of the members follow the EU, rather than the US, model for competition matters. 419 It is true at UNCTAD which is dedicated to the interests of smaller and developing jurisdictions.420 It is similarly the case at The World Bank which views competition law as part of a developmental agenda.421

A cursory review of the work product of important organizations such as the ICN and the OECD show the diversity of opinion on a plethora of key competition issues. Two surveys help illustrate the extent of the divergence. The first survey relates to the goals of competition law itself. That survey notes that a majority of the respondents identified the promotion of consumer welfare as only one of several goals for competition law. 422

A second ICN survey on unilateral conduct provisions similarly shows the wide gulf between U.S. practice and the rest of the world. The survey begins with a list of ten different goals for single firm conduct provisions which include:

1) Ensuring an effective competitive process;

2) Promoting consumer welfare;

3) Maximizing efficiency;

4) Ensuring economic freedom;

5) Ensuring a level playing field for small and medium size enterprises;

6) Promoting fairness and equality;

7) Promoting consumer choice;

8) Achieving market integration;

9) Facilitating privatization and market liberalization; and

10) Promoting competetiveness in international markets.423

#### adaptation solves the impact of SDGs now

Matt Ridley ’14, member of the British House of Lords, member of Science and Technology select committee, fellow of the Royal Society of Literature and of the Academy of Medical Sciences, foreign honorary member of the American Academy of Arts and Sciences, “We have a new climate change consensus — and it's good news everyone,” *The Spectator*, 4/5/14, <http://www.spectator.co.uk/2014/04/armageddon-averted/>

That has now changed. The received wisdom on global warming, published by the Intergovernmental Panel on Climate Change, was updated this week. The newspapers were, as always, full of stories about scientists being even more certain of environmental Armageddon. But the document itself revealed a far more striking story: it emphasised, again and again, the need to adapt to climate change. Even in the main text of the press release that accompanied the report, the word ‘adaptation’ occurred ten times, the word ‘mitigation’ not at all.

The distinction is crucial. So far, the debate has followed a certain bovine logic: that global warming is happening, so we need to slow it down by hugely expensive decarbonisation strategies — green taxes, wind farms. And what good will this do? Is it possible to stop global warming in its tracks? Or would all these green policies be the equivalent of trying to blow away a hurricane? This question — just how much can be achieved by mitigation — is one not often addressed.

There is an alternative: accepting that the planet is warming, and seeing if we can adjust accordingly. Adaptation means investing in flood defences, so that airports such as Schiphol can continue to operate below existing (and future) sea level, and air conditioning, so that cities such as Houston and Singapore can continue to grow despite existing (and future) high temperatures. It means plant breeding, so that maize can be grown in a greater range of existing (and future) climates, better infrastructure, so that Mexico or India can survive existing (and future) cyclones, more world trade, so that Ethiopia can get grain from Australia during existing (and future) droughts.

Owen Paterson, the Secretary of State for the Environment, in repeatedly emphasising the need to adapt to climate change in this way, has been something of a lone voice in the government. But he can now count on the support of the mighty IPCC, a United Nations body that employs hundreds of scientists to put together the scientific equivalent of a bible on the topic every six years or so. Whereas the last report had two pages on adaptation, this one has four chapters.

Professor Chris Field is the chairman of Working Group 2 of the IPCC, the part devoted to the effects of climate change rather than the cause. ‘The really big breakthrough in this report,’ he says, ‘is the new idea of thinking about managing climate change.’ His co-chair Vicente Barros adds: ‘Investments in better preparation can pay dividends both for the present and for the future … adaptation can play a key role in decreasing these risks’. After so many years, the penny is beginning to drop.

In his book An Appeal to Reason, Lawson devoted a chapter to the importance of adaptation, in which he pointed out that the last IPCC report in 2007 specifically assumed that humans would not adapt. ‘Possible impacts,’ the report said, ‘do not take into account any changes or developments in adaptive capacity.’ That is to say, if the world gets warmer, sea levels rise and rainfall patterns change, farmers, developers and consumers will do absolutely nothing to change their habits over the course of an entire century. It is a ludicrous assumption.

But this assumption was central, Lawson pointed out, to the estimated future cost of climate change the IPCC reported. A notorious example was the report’s conclusion that, ‘assuming no adaptation’, crop yields might fall by 70 per cent by the end of the century — a conclusion based, a footnote revealed, on a single study of peanut farming in one part of India.

Lawson pointed out that adaptation had six obvious benefits as a strategy, which mitigation did not share. It required no international treaty, but would work if adopted unilaterally; it could be applied locally; it would produce results quickly; it could capture any benefits of warming while avoiding risks; it addressed existing problems that were merely exacerbated by warming; and it would bring benefits even if global warming proves to have been exaggerated.

Ask yourself, if you were a resident of the Somerset Levels, whether you would prefer a government policy of adapting to anything the weather might throw at you, whether it was exacerbated by climate change or not, or spending nearly £50 billion (by 2020) on low-carbon technologies that might in a few decades’ time, if adopted by the whole world, reduce the exacerbation of floods, but not the floods themselves.

It is remarkable how far this latest report moves towards Lawson’s position. Professor Field, who seems to be an eminently sensible chap, clearly strove to emphasise adaptation, if only because the chance of an international agreement on emissions looks ever less likely. If you go through the report chapter by chapter (not that many people seem to have bothered), amid the usual warnings of potential danger, there are many sensible, if jargon-filled, discussions of exactly the points Lawson made.

Chapter 17 concedes that ‘adaptation strategies … can yield welfare benefits even in the event of a constant climate, such as more efficient use of water and more robust crop varieties’. Chapter 20 even acknowledges that ‘in some cases mitigation may impede adaptation (e.g., reduced energy availability in countries with growing populations)’. A crucial point, this: that preventing the poor from getting access to cheap electricity from coal might make them more vulnerable to climate change. So green policies may compound the problem they seek to solve.

In short, there is a great deal in this report to like. It has, moreover, toned down the alarm considerably. Even the New Scientist magazine has noticed that the report ‘backs off from some of the predictions made in the previous report’ and despite the urgings of Ed Davey to sex up the summary during last week’s meeting in Yokohama, New Scientist noticed that ‘the report has even watered down many of the more confident predictions that appeared in the leaked drafts’.

For instance, references to ‘hundreds of millions’ of people being affected by rising sea levels were removed from the summary, as were statements about the impact of warmer temperatures on crops. The report bravely admits that invasive alien species are a far greater threat to species extinction than climate change itself. Even coral reefs, the report admits, are threatened mostly by pollution and overfishing, which might be exacerbated at the margin by climate change. So why don’t we have intergovernmental panels on invasive species and overfishing?

As these examples illustrate, perhaps most encouraging of all, the report firmly states that the impact of climate change will be small relative to other things that happen during this century: ‘For most economic sectors … changes in population, age structure, income, technology, relative prices, lifestyle, regulation and governance will be large relative to the impacts of climate change.’ So yes, the world is heating up. But in many ways, it will be a better world.

The report puts the global aggregate economic damage from climate change at less than 2.5 per cent of income by the latter years of the century. This is a far lower number than Lord Stern arrived at in his notorious report of 2006, and this is taking the bleak view that there will be a further 2.5˚C rise from recent levels. This is the highest of nine loss estimates; the average is only 1.1 per cent.

And the IPCC is projecting two thirds more warming per increment of carbon dioxide than the best observationally based studies now suggest, so the warming the IPCC outlines is not even likely with the highest emissions assumption.

In other words, even if you pile pessimism upon pessimism, assuming relatively little decarbonisation, much global enrichment and higher climate ‘sensitivity’ than now looks plausible — leading to more rapid climate change — you still, on the worst estimate, hurt the world economy in a century by only about as much as it grows every year or two. Rather than inflict an awful economic toll, global warming would make our very rich descendants — who are likely to be maybe eight or nine times as rich as we are today, on global average — a bit less rich.

To avoid this little harm, we could go for adaptation — let poor people get as rich as possible and use their income to protect themselves and their natural surroundings against floods, storms, potential food shortages and loss of habitat. Or we could go for mitigation, getting the entire world to agree to give up the fossil fuels that provide us with 85 per cent of our energy. Or we could try both, which is what the IPCC now recommends.

But the one truly bonkers thing to do would be to go unilaterally into a policy of subsidising the rich to install technologies that drive up the cost of energy, desecrate the countryside, kill golden eagles, clear-cut swamp forests in North Carolina, turn grain into motor fuel, so driving up the price of food and killing people, and prevent poor people in Africa getting loans to build coal-fired, cheap power stations instead of inhaling smoke from wood fires cut from virgin forests.

All this we are doing in this country, with almost no prospect of cutting carbon emissions enough to affect the climate. That’s the very opposite of adaptation — preventing the economic growth that would enable us to adapt while failing to prevent any climate change.

The report is far from ideal (don’t worry, Professor Field, I know that endorsement from the likes of me would kill your career). As Rupert Darwall, author of The Age of Global Warming, has pointed out, it systematically ignores the benefits of climate change and makes the unsupported claim that crop yields have been negatively affected by climate change, its only evidence being recent spikes in crop prices — a big cause of which was climate policy, not climate change, in the shape of biofuels programmes that diverted 5 per cent of the world’s grain crop into fuel.

Did you gather from the press that the report warns of rising deaths from storms and droughts, falling crop yields, spreading diseases, and all the usual litany? Did you conclude from this that deaths from storms will increase, crop yields will fall, and diseases will kill more people? Oh, how naive can you get!

No, no, no — what they mean is that the continuing fall in deaths from storms, floods and disease may not be as steep as it would be without climate change, that the continuing rise in crop yields may not be as fast as it would be without climate change, and that the continuing retreat of malaria might not be as rapid as it would be without climate change. In other words, the world will probably heat up — but it’s not going to end. It’s going to be healthier and wealthier than ever before, just a tad less wealthy than it might otherwise have been. Assuming we do not adapt, that is.

#### Inflation dooms Brazilian Economic Recovery

Rane 21 – Stratfor develops comprehensive, independent and unbiased analyses by examining global events through the lens of geopolitics and our proprietary methodology.\

April 5 2021, “Is Brazil Barreling Toward an All-Out Economic Crisis?” Stratfor, https://worldview.stratfor.com/article/brazil-barreling-toward-all-out-economic-crisis

The Brazilian government is unlikely to implement fiscal reforms needed to emerge from its pandemic-induced recession ahead of the 2022 presidential election. This will, in turn, damage investor confidence and foreign investment inflows, which could delay Brazil’s economic recovery, worsen its fiscal problems and reduce trade with other nearby economies. Brazil’s politicians [have used costly welfare programs to keep the economy and their approval ratings afloat](https://worldview.stratfor.com/article/what-bolsonaros-new-spending-push-means-brazil-s-fiscal-future) during the pandemic, and are now adverse to putting a cap on public sector spending. Brazil’s fiscal sustainability is at risk due to rising inflation, high public debt and a recession triggered by the COVID-19 pandemic.

Before COVID-19, Brazil’s GDP was growing at 1.4% in 2019. But in 2020, the country’s GDP contracted by 4.7%, putting Brazil into a recession.

Annual consumer inflation in Brazil hit a four-year high of 5.2%

MARKED

in February, up from 4.6% in January and a steep rise from 1.9% in May 2020. According to estimates from Brazil’s central bank, inflation will likely rise to 7% by mid-2021. To combat inflation, Brazil’s central bank raised interest rates on March 17 by 75 basis points to 2.75% and has indicated that it will seek to further raise interest rates in May 2021.

In April 2020, the government implemented a costly welfare program, paid for by the accumulation of public debt. This welfare program allowed President Jair Bolsonaro to maintain high approval ratings (40%) until the program was terminated in December.

Chart

Description automatically generated

Brazil will probably not implement structural economic reforms due to domestic political pressures brought on by the 2022 presidential election. Though over a year away, Brazilian politicians are already preparing for the country’s 2022 presidential election. Former President Luiz Inacio Lula da Silva recently had corruption charges dropped, allowing him to run as a presidential challenger. Bolsonaro’s declining approval ratings will probably push him to increase fiscal spending on popular welfare programs such as cash transfers to the poor and subsidizing the price of petroleum. Additionally, should da Silva win in 2022, he would almost certainly increase spending to implement the populist policies that he has championed.

On Feb. 19, Bolsonaro announced his intent to replace the CEO of state-run oil company Petrobras with the country’s former defense minister, Joaquim Silva e Luna, following a weeks-long oil price dispute with the current CEO, Roberto Castello Branco. The swap will likely enable Bolsonaro to fix the domestic price of oil in the hopes of appeasing the trucker unions that have recently staged protests against rising diesel prices.

The government is currently pushing to send emergency stipends totaling almost $7.96 billion, which will see payouts until June 2021. This latest round of fiscal spending is not subject to the government’s spending cap, meaning that Congress may supersede budget limits.

Chart, line chart

Description automatically generated

[Failure to introduce fiscal reforms](https://worldview.stratfor.com/article/brazil-economic-overhaul-shelved-now-bolsonaro) could result in Brazil missing the opportunity to attract new waves of foreign direct investment (FDI) when the pandemic starts to subside, depriving the economy of one of its main growth drivers. 3.8% of Brazil’s GDP in 2019 came from FDI inflows, as compared with the 1.8% global average. As global economic activity recovers in the second half of 2021, investors that postponed their decisions because of the global recession are likely to drive a wave of new investment, which Brazil may miss out on due to its domestic political and economic situation. The country’s ballooning public sector debt, high fiscal deficit and political uncertainty could undermine investor confidence.

FDI flows into Brazil were roughly halved in the first half of 2020 to $18 billion, seeing a moderate recovery in the second half of the year due to asset sales and the rollout of an infrastructure program.

The Brazilian government has not taken any substantial measures to reduce public debt. In 2020, Congress was able to circumvent a constitutional spending cap, which limits public spending growth to the previous year’s rate of inflation, by using a special allowance for “emergency circumstances.” As 2021 shapes up to be another challenging year for Brazil, politicians are likely to attempt to increase public spending again.

Brazil’s fiscal policies have resulted in credit rating agencies labeling the country’s debt as junk bonds. S&P Global Ratings and Fitch Ratings have downgraded the country’s sovereign credit rating to a BB-, citing high government debt levels as the main factor in both of their decisions.

Recent political interference in Brazil’s energy sector also risks deterring investment in projects that make up the bulk of the country’s FDI levels.

Hikes in interest rates will also make it increasingly costly to take out loans in Brazil, straining the country’s businesses.

## 2NC

#### They are at best not topical. The aff only POSES the question of WHETHER the Sherman Act applies, it does not ANSWER the question with “IN MORE PLACES”

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

That leaves the question of what type of effect “gives rise to a claim” that the Ninth and Seventh Circuits have attempted to address: a US plaintiff bringing a claim against a non-US defendant encompassing wholly foreign conduct and an effect felt in the United States, such as if the US clothier from the opening hypothetical decided to sue the Pakistani textile manufacturers in the United States.195 It is this type of narrow case, where prescriptive jurisdiction hangs on the “directness” of the effect, that a balancing test would prove beneficial in the absence of a circuit split resolution.196 So, while the Supreme Court has cautioned against case-by-case comity inquiries, this balancing test is only employable in a small universe of cases.197 Consequently, the balancing test would not be “too complex to prove workable,” as imagined by the Court in Empagran, particularly taking into account the stylized factors to be discussed.198 But even if the case technically meets the standards for FTAIA’s exemption, the balancing test may still be used to evaluate whether extraterritorial application of US antitrust laws is apt.199

#### At worst, it is antitopical. Murray indicates the “modus operendi” of the aff’s balancing test is responding to criticism that the Sherman act applies TOO WIDLY

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

Chiefly, this balancing test would supplement the FTAIA. The underlying impetus for the FTAIA’s enactment – responding to international criticism of expansive US extraterritorial jurisdiction and to calls for recognizing foreign sovereignty where the basis for US prescriptive jurisdiction is weak – functions as this balancing test’s modus operandi. While the difficulty in interpreting “direct” has instigated its introduction, the balancing test does not attempt to shed any more light on the FTAIA’s contemplation of “direct.” Instead, it provides an alternative framework to properly apply the FTAIA where the statute’s language makes it impossible to do so.

#### their ev is explicit that the comity test would attempt to stop over-enforcement of antitrust – that’s the opposite of what the aff has to do!

Murray ‘17 [Sean; 2017; J.D. Candidate and Stein Scholar, Fordham University School of Law; Fordham International Law Journal; “With A Little Help From My Friends: How A Us Judicial International Comity Balancing Test Can Foster Global Antitrust Private Redress.” vol 41, iss. 1 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj]

In response to international criticism of the statute’s unbridled transnational application, the United States has curtailed the Sherman Act’s reach both judicially and legislatively.20 Judicially, courts looked to international comity, the practice of taking into account the interests of other nations.21 The Ninth Circuit was the first court to invoke international comity in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., which used an interest-balancing test to determine whether exercising jurisdiction was proper.22 Legislatively, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), which attempts to delimit and define the cross-border reach of US antitrust laws by introducing an objective test under the effects doctrine.23 Powerful arguments can be advanced in the American interest for applying US antitrust laws beyond US borders, including adequately protecting American competition and consumers, deterring inimical foreign anticompetitive behavior affecting the United States, especially in an increasingly globalized economy, and providing remedial measures to US victims of such conduct.24 However, these interests in providing protection and redress are counterbalanced by equally important rationales for limiting the extraterritorial span of US antitrust law, such as costly overregulation, avoiding international disputes, allowing nascent worldwide antitrust regimes to develop to beget increased antitrust enforcement, and avoiding harmful interference with antitrust regulators’ amnesty programs.25

The aforementioned responses to these competing concerns have been ambiguous, inconsistent, and over-inclusive or under-inclusive.26 In particular, the poorly worded FTAIA has created more problems than it has solved, including inconsistent holdings, wrongly decided cases, and disagreements among the circuit courts over interpreting the statute’s language.27 The most recent interpretational difficulty involves determining what constitutes a “direct” domestic effect under the FTAIA. Some courts have held that “direct” takes on a broader meaning, where conduct causing domestic effect need only be an “immediate consequence.”28 In comparison, other courts have narrowly interpreted the statute’s “direct” domestic effect requirement as calling for “a reasonably proximate causal nexus,” drawing from tort law to exclude an injury that is too remote from the injury’s cause.29 The most recent appellate decision involving the FTAIA, Motorola Mobility LLC v. AU Optronics Corp., has contributed to the statute’s confusion.30 There, the Seventh Circuit held that a US parent company failed to show that it suffered direct injury as a result of foreign anticompetitive conduct, despite the fact that price-fixed component products were purchased by its majority-owned foreign subsidiaries to be incorporated into final products purchased by the US parent and sold to US customers.31

Nevertheless, various delineations already exist that suggest a solution to the inconsistency is attainable and may be designed to enhance global antitrust enforcement through greater availability of worldwide private redress. What is apparent from the succession of decisions from Hartford Fire Insurance Co. v. California32 to F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran)33 is that the FTAIA grey area has been sufficiently tapered to allow for the return of a comity balancing test to appropriately reconcile the conflicting interests at hand in the residual universe of cases.34 This Note argues that Hartford Fire, its progeny, and Empagran form confining parameters on the applicability of the FTAIA, namely that cases that do not involve a US party, domestic effect, and domestic injury arising from that effect will fail the FTAIA’s exemption test. Moreover, because the FTAIA’s “direct, substantial, and reasonably foreseeable” effect test can be construed as a proxy for the United States’ prescriptive jurisdiction interest, comity analysis is helpful in its interpretation.35 Thus, claims which are based on exclusively non-US conduct that questionably has a “direct effect” on US commerce resulting in the plaintiff’s injury are more properly decided not by the courts’ current focus on statutory interpretation, but rather by a Timberlane-style ad hoc fact-intensive balancing test that contemplates factors more suitable to the modern global economy and promoting international dialogue.36

In sum, this Note proposes the introduction of a new international comity balancing test into US antitrust jurisprudence with the aim of fostering and strengthening global antitrust enforcement and private redress. It does so in four parts. Following this introduction, Part II briefly summarizes the expansion of US antitrust extraterritorial application. Next, Part III discusses various developments undertaken to limit and demarcate the reach of US antitrust law. Part IV raises issues arising from those efforts that have resulted in inconsistent and questionable holdings. Finally in Part V, by analyzing and synthesizing the existing precedent, this Note contends that a judicial international comity balancing test would most appropriately determine the propriety of US antitrust extraterritoriality for particular types of private recompense cases that are problematic under the current framework.

#### the internal link to their second advantage is ENTIRELTY about why OVERENFORCEMENT is happening now and is bad because it means companies won’t develop their own internal regimes

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

Lastly, worldwide governments have expressed concern that US antitrust extraterritoriality stunts the growth of their own antitrust regimes due to the allure of treble damages.109 For example, competition authorities have argued that improper extraterritorial application of US antitrust law is likely to substantially undermine the effectiveness of other countries’ leniency programs, which are successful tools in discovering unlawful cartel activity, and thus will interfere with those countries’ overall antitrust enforcement, including private enforcement.110 Additionally, broad availability of US treble damage recovery to non-US litigants attracts away cases that might otherwise be litigated in non-US courts, thereby depriving those jurisdictions the development of the substantial body of jurisprudence that is necessary to facilitate the private enforcement of antitrust claims.111 An example of underdeveloped jurisprudence can be demonstrated in Israel, where the Israeli Supreme Court has not yet been required to decide whether Israel’s antitrust statute provides for indirect purchaser recovery.112 Other countries with underdeveloped private recovery doctrine, such as South Africa and Denmark, have seen little private litigation to fine-tune their private enforcement schemes, though activity is on the rise.113

#### Expand” means to enlarge from a first to a second larger dimension – they make it smaller

White 07 – United States District Court, California Northern

Jeffrey S. White, Medtronic, Inc. v. W.L. Gore & Assocs., 2007 U.S. Dist. LEXIS 80038, United States District Court for the Northern District of California, October 2007, LexisNexis

8. "Expand" and variations.

Medtronic contends that the Court should construe this term, and its variations, to mean "enlarge from a first to a second larger dimension." Medtronic's proposed construction is in accord with the plain meaning of the term "expand." See, e.g., Webster's Ninth New Collegiate Dictionary at 436 ("to open up; to increase the extent, number, volume or scope of'). Gore, in contrast, argues that the Court should construe this term, and its variations, to require that the device expanded is a "low memory metal stent," which is expanded by a balloon rather than by its own resilience. For the reasons previously stated, the Court rejects Gore's proposed construction.

The Court finds further support for its conclusion from the claims of the '062 Patent, which do not contain the "balloon-expandable" limitation proposed by Gore. In contrast, dependent claim 2 of the '219 Patent does contain such a limitation, whereas independent claim 1 of that patent, does not. (See Bianrosa Decl., Ex. 6 ("219 Patent, 8:2-I 1.) Similarly, dependent claim 15 of the '828 Patent requires the use of a balloon, whereas claim 14 of the '828 Patent, from which claim 15 depends, contains no such limitation. ('828 Patent, 8:29-59.) Moreover, the use of the balloon in the dependent claims is the only meaningful distinction from the independent claims. Thus, the presumption of claim differentiation weighs against Gore's proposed construction. See SunRace Roots, 336 F.3d at 1303.

Accordingly, the Court construes the term "expand" (and its variations) to mean: "to enlarge from a first to a second larger dimension."

#### “Expand the scope of its core antitrust laws” requires modifying the amount of conduct that violates US antitrust law

Kovacic et al. 03 – Professor at George Washington University Law School

William E. Kovacic, Theodore B. Olson, R. Hewitt Pate, Paul D. Clement, Jeffrey A. Lamken, Catherine G. O’Sullivan, Nancy C. Garrison, David Seidman, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Communs. Inc. v. Law Offices of Curtis v. Trinko, 2003 U.S. S. Ct. Briefs LEXIS 513, Supreme Court of the United States, May 2003, LexisNexis

Conversely, the 1996 Act does not expand the scope of the antitrust laws to outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws. Such an expansion of Sherman Act duties would "modify \* \* \* the applicability of \* \* \* the antitrust laws" in contravention of 47 U.S.C. 152 note. Violations of the duties imposed by the 1996 Act are just that--violations of the 1996 Act, subject to the sanctions and penalties imposed by that Act. They do not automatically amount to treble-damages antitrust claims. The courts of appeals are again in accord. Pet. App. 29a; Covad, 299 F.3d at 1283 ("We agree with Goldwasser that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations."); Goldwasser, 222 F.3d at 400 (It is "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws."); Cavalier Tel. Co., 2003 WL 21153305, at \*11-\*12 (similar).

## CP Comity

#### Balancing tests are *subjective* forms of legal reasoning

LII, Legal Information Institute, No Date, https://www.law.cornell.edu/wex/balancing\_test

Balancing test

Primary tabs

Definition

A subjective test with which a court weighs competing interests, e.g. between an inmate's liberty interest and the government's interest in public safety, to decide which interest prevails.

#### The CP is a different type of reasoning – it forces the court to rely on objective determinants

Piraino 12 – Law Clerk, Meltzer, Lippe, Goldstein, & Breitstone, LLP

Stephen D. Piraino, “A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act,” Hofstra Law Review, Vol. 40, Issue 4, Article 10, 2012, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2685&context=hlr

The analysis into a country's regulation of an industry would be objective because it would be "based on externally verifiable phenomena, as opposed to individual's perceptions., 345 History of regulation and a country's market share in an industry are objective factors.346 Market share is data-based, which is clearly an objective factor.347 A history of regulation is also an objective factor because it is based on fact, instead of a judge's opinion about national interests.348

#### Broad analysis. It provides a standard for evaluating all conduct, which ensures compliance.

Kava 19 – J.D./M.B.A. Candidate, 2020, University of Maryland Francis King Carey School of Law and Johns Hopkins University Carey School of Business

Samuel F. Kava, “The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity,” Journal of Business & Technology Law, Vol. 15, Issue 1, 2019, HeinOnline

B. International Comity Test

In essence, to ensure the economic prosperity of the global economy, the United States Congress should be proactive in amending the FTAIA. Specifically, Congress should prescribe a broad international comity test for courts to consider when deciding if the Sherman Anti-Trust Act should apply extraterritorially. If international comity is taken seriously, unlike its most recent application by the Supreme Court in Hartford Fire Insurance Co., there will be a greater degree of compliance by the international community and more certainty will be provided to consumers and producers. Moreover, federal courts should not wait until Congress amends the FTAIA. In fact, federal courts should, on its own accord, extensively apply an international comity analysis to every case where a foreign entity is involved. As was previously mentioned, some courts continue to apply a robust international comity analysis. Specifically, the Ninth Circuit Court of Appeals in Mujica v. Airscan Inc. considered:

[T]he location of the conduct in question, the nationality of the parties, the character of the conduct in question, the foreign policy interests of the United States, any public policy interests, the strength of the foreign governments' interests, and the adequacy of the alternative forum. 171

Thus, until the United States Congress takes the necessary step to amend the FTAIA, federal courts should consider applying an international comity analysis to all cases that involve an international entity. By adopting a broad international comity analysis: (1) foreign nations would be less likely to adopt burdensome blocking statutes, (2) consumers and producers would have more certainty through unified laws, (3) the global economy will continue to prosper because of the certainty and predictability of the law, and (4) foreign nations may become more amenable to enter into bi-lateral treaties with the United States.

#### The counterplan strikes a balance between avoiding international tensions and avoiding underenforcement.

Piraino 12 – Law Clerk, Meltzer, Lippe, Goldstein, & Breitstone, LLP

Stephen D. Piraino, “A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act,” Hofstra Law Review, Vol. 40, Issue 4, Article 10, 2012, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2685&context=hlr

It is unimaginable that the American Banana Court could have foreseen the dramatic expansion of the Sherman Act.392 Through the effects test and the majority opinion in Hartford Fire, more and more international conduct comes under the ambit of the Sherman Act.393 While the Supreme Court did recognize the importance of prescriptive comity in Emagran, it failed to extend its usefulness to a common area of antitrust enforcement: foreign conduct causing effects in the United States.394 A once strictly territorial statute has, through the years, led to international tensions, even between the United States and its closest allies and trading partners. 395 The current state of the extraterritorial application of the Sherman Act, if not changed through a new judicial standard, will only cause further international tensions.396 Requiring courts to always recognize prescriptive comity is a practical solution that can help to relieve some international tensions.397 It will not dilute antitrust enforcement, but will instead ensure that it is done in a manner consistent with accepted international principles.398 As seen in Justice Scalia's dissenting opinion in Hartford Fire, a comity-based antirust system is consistent with accepted norms of international law that date back to Justice Story.399 This system would appropriately recognize the limits of U.S. laws.400

#### The plan defiantly makes it worse if judges use the balancing tests to apply Sherman act to states with established antitrust regime—Japan proves

Negishi 14 – Law professor at Konan Law School and Emeritus Professor at Kobe University

Akira Negishi, Amicus Curiae Brief of Professor Akira Negishi in Support of Appellees, Motorola Mobility LLC v. AU Optronics Corporation, et al., US Court of Appeals for the Seventh Circuit, October 2014, LexisNexis

III. International Comity

Applying U.S. antitrust law and approving the treble damages claim based on the sales arising from trades outside the United States would have an extremely severe and negative effect on enterprises in Japan and also on the proper enforcement of the Antimonopoly Act. Doing so would also cause serious concerns in terms of international comity.

Assume an enterprise in Japan participated in bid rigging or price cartels, outside the United States, and then self-reported the facts regarding a violation to the JFTC. Pursuant to the leniency program under the Antimonopoly Act, the enterprise is granted reduction or exemption of surcharges because the enterprise self-reported the violation. It is inevitable that the enterprise would be subject to a claim for treble damages pursuant to the U.S. antitrust law, which significantly exceeds the amount of the benefit given under leniency program. Therefore, if the enterprise's conduct is subject to U.S. antitrust law, the enterprise in Japan might refrain from self-reporting the facts regarding any violation to the JFTC. In that case, in light of the situation wherein the proper function of the leniency program is essential for enforcing the Antimonopoly Act as stated above, applying U.S. antitrust law and approving the treble damages claim based on the sales arising from foreign trades would have a severe and negative impact on the proper enforcement of the Antimonopoly Act.

#### They’ll also impacts enforcement and cooperation which turns the entirety of the aff

Tone 14 – Partner, Katten & Temple LLP

Jeffrey R. Tone, Brief of the Korea Free Trade Commission as Amicus Curiae in Support of Appellees’ Opposition to Rehearing En Banc, Motorola Mobility LLC v. AU Optronics Corporation, et al., US Court of Appeals for the Seventh Circuit, October 2014, LexisNexis

II. Application of U.S. Antitrust Laws in the Context Proposed by Plaintiff Will Interfere With Other Countries’ Antitrust Enforcement.

The expansive application of the U.S. antitrust laws urged by Plaintiff will also undermine one of the most fundamental features of other countries’ public antitrust enforcement regimes: leniency programs. Like the U.S. Department of Justice and the European Commission, the KFTC has adopted a delicately balanced leniency program that effectively detects and deters cartel activities, which by nature are often undertaken in secret. To the KFTC’s knowledge, numerous other countries have also adopted similar leniency programs. If the U.S. antitrust laws are applied to claims arising out of transactions that take place outside the United States without any direct effect on the U.S. markets, companies will be discouraged from seeking leniency from non-U.S. antitrust authorities, including the KFTC. Under those circumstances, filing for leniency with non-U.S. antitrust authorities might actually result in a greater likelihood of facing private antitrust damages actions in the United States. Such disincentive is likely to undermine substantially the effectiveness of other countries’ leniency programs and will interfere with those countries’ overall antitrust enforcement.

#### The rules bind courts to the standard set by the CP – tests do not

Dodge, Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law, ‘15

(William S., “INTERNATIONAL COMITY IN AMERICAN LAW,” Columbia Law Review, Vol. 115, No. 8, <https://columbialawreview.org/wp-content/uploads/2016/03/Dodge-William-S..pdf>)

In effectuating the purposes of international comity, rules have some advantages over standards. Many of the comity doctrines are justified on the basis of respecting foreign sovereignty and fostering friendly relations.358 Rules further these interests by binding courts to defer to foreign government actors even when they might prefer not to do so. Discussing prescriptive comity as a principle of restraint in the Laker case, Judge Malcolm Wilkey observed:

If promotion of international comity is measured by the number of times United States jurisdiction has been declined under the “reasonableness” interest balancing approach, then it has been a failure . . . . A pragmatic assessment of those decisions adopting an interest balancing approach indicates none where United States jurisdiction was declined when there was more than a de minimis United States interest . . . . When push comes to shove, the domestic forum is rarely unseated.359

Rules may also have advantages with respect to comity’s other purpose of promoting commercial convenience. As a general matter, predictable rules better enable commercial parties to plan their affairs.

#### which is key to the credibility of antitrust abroad

John Byron Sandage, Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law, 1985, Yale Law Journal, Vol. 94

Courts avoid rendering determinations beyond their constitutional competence by using the political question doctrine. Relevant indicia of a nonjusticiable question include the court's inability to secure information necessary for reasoned decision,6 " the implication of the responsibilities of the political departments, 3 the dearth of well-defined criteria for judicial decisionmaking," and the appearance that the courts are no longer able to act as neutral arbiters of law.65 Timberlane's method of decision implicates each of these aspects of nonjusticiability.

First, proper resolution of international antitrust cases requires access to a great deal of reliable information68 on the internal policy determinations of foreign governments.17 Hostility to American law has made procuring such data directly from governments extremely unlikely. 8 Further, the limits that other governments have imposed on discovery inhibit necessary fact-finding.69 Second, the President, with the approval of Congress, has responsibility for the conduct of foreign relations."0 Ultimately, these policies must be "defined, presented and defended by the political departments of the government. ' 71 The courts have only a limited role in unsettled areas of foreign affairs.71

Third, as Chief Justice Hughes recognized more than forty-five years ago, one hallmark of a political question is the need for "appraisal of a great variety of relevant conditions, political, social and economic" where there are simply no useful criteria for judicial determination." Such matters are non-justiciable and belong to the political departments. 74 Cases implicating foreign affairs constitute paradigmatic political questions because resolution of such cases requires policy determinations where there are no well-developed guiding principles."5 The lack of useful principles for interest analysis is exemplified by the failure of courts and commentators to agree even on a definition of an "interest" and its constituent elements. 6

Finally, no matter how carefully done, it is unseemly for courts to enter the political thicket of foreign relations. 7 Unquestioning support for the executive branch calls into question the courts' institutional integrity. If judges act independently, however, they may preempt the formulation of policies by the Executive or the Congress for which the latter two branches are together accountable."9 Conversely, any efforts by the political branches to ignore or defy court decisions will diminish the respect and authority upon which the courts' legitimacy depends."0

### Cartels

#### Studies prove – even assuming companies are caught, fines are insufficient to deter price-fixing.

Violante 17 – Bachelor of Criminology (Florida State University), Juris Doctor (American University, Washington College of Law) Attorney at Nelson, Bryan, and Jones

Keith Violante, “Making Deal with the Devil: Are Current Antitrust Sanctions Deterring Cartel Behaviour,” International Trade and Business Law Review, Vol. 20, 2017, HeinOnline

Regardless of the amount of the fine, it seems civil sanctions do not have more than a transitory impact upon the profitability of a business. Another recent study also suggests that civil sanctions have little to no deterrent value. The study identified several companies that average one or more antitrust civil judgements annually between 1990-2015.103

1 The world's leading recidivist for corporations that commit antitrust violations.104

[table omitted]

Evaluating this data, the study concludes:

Monetary sanctions imposed [upon companies who commit antitrust violations] have been the highest in antitrust history. ... extensive recidivism implies that present ... sanctions are inadequate to deter [antitrust violations].105

The study further found that:

Even under the most optimistic assumptions about discovery, leniency and prosecution rates, corporations have found price fixing schemes to be profitable... [T]o ensure optimal deterrence, total financial sanctions should be greater than four times the expected profit one would expect from a price fixing scheme to optimally deter antitrust violations. 106

Put simply, for a civil fine to adequately deter antitrust violations, the fine must certainly take the profit out of committing antitrust violations.

#### Enforcement is impossible – agencies are extremely strapped for cash.

Baer et al. 20 – Visiting fellow in governance studies at The Brookings Institution, former assistant attorney general of the Antitrust Division, former acting associate attorney general of the U.S. Department of Justice, former director of the Bureau of Competition at the Federal Trade Commission

Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro, Tim Wu, “Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress,” Washington Center for Equitable Growth, November 2020, <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/>

Limited resources constrain enforcement activity

Over the course of the previous decade, total appropriations to the Federal Trade Commission and the Antitrust Division barely grew in nominal terms. Antitrust appropriations have been nearly flat in the past decade, despite nearly 40 percent growth in U.S. Gross Domestic Product. (See Figure 1.) The Antitrust Division had 25 percent fewer full-time employees in 2019 than it did 10 years earlier.22 And the Federal Trade Commission has roughly the same number of full-time employees as it did in 2009.23

This austerity occurred even while the need for antitrust enforcement grew as market power in the U.S. economy grew. Merger filings increased dramatically; civil antitrust enforcement was flat.24 (See Figure 2.)

The two antitrust agencies were no more aggressive, and probably less aggressive, in bringing cases, with the exception of hospital mergers and challenging pharmaceutical patent settlements.25 At the same to time, the enforcement actions that did happen required the government to try more cases to judgment, despite being no more aggressive in case selection.26 That combination of flat appropriations, more trials, but no more aggressive enforcement agenda indicates that the agencies’ budgets have sharply limited their capacity to bring antitrust cases.

[charts omitted]

Resource limitations also undermine the agencies’ mission in other ways. One way to improve enforcement, for example, is through merger retrospectives, which study the impact of mergers, enforcement actions, and settlements. In the past, such studies helped the Federal Trade Commission reinvigorate its enforcement effort against hospital mergers.27 Regularly, there are calls for more retrospectives, but those studies are time-consuming and data-intensive, and thus expensive. Current budgets limit the agencies’ ability to fulfill these responsibilities as well.

#### But payments made to these companies have declined for 10 years

Mallison 9/3 – Keith Mallinson is a leading industry analyst, commercial consultant and testifying expert witness.

Keith Mallinson, September 3 2021, “Modest SEP royalties on smartphones have declined and licensing is stabilizing (Analyst Angle),” RCR Wireless News, https://www.rcrwireless.com/20210903/analyst-angle/modest-sep-royalties-on-smartphones-have-declined-and-licensing-is-stabilizing

Aggregate royalty payments for licensing cellular technology standard-essential patents (SEPs) in smartphones have remained in modest single-digit percentages and have declined since 2013.

This defies purported concerns that the stacking of patent royalties paid to multiple licensors have led to or would lead to unreasonably high aggregate rates on mobile devices. It also counters the claims of some OEMs and others that various SEP owners demand licensing fees in excess of what is fair, reasonable and non-discriminatory (FRAND).

The true aggregate price is fair and reasonable

Amid wild speculation about SEP licensing charges up until 2015, one article drawing a lot of attention around then outrageously asserted the cost could be 30 percent of a $400 smartphone price. In response, I set about measuring how much in patent royalties was actually being paid in comparison to total revenues generated on mobile handset sales (e.g. $410 billion in 2014, according to IDC). I termed the ratio of the two figures, expressed as a percentage, the “royalty yield.” This is an average reflecting all royalties paid divided by the total of licensed and unlicensed handset sales revenues.  [I found the royalty yield to be no more than around 5 percent in aggregate](http://www.ip.finance/2015/08/cumulative-mobile-sep-royalty-payments.html) including all licensors. That percentage is the sum of the royalty yields for individual licensors.

My assessments were conservatively high because some of the royalties paid are for licensing intellectual property other than cellular SEPs, or are for network equipment, devices such as PC data sticks or IoT appliances.

I found that major licensors Alcatel-Lucent, Ericsson, InterDigital, Nokia and Qualcomm accounted for most royalties paid, even with conservatively high estimates for other licensors. For example, I included 3G and 4G LTE patent pool licensing at rate card prices, even though it was evident hardly any implementers were signing up for those.

My methodology and results were replicated and validated in a couple of [academic research papers, including one enduring peer review](https://www.sciencedirect.com/science/article/pii/S0308596117302240?via%3Dihub) before publication, which with more detailed analysis showed aggregate yields to be even lower than my estimates.

Aggregate royalties declined despite global boom in 4G LTE smartphones and introduction of 5G

MARKED

Total royalties and royalty yields have fallen substantially since 2015 for those major cellular SEP licensors. While 4G LTE smartphone sales surged, OEMs have managed to reduce royalty rates paid for licensing. For example, even though royalties are generally charged as a percentage of a phone’s selling price, royalty caps limiting the royalty charge—as if the phone price was, for example, $200 or $400—ensure that royalty yields reduce as smartphone prices are raised, for example, with introduction of new models priced at $1,000 or more in recent years.

Licensing revenues and aggregate royal yield for major mobile SEP licensors 2013-2020

Chart, bar chart

Description automatically generated

Source: Company financial disclosures and WiseHarbor analysis.  
Nokia completed its acquisition of Alcatel-Lucent in 2014.  
Qualcomm figures include retroactive allocations of licensing dispute settlement payments of $4.7 billion by Apple in 2019 and $1.8 billion by Huawei in 2020 that were not included in Qualcomm Technology Licensing segment figures.

With the introduction of each new generation of mobile technology since 3G, it was also alleged that charges for the new standards would stack further to an unreasonable aggregate burden on OEMs and consumers. However, despite 5G’s commercial introduction in 2019, aggregate royalties have not risen for these companies that also first announced programs and charges for 5G licensing.

#### And domestic tech consolidation makes a decline in economic growth inevitable – plan doesn’t fiat increased enforcement against that

Decker et al., PhD, Board of Governors of the Federal Reserve System, University of Maryland and NBER, ‘17

(Ryan A., John Haltiwanger, Ron S. Jarmin, and Javier Miranda, “Changing Business Dynamism and Productivity: Shocks vs. Responsiveness,” June, <http://econweb.umd.edu/~haltiwan/Shocks_06_30_17.pdf>)

A hallmark of market economies is the continual reallocation of resources from less-valued or less-productive activities to more-valued or more-productive ones. Business dynamics—the process of business birth, growth, decline and exit—is a critical driver of the reallocative process. An optimal pace of business dynamics balances the benefits of productivity and economic growth against the costs associated with reallocation—which can be high for certain groups of firms and individuals. While it is difficult to prescribe what the optimal pace should be, there is accumulating evidence from multiple datasets and a variety of methodologies that the pace of business dynamism in the U.S. has fallen over recent decades and that this downward trend accelerated after 2000.1

Canonical models of firm dynamics and empirical evidence imply that there is a tight link between business dynamism and productivity growth. As highlighted by Hopenhayn and Rogerson (1993), increases in the dynamic frictions of adjustment on the extensive or intensive margins will reduce the pace of reallocation and lower productivity. Thus, a prima facie concern arising from these trends in business dynamism is that they may have had adverse effects on aggregate productivity growth. The question is particularly important in light of the growing body of evidence showing that aggregate productivity growth in the U.S. has been declining since the early 2000s (Fernald (2014)).2

At first glance, medium-run fluctuations in economywide productivity growth do not match up with patterns of declining business formation and business dynamism. Productivity growth accelerated in the 1990s through the early 2000s before slowing down after 2003, while aggregate startup activity and job reallocation fell throughout the 1980-2014 period. However, a more careful review of theory and evidence resolves the inconsistency: during the 1980s and 1990s, the decline in entrepreneurship and reallocation was dominated by the Retail Trade sector, where evidence suggests that falling dynamism was actually consistent with rising productivity growth.3

Fernald (2014) highlights that the surge in productivity from the late 1980s to early 2000s and the subsequent decline were both led by the ICT-producing and intensive ICT-using sectors. Interestingly, the High Tech sector exhibits a rise in business formation and job reallocation over the first period and a sharp decline in the post-2000 period, with the period since 2000 also being characterized by a decline in high-growth firm activity throughout the US economy more generally (Haltiwanger, Hathaway and Miranda (2014)). 4

In this paper, we find that changes in how businesses respond to their idiosyncratic productivity conditions are an important driver of the evolution of aggregate job reallocation and productivity in recent decades, especially in the High-Tech sector. We argue that the observed decline in responsiveness is consistent with models of firm dynamics in which increases in adjustment frictions can reduce the pace of reallocation and, consequently, productivity growth. As noted above, the canonical model is Hopenhayn and Rogerson (1993), but this theme is consistent with a wide class of firm-level adjustment cost models (e.g., Cooper and Haltiwanger (2006), Cooper, Haltiwanger and Willis (2007, 2016), and Elsby and Michaels (2013)). The core hypothesis is intuitive. An increase in adjustment frictions makes firms more cautious in responding to idiosyncratic productivity shocks. This yields a decline in the pace of job reallocation (as firms’ hiring and downsizing decisions become more sluggish), an increase in the dispersion of marginal revenue products and a decline in aggregate productivity.

## 1NR

### Modeling

#### Stonks and deficits means Brazil’s economy is beyond saving AND they matter more than anticompetitive business practices

Gallas and Palumbo 19 – Reporters for BBC News.

Daniel Gallas & Daniele Palumbo, May 27 2019, “What's gone wrong with Brazil's economy?” BBC News, https://www.bbc.com/news/business-48386415

But one sector was almost unanimous in praising Mr Bolsonaro's rise to power: business people.

Brazil's president boasted during the election that he did not understand anything about economics.

Once in power, he delegated all decisions on the subject to businessman Paulo Guedes, who became a "super-minister" of the economy.

The task of rescuing Brazil's economy from the brink of yet another recession was urgent. The economy is still at the same level it was back in 2014.

Markets were excited at the prospects of liberal reforms to come.

[Is the honeymoon period over for Brazil's Bolsonaro?](https://www.bbc.co.uk/news/world-latin-america-47865386)

[Jair Bolsonaro: The Trump of the Tropics?](https://www.bbc.co.uk/news/resources/idt-sh/Jair_Bolsonaro_Brazil)

But expectations soon started to fall apart. A series of government blunders - political infighting inside the administration, a clumsy attempt at state intervention in Brazil's fuel policy and the lack of leadership in Congress - hampered growth expectations.

Most analysts have halved their growth expectations for Brazil and now believe significant growth will not start until 2020.

Here is a look at some of the key figures that suggest Brazil's economy is not moving forward.

1. There's no economic recovery in sight

In the previous decade, Brazil was lauded (along with Russia, India, China and South Africa) as one of the Brics powers - emerging economies with superfast rates of economic growth that would surpass developed economies by 2050.

The economic performance of this decade, however, suggests Brazil does not belong in that league.

A crippling two-year recession in 2015 and 2016 saw the country's economy contract by almost 7%.

Economic recovery has been sluggish. In 2017 and 2018, the economy grew at a meagre pace of 1.1% a year.

And there is still more bad news: since the beginning of the year, economists have more than halved their expectations of economic growth for 2019 to a rate not very different from that seen in the past two years.

2. The unemployment problem isn't being solved

Brazilian workers are the ones paying the price.

The number of unemployed people has increased from 7.6 million in 2012 to 13.4 million this year.

Mr Bolsonaro thinks these numbers actually underestimate the real picture. He believes the situation is worse.

The official unemployment survey shows that 28.3 million people are under-utilised - which means they are either not working or working less than they could.

There are fewer people with formal jobs, while wages are barely keeping up with inflation - which has been brutal. Since the beginning of Brazil's recession four years ago, prices have gone up by 25%.

3. The currency and stock market have dashed post-election hopes

During much of the election, the Brazil's currency - the real - rallied strongly as it became clear that Mr Bolsonaro would win the election.

It was a clear sign of confidence from investors abroad.

A poll by Bloomberg late last year among chief international strategists saw Brazil top the list of best bets in three categories: foreign exchange, bonds and stocks.

After almost five months, prospects are now bleak.

Both the stock exchange and the currency - which usually anticipate the pace in the real economy - are close to the same level they were at the beginning of this year.

Brazil's stock exchange hit an all-time high in March this year, but has returned most of its gains following disappointing corporate results.

4. Still mired in debt

So why is Brazil in such a mess in the first place?

The main consensus among market analysts - and also people in Mr Bolsonaro's government - is that the country started spending too much money around 2013, during the leftist government of Dilma Rousseff.

Since then, one of the main thermometers of Brazil's economy has been the fiscal deficit - the amount of money spent beyond the country's revenues.

Ms Rousseff was impeached amid allegations that she masked Brazil's fiscal deficit to hide how much her government was overspending.

Since her downfall, all efforts from the government have gone into lowering this fiscal deficit.

Some economists say the main culprit is the pension system, with Brazilians retiring too early (some in their early 50s) and with too many benefits (especially amongst civil servants).

Mr Bolsonaro is proposing pension cuts and a minimal retirement age of 65 for men and 62 for women.

During the boom years, Brazil had a debt which was 51% the size of its economy.

The growing fiscal deficit raised the debt level to 77.1%.

The government says that if nothing is done, the country's debt will be the size of its entire economy by 2023.

#### There’s 0 way to transition away for developing countries – fossil fuels are so cheap and to get out of poverty developing countries have to emit more

Davey 16 – Tucker graduated from Boston College in 2016 with a major in Political Science and minors in Philosophy and Hispanic Studies

Tucker Davey, August 5 2016, “[Developing Countries Can’t Afford Climate Change](https://futureoflife.org/2016/08/05/developing-countries-cant-afford-climate-change/),” Future of Life Institute, https://futureoflife.org/2016/08/05/developing-countries-cant-afford-climate-change/

Fossil fuels are still the cheapest, most reliable energy resources available. When a developing country wants to build a functional economic system and end rampant poverty, it turns to fossil fuels.

India, for example, is home to one-third of the world’s 1.2 billion citizens living in poverty. That’s 400 million people in one country without sufficient food or shelter (for comparison, the entire U.S. population is roughly 323 million people). India hopes to transition to renewable energy as its economy grows, but the [investment needed](http://scroll.in/article/774844/indias-2022-renewable-energy-goal-will-require-investment-four-times-the-defence-budget) to meet its renewable energy goals “is equivalent to over four times the country’s annual defense spending, and over ten times the country’s annual spending on health and education.”

Unless something changes, developing countries like India cannot fight climate change and provide for their citizens. In fact, developing countries will only accelerate global warming as their economies grow because they cannot afford alternatives. Wealthy countries cannot afford to ignore the impact of these growing, developing countries.

### CP Private Enforcement

#### Public enforcement with SINGLE damages is enough

Italianer, Director-General for Competition, European Commission, ‘13

(Alexander, “Fighting cartels in Europe and the US: different systems, common goals,” October 9, <https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf>)

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

#### Margins---no reason the aff is net better---the system is already overdeterrent, adding another layer only has downside for innovation

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

A defendant’s conduct in such cases generally lacks the features that could possibly justify punitive damages. In most, there was nothing surreptitious about the defendant’s conduct; indeed, it may have been common knowledge to everyone in the relevant business community. Like defendants in many negligence cases, defendants in rule-of-reason antitrust cases could not have predicted with any reasonable degree of certainty that their conduct would later be deemed unlawful. “The line between winning and losing may be exceedingly fine in such cases,”16 but “no matter how close the case, the winner gets a bounty and the loser gets a penalty” in the form of treble damages.17

The leading antitrust treatise describes that outcome as “an embarrassment to antitrust policy,” given “the law’s usual discomfort with imposing unforeseen liability.”18 Moreover, “[t]he practical effect of mandatory trebling is to tilt the settlement process in the plaintiff’s favor because mandatory trebling so inflates the defendant’s cost of losing and the plaintiff’s value of a victory in a rule of reason case.”19

#### “Toxic cocktail” of procedural benefits---magnifies unpredictable negative effects

Briggs, partner in the law firm of Axinn, Veltrop & Harkrider, and co-chair of the firm’s Antitrust and Competition Group, Managing Partner of the firm's Washington, DC office, and an Adjunct Professor of International Competition Law at The George Washington University Law School. He is also a former Chair of the American Bar Association's Section of Antitrust Law, ‘18

(John Deq., “Re-Designing the American Antitrust Machine Part I: Treble Damages, Contribution and Claim Reduction,” <http://awa2018.concurrences.com/IMG/pdf/re-designing_the_american_antitrust_machine.pdf>)

Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years3 studying these matters and have tended to come to relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations. 4 Since the advent of this century, most of the world’s governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the “excesses” of the American system5 and without the “toxic cocktail”6 of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this “toxic cocktail” seem to refer to many features of the American legal system, but especially:

The mandatory award of one-way attorneys’ fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries. The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.7

The existence of joint and several liability without any right of contribution or meaningful claim reduction.

The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.

The policy chaos that has ensued in the wake of the Supreme Court’s decision in Illinois Brick, 8 which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.9

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

#### Settlements---private suits lead to tons of costly settlements, but don’t result in judgements which means companies can keep doing the bad practice

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

#### Kills solvency---private litigation conflicts with and undermines public enforcement so both fail

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘19

(Daniel A., “Toward a Realistic Comparative Assessment of Private Antitrust Enforcement,”

*In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy*, edited by Damien Gerard, and Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019)

The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.30

The EU Directive also shows sensitivity to the relationship between public and private enforcement, asserting the need for “coordination of these two forms of enforcement in a coherent manner,”31 and proposing mechanisms for preventing private enforcement from undermining public enforcement, such as limiting private access to self-incriminating materials received as part of leniency applications.32 The reality, however, is that private enforcement cannot help but have spillover effects on public enforcement – not all in the direction of making public enforcement more effective. To the contrary, the US experience shows that a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether.33 Particularly if private enforcement in particular areas comes to significantly outstrip public enforcement in frequency, with the governing liability norms being predominantly created in private litigation, public litigation can become laden with the baggage of private litigation to the point if ineffectiveness or practical disappearance.

US monopolization law is a case in point. Historically, public antitrust enforcement of s. 2 of the Sherman Act has declined since a high in the 1970s, when the agencies were bringing over three cases a year,34 to the last several administrations where very few monopolization cases have been brought. Over the eight years of the Bush administration, the Justice Department filed no monopolization cases. While running for office in 2007, Senator Barak Obama singled out this ostensibly weak enforcement record for condemnation, characterizing the failure to pursue monopolization cases as “lax enforcement” that harmed consumer interests.35 His Antitrust Division immediately withdrew a report on monopolization offenses disseminated by the Bush administration and promised that the Justice department would be “aggressively pursuing” monopolization cases.36 But, then, over seven and a half years, the Justice Department brought only one monopolization case. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”37 The government’s theory – that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors – broke no new theoretical or practical ground.

What happened to public enforcement against monopolization? Among the several contributing factors is the dramatic rise of private monopolization actions in the later part of the twentieth century. Figure 17.2 below provides a statistical summary of public and private monopolization cases in the federal appellate courts in the post-war period. From the 1950s to the 1970s, the federal agencies filed a modest number of monopolization cases during each five-year period – far fewer than private monopolization cases, but still enough to make a significant impact on the formation of legal norms and market circumstances. But, as private monopolization litigation skyrocketed from the mid 1970s to the early 1990s, public monopolization enforcement receded, both proportionally and absolutely. With a few notable exceptions such as the DC Circuit’s en banc Microsoft decision, the monopolization law made from the 1970s forward was made in the context of private litigation. As the courts reacted to the dramatic rise of private monopolization cases by announcing new restrictions on a variety of exclusion theories – from predatory pricing, to tying, to duties to deal – private monopolization cases began to recede, reaching an apparently stable equilibrium at about half of their peak levels for the last two decades. This dramatic rise and then significant reduction of private monopolization litigation left in its wake public monopolization enforcement, which all but disappeared.

#### Frivolous litigation---private companies stick their competitors with the cost---turns case

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

#### Expansion of the antitrust laws necessarily allows for private suits—CP is germane because it’s a distinct model

Kenneth Ewing, JD, Steptoe & Johnson LLP, Private anti-trust remedies under

US law, 2007, <https://www.steptoe.com/images/content/1/7/v1/1731/2804.pdf>

One of the most important features of anti-trust enforcement in the US is the large and complicated role played by private remedies. Unlike most jurisdictions around the world, in which only governmental enforcement must be considered, the US grants private parties (and all state governments, acting on behalf of their citizens) a wholly independent right to seek:

Monetary damages.

Court injunctions to order potentially far-reaching changes in anti-trust defendants’ conduct.

In addition, special rules, such as the automatic trebling of damages, award of attorneys’ fees and costs, and aggregation of hundreds to thousands or more claims within a single action on behalf of a class of similarly placed claimants, dramatically increase both the attractiveness of bringing private claims and the stakes for defendants.

#### The whole problem their evidence cites for the inability of EMERGING regimes to develop new antitrust laws and sustainable development is that at there is a flood of privaten litigation now in the US, which the CP SOLVES because it is a PIC out of that private litigation

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

In the past fifty years the world has experienced a marked increase in international trade. Global exports have exploded (in constant 2010 dollars) from US$1.6 trillion in 1965 to US$22.7 trillion in 2015.4 Total exports’ share of the global economic activity more than doubled in the same period, from twelve percent to twenty-nine percent in 2015.5 But while markets for goods and services transcend national borders, antitrust laws regulating these markets are national in scope.6 Historically, the United States has served as the primary enforcer of antitrust law for private litigants due to its early development of redress for these litigants, including the availability of treble damages and other plaintiff-friendly procedural mechanisms, as well as the progressively long extraterritorial reach of the Sherman Act.7 Its evolution as the world’s antitrust courtroom was, of course, grounded in the interest of protecting national commerce and allowing its citizens to recover from wrongful acts committed at home or abroad.8 Internationally, widespread antitrust law only began to emerge decades later when, for instance, the European Union (“EU”) introduced its own antitrust law in the form of Articles 85 and 86 (now 101 and 102 in the Treaty on the Functioning of the European Union (“TFEU”)) in the 1957 Treaty of Rome, which initially founded the European Economic Community.9 The private right to sue would wait until 2014, when the European Commission (“EC”) issued Directive 2014/104/EU (“the EC Directive”),10 requiring EU member states to legislatively facilitate private enforcement of competition law at the national level.11

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

Moreover, bringing claims to the United States strips valuable opportunities for young foreign antitrust regimes to develop their own jurisprudence, depressing the effectiveness of global antitrust enforcement and stalling the emergence of private redress.16 Worldwide jurisdictions are increasingly recognizing the importance of private rights of action to enforcement efforts.17 Within the past ten years several countries have expanded private parties’ ability to recover harm from unlawful anticompetitive behavior by allowing collective action.18 However, private actions remain rare in many developing antitrust jurisdictions with little, if any, precedent establishing the basis for compensatory damages or discovery.19

#### Cp solves through public enforcement--Only judgements really matter for actually stopping bad action—the plan just results in huge costs

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘10

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

There are two other ways that private antitrust lawsuits might mete out negative sanctions on corporate managers prior to judgment day. First, antitrust litigation is extremely expensive and the costs are often borne disproportionately by defendants. 100 CEOs, CFOs, and particularly general counsels care a great deal about legal fees, but the divisional managers who often make the decisions that ensnare a firm in an antitrust suit may not care. A divisional manager typically seeks to maximize the reported profitability of her own business unit, not necessarily the value of her firm as a whole.' 0' For accounting purposes, legal fees are often treated as operating expenses of the firm as a whole. Therefore, legal fees may not come directly out of a divisional manager's budget or count against her revenues for the purposes of divisional financial reporting and incentive compensation. The threat of having to pay legal fees during a protracted and expensive lawsuit may have relatively little deterrent effect on the key decisionmakers who consider whether to engage in anticompetitive tactics.

A second way that private antitrust lawsuits could provide an early deterrent shock is through large settlement payouts, which are a sort of privately negotiated and accelerated judgment day. But with the exception of government case tag-along suits, which are discussed below, large settlement payouts in private cases usually do not occur until the eve of trial. Corporate managers and boards are usually unwilling to open up their coffers for more than nuisance value settlements until the threat of an adverse judgment is imminent. Thus, private settlements may accelerate judgment day by shortcircuiting appeals, but the average time from the planning of anticompetitive conduct to the payment of any substantial settlement amount still probably exceeds five years.

#### Takes too long to create a clear signal

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘10

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

Given all of the above factors, it is implausible that the threat of future private litigation does much to deter anticompetitive behavior. The author's own experience in a private antitrust case is illustrative. By the time the case settled during an appeal, it had been nine years since the lawsuit was filed and fifteen years since the alleged misconduct began. Only a handful of personnel who were with the company during the relevant events were still employed by the firm at the time of settlement. Since the underlying conduct occurred, the company had witnessed multiple generations of senior management come and go. The company's capital structure had changed multiple times, too. First, it was part of a corporate conglomerate, then it was spun off as an independent, publicly traded company, then it was acquired by another conglomerate, and shortly afterwards it was taken private. The managers and shareholders who had reaped the gains from any unlawful conduct-assuming that there was any-had long since moved on.

#### That achieves optimal deterrence because agencies can sue to stop bad conduct without creating zealous liability regimes

Juška, PhD candidate, Leiden Law School, Leiden University, Leiden, ‘18

(Žygimantas, “The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation,” IIC - International Review of Intellectual Property and Competition Law volume 49, pages63–93)

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in or continuing behaviour contrary to competition rules (in other words, general deterrence).Footnote9 According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.Footnote10 In this respect, it must be borne in mind that EU competition law focuses exclusively on imposing fines on infringing businesses, but Member States are given space to introduce other types of penalties.Footnote11 In order to combat cartels, a majority of EU Member States have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.Footnote12 However, these sanctions have very rarely been imposed in practice.Footnote13 Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

Achieve Corrective Justice When the Infringement Has Taken Place

This goal can be pursued if two conditions are met.Footnote14 First, corrective justice is achieved if the monetary remedy deprives the wrongdoer of any benefit gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kinds of damages.Footnote15 For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this paper.