**R5 D7 Disclosure**

**1NC**

**Off**

**1NC---T**

T Prohibitions---

**Prohibition requires completely ending a practice---that’s distinct from limitations on such practices**

**Feldman 86** – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the **prohibition** and **regulation** of the sale of liquor are **entirely different things**: "To **prohibit** the liquor traffic implies the **putting a stop** to its sale as a beverage, to **end it fully**, **completely**, and **indefinitely**." In contrast, regulation "implies that the sale of intoxicating liquor shall go on **within the bounds** of **certain prescribed rules**, **restrictions**, and **limitations**." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are **analytically distinct**. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

**Vote neg---**

**[A]---Predictable limits---rule of reason affs double the topic---any given anticompetitive conduct can have multiple affs associated with it, which decks aff specific preparation**

**[B]---Ground---allows 2ACs to shift out of disad links, and they foreclose the rule of reason PIC, which is core neg ground**

**1NC---CP**

Public Enforcement Counterplan---

**Text: The United States federal government should allow relevant agencies to sue to enjoin anticompetitive business practices conducted against wholly owned foreign subsidiaries of United States based parent companies 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.

**1NC---T**

T Expand---

**FTAIA is an interpretation of current antitrust law, rather than a limitation**

**Bona 21** – founder and CEO of Bona Law PC

Jarod Bona, "What are the Available Exemptions to Antitrust Liability?," The Antitrust Attorney Blog, 11-7-2021, https://www.theantitrustattorney.com/what-are-the-available-exemptions-to-antitrust-liability/

Foreign Trade Antitrust Improvements Act (**FTAIA**). This poorly worded and confusing Congressional Act **is** not so much an exemption as an **interpretation** of the **extraterritorial application** of the federal antitrust laws. It comes up quite often.

**That violates ‘expand’---clarification is distinct from a change in law**

**Hatter 90** – United States District Court, California Central

Terry J. Hatter, Jr., In re Eastport Assoc., 114 B.R. 686, United States District Court for the Central District of California, March 1990, LexisNexis

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

**Vote neg---**

**[1]---Limits---any other interpretation allows the aff to change *any* determination the courts have made about the legality of private sector practices, which creates an untenable research burden**

**[2]---Grounds---provides a core mechanism that can predictably and reliably be the focus of neg contestation**

**1NC---DA**

Exemption Spillover DA---

**The aff’s application of antitrust to a previously exempted area causes future limitations in immunities---courts perceive shifts in legislative opinion and adapt accordingly**

**Pearlstein 20** – former business and economics columnist for The Washington Post and the Robinson professor of public affairs at George Mason University

Steven Pearlstein, "Facebook and Google cases are our last chance to save the economy from monopolization," The Washington Post, 12-18-2020, <https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/>

**Keeping a close eye** on both the antitrust cases and the legislative debate will be the members of the Supreme Court, including six conservative justices who have a well-documented hostility to government regulation of business. The century-old Sherman and Clayton acts are remarkably spare and concise statutes, which has meant that most antitrust law has been judge-made, based on the precedents laid down in individual cases**. Any antitrust reform that might come out of Congress**, however, is certain to be much more detailed and prescriptive than those earlier laws. Not only would such legislation **erode** the **power** and **discretion** of the court, but it **would also likely overturn a number of recent precedents** that have made it much **more difficul**t for regulators to **limit** the **size** and **business practices** of dominant firms.

All that could well be playing out in Congress just as the court considers the inevitable appeals in the cases of U.S. v. Google and FTC v. Facebook. And it would hardly be unprecedented if some members of the Supreme Court were to consider the **political and legislative consequences** as they decide the fate of two companies with whom most Americans interact on a daily basis.

A similar dilemma faced Judge Learned Hand of the U.S. Court of Appeals in 1945 as he considered U.S. v. Alcoa. After the longest federal trial in history — two years — a district court judge had ruled against the government’s request to break up Alcoa, declaring that the company had legally obtained its 90 percent share of the aluminum market. Hand himself was an antitrust skeptic. But in a memo to his fellow appeals court judges, Hand recognized that the public would not accept a highly technical ruling that any such monopoly was benign.

“If we hold that [Alcoa] is not a monopoly, deliberately planned and maintained,” Hand wrote, “everyone who does not get entangled in the legal niceties … will quite rightly, I think, write us down as asses.”

In the end, the appeals court ruled that Alcoa had illegally monopolized the market for aluminum, and Hand’s opinion **became one of the most influential**, and controversial, **in the history of antitrust**. The cases against Google and Facebook will be no less consequential or contentious.

**Shifting causes regulators to perceive that antitrust exemptions will be narrowed in the future, limiting SEC regulatory flexibility**

**Kling 11** – Yale Law School, J.D. 2010, Brown University, A.B. 2007

Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

This Part argues that a broad implied immunity standard predicated on the SEC's jurisdiction over, and active review of, a particular activity is efficient. But whereas in Billing the Court justified its implied immunity analysis by reference to the chilling effects of erroneous antitrust judgments ex post, this Part shifts the focus to ex ante regulatory action by the SEC. It argues that, from an ex ante perspective, the **principal concern** with a **narrower implied immunity doctrine** is that it might **distort** the SEC's **regulatory decisions.** In particular, if the SEC has three regulatory choices- **prohibit** a class of conduct **entirely**, **permit it entirely**, or **adopt a nuanced rule** that permits some forms of the conduct but prohibits others - and if a nuanced approach is optimal but a blanket authorization is preferable to a complete prohibition, then under either a some regulation standard or an affirmative approval standard the SEC **might opt** to permit the conduct **in its entirety** simply in order to **preempt antitrust suits**.167

[[Begin Footnote 167]]

167. Because the SEC did in fact adopt a fairly nuanced approach to the laddering and tying arrangements at issue in Billing, the arguments presented below might seem inapplicable to the facts of the case. But the SEC **presumably expected** that antitrust actions **would be preempted** **given** the **precedents** discussed in Part I. Thus, it might in fact be **precisely** **because** of the Court's **broad implied immunity** doctrine that the SEC was able to **issue finely drawn guidance** with respect to the conduct challenged in Billing.

[[End Footnote 167]]

The SEC can be expected to choose such a **second-best solution** in two situations. First, the SEC might opt for such a rule if it believes that it will **not have time** to study the activity at issue **before** an **antitrust suit is resolved** and that an antitrust court, if left to its own devices, might prohibit too much conduct or impose excessive liability for antitrust violations. Second, the SEC might choose to permit the entire class of conduct if it believes that, even if it were able to adopt a nuanced rule in time, a **court might misapply that rule** and **prohibit conduct** that the SEC would permit or **award excessive damages** for activities that the SEC prohibits. In combination, these two scenarios, which are modeled in the following Sections, suggest that an active review standard is optimal because it enables the SEC to regulate without solicitude for the possibility of erroneous decisions in antitrust cases.168

[[Begin Footnote 168]]

168. In practice, the SEC would not justify its regulatory choices by reference to the possibility of erroneous antitrust decisions. Nevertheless, such concerns might have a **subtle** and even **unacknowledged influence** on the **form of regulation ultimately adopted**.

[[End Footnote 168]]

**That disrupts financial stability---effective and unilateral SEC regulation is critical**

**Allen**, Associate Professor, Suffolk University Law School, **‘18**

(Hillary, “The SEC as Financial Stability Regulator,” 43 J. Corp. L. 715)

After the financial crisis of 2007-2008 (the “Crisis”), regulators around the world adopted the pursuit of “financial stability” as one of the foremost goals of financial regulation.2 However, the ubiquity of the goal belied a lack of consensus about how regulators should approach financial stability, and that lack of consensus persists today. This Article takes an expansive view of financial stability regulation, arguing that such regulation should seek to prevent disruptions to both financial institutions and markets, if such disruptions would have negative consequences for the broader economy. Because the Securities and Exchange Commission (the “SEC”) has much more experience with the securities markets than other US financial regulators, the SEC is the agency best positioned to **ensure the robustness of those markets**. The SEC can therefore make a significant contribution **as a market-oriented financial stability regulator** – even if other forms of financial stability regulation might be best left to prudential regulators, like the Federal Reserve.

Private participants in the securities markets have neither the **incentives** nor the **ability** to promote **financial stability** (a collective good),3 and so **only a government body** can work to ensure that the securities markets are **robust to shocks**, and minimize the likelihood of shocks occurring in the first place. **If the SEC fails** to take on this role, we **cannot expect any other government agency to fill the lacuna**. While the Financial Stability Oversight Council (“FSOC”) was created to address threats to the stability of the financial system, it is, at its core, a committee that is designed to leverage the expertise of its member agencies rather than performing extensive regulatory functions itself. Other than the SEC, there is no regulatory agency represented on the FSOC that has extensive experience with the securities markets.4 And there are certainly developments in the securities markets that raise financial stability **concerns** – this Article will focus in **particular** on the increasing prevalence of **high frequency trading** (“HFT”) in the equity markets.

HFT is an umbrella term for a variety of different automated trading strategies; their common characteristic is that the computer algorithms that make the trading decisions are designed to hold assets for only a very short period of time. HFT now accounts for **more than half of all trading** in the US equity markets,5 and while the practice certainly affords benefits in terms of reducing the time and cost of executing trades, it also increases the **complexity**, **interconnectedness** and **opacity** of the equities markets.6 Events such as the **“Flash Crash”** in May 2010 have alerted regulators to HFT’s potential to both generate and transmit shocks through the financial system: the potential **threats** that HFT **poses to financial stability** (as well as to **investors** and **capital formation**) will be explored in detail in this Article. Of course, high frequency traders do not trade exclusively in the equity markets (i.e. the secondary trading market for listed stocks): 7 there is an almost limitless list of assets that HFT firms will trade, including a multitude of derivatives instruments. However, this Article will focus on the equity markets.

The SEC is **currently considering** how to **reform its regulation of the equity markets** in light of HFT and other developments, a project that began in earnest with the issuance of a “Concept Release on Equity Market Structure” on January 14, 2010 (the “Concept Release”).8 Although some reforms have been implemented since that time, the project of market structure reform is nowhere near complete. To the extent that the SEC is planning to promulgate further rules addressing HFT and the equity market structure more generally, **such rules can be said to be in the “preproposal period”** (i.e. the time prior to the proposal of any rule in the Federal Register). As Krawiec notes, the preproposal period is “a time period about which little is known, despite its importance to policy outcomes. . . the need to produce a proposed rule that is ready for comment pushes much regulatory work to this early stage of the rule development process.”9 This Article seeks to provide some insight into the preproposal stage of the market structure reform project by considering the testimony, public statements, speeches and press releases that have been disseminated on the subject of HFT by the SEC, its Commissioners, and its staff.10

**Sparks global war---intervening action fails to stop financial collapse**

**Sundaram and Popov 19** – former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007; former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin

Jomo Kwame Sundaram and Vladimir Popov, "Economic Crisis Can Trigger World War," Inter Press Service, 2-12-2019, http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/

KUALA LUMPUR and BERLIN, Feb 12 2019 (IPS) - Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another **international financial crisis**, there are **growing concerns** about the increased possibility of **large-scale military conflict.**

More worryingly, in the current political landscape, **prolonged economic crisis**, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could **easily spin out of control** and ‘morph’ into **military conflict**, and worse, **world war**.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘**bankrupted’ governments** and caused **systemic collapse**. Policymakers managed to pull the world economy **from the brink**, but soon switched from counter-cyclical fiscal efforts to **unconventional monetary measures**, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address **underlying economic weaknesses**, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This **lack of structural reform** has meant that the **unprecedented liquidity** central banks **injected into economies** has not been well allocated to **stimulate resurgence of the real economy**.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, **another economic crisis** — possibly **more severe** than the last, as the economy has become **less responsive** to such blunt **monetary interventions** — is **considered likely**. A decade of such unconventional monetary policies, with very low interest rates, has **greatly depleted their ability to revive the economy**.

**1NC---CP**

States Counterplan---

**Text: The fifty states and all relevant United States territories should:**

* **Provide standing to plaintiffs suing under state antitrust laws who have suffered indirect harm from anticompetitive practices, and explicitly allow application of their antitrust statutes extraterritorially in such cases**
* **Coordinate unified, multistate efforts to prosecute violations of anticompetitive business practices conducted against wholly owned foreign subsidiaries of United States based parent companies through the National Association of Attorneys General**

**States solve---they can enact and interpret their own laws, and cannot be inherently preempted**

**HLR 20** – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

**Antitrust federalism**, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the **states' ability** to **bring suit under federal antitrust law** and the second their ability to **enact** and **enforce** their **own state antitrust laws** -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to **attack antitrust offenders**, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in **congressional action** or the **courts' interpretation of congressional inaction**. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in **Hart-Scott-Rodino**. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- **was not preempted** in **California v. ARC America Corp.**, it considered the same Sherman Act silence.

**State coordination through the NAAG solves certainty and resource disparities**

**ABA 10** – American Bar Association

“ABA Antitrust Health Care I-G,” Antitrust Health Care Handbook, American Bar Association, 2010, LexisNexis

Federal and state enforcement authorities frequently cooperate in health care antitrust investigations and enforcement actions, and the agencies have issued a protocol describing basic procedures for their coordinated enforcement. **States** also **coordinate** their **antitrust enforcement** through the **Multistate Antitrust Task Force** of the **National Association of Attorneys General**. These efforts serve **important enforcement goals** by **permitting participants to share expertise and resources** and **affording greater certainty** to health care providers and payors **seeking to resolve antitrust concerns** in a **consistent** and **expeditious manner**. Federal and state enforcement authorities have overlapping jurisdiction with respect to most conduct, and some states have aggressively enforced the antitrust laws in the health care sector.

**1NC---DA**

Sovereignty DA---

**Unilateral imposition of extraterritorial antitrust liability escalates to war---collapses trade flows and cooperation on other issues**

**Salbu 99** – Professor of law and ethics, Georgia Tech

Steven R. Salbu, The Foreign Corrupt Practices Act as a Threat to Global Harmony, 20 MICH. J. INT'L L. 419 (1999), Available at: <https://repository.law.umich.edu/mjil/vol20/iss3/1>

The world is too culturally diverse to accept the external imposition of laws without resentment. 154 [ FN 154] 154. For comparison, consider treaties through which signatories all agree to mutually accepted conditions and terms that apply only to the signatories themselves. Within these bounds, no laws are being applied extraterritorially without the consent of the local sovereignty. In contrast, FCPA-style legislation, now to be adopted in dozens of countries, **restricts behavior even in** non-signatory **nations that have not consented** to the intrusion. [End FN] Under these conditions, extraterritorial legal fiat is at the very least insulting and distasteful.'55 Transnational relations **likely will be strained** by the overreaching of any one nation into the affairs conducted within the borders of another.'56 As one commentator suggests, other nations "may perceive the FCPA as a culturally arrogant encroachment on their ability to govern activities exclusively within their own borders, in accordance with international law principles on territorial sovereignty."''57

While the risk of being perceived as obnoxious and intrusive is hardly insignificant, it pales when compared with a **more serious risk**--the increased likelihood that **transnational relations** will **become strained**,'58 and that **nationalistic sentiments** will **flourish in response** to the perceived invasiveness of the extraterritorially applied laws. 5 9 The **results** of this scenario can range from **mounting hostilities over other issues** to the **severance of trade**,' 6 0 and potentially even to **military confrontation**.161 [Footnote 161] 161. The potential for hostilities over extraterritorial legislation to **escalate to the point of military confrontation** is a **logical possibility**, rather than a trend in recent history. Indeed, even **U.S. antitrust law**, the **extraterritorial application** of which **has evoked substantial retaliatory reaction**, **has not** led to this extreme. See William S. Dodge, Extraterritoriality and Conflict-ofLaws Theory: An Argument For Judicial Unilateralism, 39 HARV. INT'L L.J. 101, 165 (1998) (noting that while extraterritoriality of U.S. antitrust law has evoked **blocking statutes** and **claw-back statutes**, it has **not** caused the **cessation** of **international cooperation**). **While we have yet to see** hostilities over U.S. extraterritorial legislation **escalate to the point of war**, **the potential for such a scenario can never be ruled out.** [End FN] Thus, van den Berg observes that extraterritorial application of the Helms-Burton Act in Canada has fueled an "international perception of the United States not only as a cultural imperialist but as a growing legal imperialist."' 62 Perhaps more threatening to the **delicate global diplomatic balance**, the **reach of** the **Helms-Burton** Act has **sparked** an unforeseen and undesirable **alliance between Canada and Cuba**, 163 in effect **undermining U.S.** efforts to apply **economic sanction pressures in the latter**. Simply stated, laws resented for their overreaching nature can be counterproductive.

Van Wezel Stone identifies similar risks in another area where extraterritorial law has been posited as a possible global solutioninternational labor regulation.'" She notes that because extraterritorial jurisdiction does not aspire to be integrative, it fails to contribute to a common international system of norms and standards.' 65 Instead, extra-territorial jurisdiction tends to **undermine international peace and cooperation** by creating tension and **destabilizing international relations**.'" Sovereign nations "react with **intense hostility** when... **activities within their own borders** are made the **subject of investigation by a foreign nation** applying **foreign rules** and procedures.' 6

The world is not sufficiently homogenized to embrace one conceptualization of morality in gray areas, '6 8 and attempts to force a unified fit via extraterritorial legislation are likely to spark ill will and retaliation.'69 Such **hostilities** can result, of course, whenever one country **imposes its rule upon transactions that occur in another country**. The potential is increased when vague laws are applied to the ambiguous conditions of markets in transition, such as communist economies that are in the process of converting to capitalist ones. 70 This suggests a danger in externally-based efforts to unify legal structures addressing such moral issues. Must we therefore throw up our hands in despair, and abandon all exertions to extirpate bribery and corruption? The answer is decidedly **no**. Abdication of responsibility to improve global markets would be as irresponsible as overweening intrusion into the affairs of other nations. The **appropriate middle ground** between complacency and invasiveness is **persuasion**.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is **disintegrating**.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the **antagonistic protectionist politics** that defined a bygone era that ended with **World War I** — suggesting that today’s protectionist revival threatens **not just** the global economy, but **world stability and peace.**

Leading liberal democracies have **turned their back** on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This **widespread fear** of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to **halt** the forces of **globalization**. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned **against trade liberalization**. **Trade wars**, **colonialism** and **closed markets** became the name of the **geopolitical game**.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the **Franco-Italian trade war**, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy **ever closer** to Austria-Hungary and Germany — the Triple Alliance — in the years before the **First World War**.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered **international stability and peace**, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how **protectionism fomented geopolitical rivalry and conflict.**

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds **dire consequences** for the liberal economic order by pitting nations **against one another** and breeding **suspicion, distrust** and **conspiratorial thinking**. The **ultranationalism**, **militarism** and **tariff wars** of the late 19th century spilled over into the 20th century, and ended in **world war** — suggesting a return to the protectionism of old could **damage far more than national economies**.

**Antitrust key—Reverse-causal**

--We control uniqueness: *protectionism* is inevitable, but strong trade barriers + the political lawmaking constituencies around them make doing things like tariffs broadly infeasible, so it’s try or die for global trade to prevent antitrust law becoming inflected with a protectionist and arbitrary bent that gets modeled!

**Murray 19** – Chief Growth Officer, CheckAlt; Judicial Law Clerk, US Bankruptcy Courts

Allison Murray, JD, Loyola Law School, Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?, 42 Loy. L.A. Int'l & Comp. L. Rev. 117 (2019), Available at: <https://digitalcommons.lmu.edu/ilr/vol42/iss1/3>

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

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

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

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

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

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

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

This paper explores how the **near-term enforcement of antitrust** and competition laws may be **either** the **last hope** for **preserving** aims toward **a free global economy** **or** the **final nail in free trade’s coffin**. We will begin by examining the background of antitrust and competition laws, explaining the goals and economic theories at the heart of the laws, including the myriad of criticisms. Next, we will take a general view of the prevalence of competition laws in the world market, revealing the differences in underlying theory and enforcement by the top three players on the international trade stage. This paper will finish with the subject most at the center of the recent rise of protectionist rhetoric: the perception of unfair enforcement of antitrust laws among the United States, the European Union, and China.

**1NC---DA**

Court Ptx DA---

**The court will avoid abortion ban now due to the perceived fear of court reform**

**Scher 4-20** (Bill Scher is the host of the history podcast "When America Worked" and the co-host of bipartisan online show and podcast "The DMZ", Should Biden Pack the Supreme Court? <https://washingtonmonthly.com/2021/04/20/should-biden-pack-the-supreme-court/>, y2k)

After four congressional Democrats introduced a bill **expanding** the Supreme Court, Senate Minority Leader Mitch McConnell accused Democrats of trying to pressure the current Justices. “It’s **not** just about whether this insane bill becomes law. Part of the point here are the **threats themselves**,” said the Kentucky Republican who always evinces a tender concern for the sanctity of the Court. “The left wants a sword dangling over the Justices when they weigh the facts in every case.”

Well, yeah.

I agree with McConnell that packing the Court would be insane. Allowing one party to determine control of the Supreme Court whenever it controlled the White House and Senate would destroy the legitimacy of the entire judiciary, if not the underpinning of our constitutional government. Threatening to **pack** the Court, however, is perfectly **sane**, and may already be **working**. Count me in.

**Prior** ideologically driven attempts to either **pack the Court** or **strip powers** from the Court **never** became law. But they appear to have **influenced** Court behavior. As my colleague Daniel Block explained last fall, “In the mid-1950s, the liberal Warren Court backed away from protecting victims of McCarthyism because a popular Senate bill threatened to strip the Court’s powers. Throughout the 1970s and 1980s, **conservative politicians** flooded Congress with legislation to stop the Court from ruling on **racial integration**. The justices retreated from enforcing **busing regulations**.”

Franklin D. Roosevelt’s 1937 court-packing scheme came in response to rulings that shut down New Deal programs and curtailed federal government power. FDR’s bill was rejected by Congress—even though Democrats controlled 71 of 96 seats in the Senate. But after its introduction the Court began to uphold New Deal laws. Historians continue to debate whether FDR lost the battle but won the war. Understanding what happened then is instructive for determining how far Democrats should go today.

In the June 1936 Tipaldo case, decided on a 5-4 vote, the Supreme Court struck down a women’s minimum wage law in New York State. The decision was part of a long line of rulings based on the principle that employers and employees have the “freedom” to forge contracts, and any “[l]egislative abridgement of that freedom can only be justified by the existence of exceptional circumstances.”

Roosevelt announced his plan to expand the Court on Feb. 5, 1937. Fifty-two days after FDR’s move, the Supreme Court ruled in the Parrish case that Washington State’s minimum wage for women was constitutional. As the law was very similar to the one struck down nine months before, the ruling amounted to a complete reversal. Between the two cases, Justice Owen Roberts moved from the conservative to liberal position, a move that became known as the “switch in time that saved nine.”

Parrish was followed in April with the Court’s upholding of FDR’s National Labor Relations Act. Then in May, Social Security was also deemed constitutional. Even though in July the Senate sent the court-expansion bill back to committee, to be filleted, the Court was no longer an obstacle to the New Deal.

That chronology of events suggests FDR’s bill moved the Court. Roosevelt himself championed that narrative in an introduction to a volume of his public papers: “The Court began to interpret the Constitution instead of torturing it. It was still the same Court, with the same justices. No new appointments had been made. And yet, beginning shortly after the message of February 5, 1937, what a change!”

But FDR left out two key data points. One (most likely unbeknownst to FDR) is that Roberts executed his switch in December 1936—before FDR’s message. In a 1945 memo, Roberts explained that the December vote wasn’t immediately made public because one Justice was ill. The Court could have deadlocked 4-4 and still have upheld Washington State’s minimum wage law, because it would have left in place a lower court ruling, but the Justices knew their absent colleague would also support the law and they wanted a majority 5-4 vote.

We can say that FDR’s announcement did not pressure Roberts to switch, since the switch came first. What remains a source of scholarly debate is whether speculation in the press about a forthcoming court-packing plan, in the immediate aftermath of FDR’s landslide 1936 re-election win, nevertheless pressured Roberts to switch. If not, was there already evidence of doctrinal evolution by Roberts, and other Justices, in the midst of Depression and modernization, which culminated with the springtime 1937 liberal rulings? (For a deep dive into this debate, read this series of essays in the October 2005 edition of the American Historical Review.)

Roberts himself gives conflicting evidence. On one hand, he insisted in his 1945 memo (published posthumously 10 years later) that in the two minimum wage cases, he didn’t switch at all. He just wasn’t asked in Tipaldo, the first case, to overrule the 1923 Adkins opinion—which struck down a law passed by Congress establishing a minimum wage for Washington, D.C. But the second case, Parrish, did confront Adkins directly, and then Roberts made his view known. He admitted he could have taken the “proper course” and written his own concurring opinion for Tipaldo plainly stating his view, and neglected to give a reason why he didn’t.

FDR biographer Kenneth S. Davis, in FDR, Into the Storm 1937-1940, found Roberts’ belated explanation “disingenuous” and “desperately contrived … made solely for the purpose of protecting the Court against a probable attempt to drastically limit its powers.” And, as Block noted, Roberts acknowledged in congressional testimony that he was “fully conscious” of how the “court-packing plan” put “tremendous strain and threat to the existing Court.” Roberts didn’t say he switched because of that strain, but those dots seem very connected.

The other data point FDR left out of his narrative is the political damage he suffered as a result of his bill’s decisive rejection by the Senate. Many FDR allies in the chamber urged him to stand down after the switch, but he greedily persisted and paid a steep price.

In Roosevelt’s Purge, the historian Susan Dunn explained how the defeat emboldened the conservative anti-New Deal wing of the Democratic Party, mere months after Roosevelt’s historic 24-point election victory in 1936: “Gleefully, they banded together to sabotage the rest of the New Deal, voting down Roosevelt’s progressive tax measures, abolishing the graduated tax on capital gains, killing his proposal for seven regional agencies patterned after the TVA, tearing apart his executive reorganization plan and burying in committee his Fair Labor Standards Act.” Davis sharply concluded, “his sadly mistaken court-packing effort effectively ended the New Deal as a reforming, transforming social force[.]” FDR can’t cheerily claim he won the war for the Court, if in the process he lost the war for his agenda.

How should Democrats apply the FDR lessons? As the chess adage goes, “**the threat is stronger than the execution**.”

We can’t cleanly separate and sort out what factors influenced Roberts, but we do know that FDR’s announcement wasn’t one of them, because it was after the fact. Moreover, FDR’s proposal was immediately unpopular: 47 percent in favor, 53 percent opposed in an early March 1937 Gallup poll. After the “switch” became public, support further declined. Despite FDR’s electoral mandate, his attempted power grab depleted his strength. But beforehand, the landslide election and speculation over court-packing was likely helping to move the Court his way. If FDR hadn’t announced a specific proposal, he probably would have gotten the same results from the Supreme Court, without shattering his congressional coalition.

Today’s congressional Democratic leadership has kept their distance from the court-packing bill. **Leaning** on the President’s new blue ribbon **commission** exploring non-specific **judicial reforms**, House Speaker Nancy Pelosi said she has “no plans to bring [the bill] to the floor.” This is wise. FDR couldn’t move public opinion in favor of the bill, and he won his election by 20 more points than Biden. While there are far fewer conservative Democrats today than in 1937, a move to a floor vote could well have split the Democrats and harmed the rest of their agenda.

But McConnell is correct that the threat still **looms**—which is a good thing. What if the Supreme Court moved in a **radical right-wing direction** now that it has a 6-3 conservative majority? What kind of **backlash** would materialize? Could it lead to big Democratic gains in the upcoming elections and give Biden a greater mandate to pack the Court than FDR had? The conservative Justices **can’t** know for **sure**, and **they may not want to test the proposition with a slew of provocative rulings.**

John Roberts has shown for almost a decade that he’s happy to lead the march in a conservative direction, **but** not **too** quickly, avoiding some incendiary cases and defusing others—most notably, preserving Obamacare in 2012. This could explain why the Court has kept **punting** on the Mississippi 15-week **abortion ban** case. If the Court’s conservatives are ready to overturn Roe v. Wade, right now they would take the case. If they want to avoid needless **divisiveness** and protect their legitimacy, they will **leave it alone.**

So long as the latter strategy appears to be **in effect**, that strongly suggests the conservative Justices **see the dangling sword**. Biden, Pelosi and Schumer are wise to keep it sheathed, and keep them guessing.

**Plan allows Roberts to moderate the court’s conservative credentials and builds credibility---that relieves pressure on the court**

**Masters 20** (Brooke Masters, FT’s Chief Business Commentator and an Associate Editor, US Supreme Court adjusts to new tilt to the right, 12-10, <https://www.ft.com/content/16489a50-e828-4cc6-8d0d-a261c1f1f9d8>, y2k)

The US Supreme Court is having **adjustment** problems. The addition of three **conservative** appointees by President Donald Trump in four years has **disturbed** the balance and possibly destroyed the comity of America’s highest court. The arrival of Amy Coney Barrett in October, replacing the late Ruth Bader Ginsburg, gives the court a 6-3 conservative majority after decades of a 5-4 split or control by a moderate block.

A court that has been **reliably pro-business** for years will stay that way at a time when incoming president Joe Biden is expected to favour stricter **regulation** and labour rights. The court also appears poised to invalidate or sharply narrow social reforms and government programmes that are popular with the majority of Americans, including abortion rights, gay marriage and Obamacare.

Some of the justices cannot wait. Samuel Alito, long one of the most conservative, recently complained in a speech that the court’s landmark 2015 gay rights decision in Obergefell vs Hodges had made traditional views unacceptable. “You can’t say marriage is a union between one man and one woman,” he said. “Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry.”

The significance of Ms Barrett’s arrival was underscored last month when the court blocked New York’s Covid-19 related restrictions on public religious services, saying they violated the freedom to worship. Before Ginsburg’s death, the court had upheld similar rules in California and Nevada, holding that they were necessary to control the pandemic and did not treat religious gatherings differently from secular ones.

The New York ruling was also notable for its many sharply worded opinions. Trump appointee Neil Gorsuch declared bitterly it was “past time” to strike down such restrictions, writing: “Even if the constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”

The question **now** is **not** whether the court will move to the right, **but how far**. History shows that even though the justices are required to base their decisions on the constitution and legal precedent, **popular opinion plays a role**. After all, the court has no enforcement mechanism — it de­pends on the rest of government and the respect accorded to its rulings.

In the past, when Supreme Court rulings departed **too far** from public consensus, it has ended up **adjusting**. The best known instance is often described as the “**switch in time that saved nine”.**

In the 1935-36 terms, the justices capped a 40-year period of conservative rulings by striking down several **New Deal** statutes by 5-4 votes, drawing **public opprobrium** and a threat from then president Franklin Roosevelt to **pack the court** with additional liberals. While the bill was still pending, Owen Roberts changed sides — “**switched**” — and voted to uphold a Washington state minimum wage bill and continued to support **regulation of business**.

But liberals have seen the court shy away from confrontation as well. In 1954, in Brown vs Board of Education, the court invalidated segregated schools but put off immediate implementation, saying in Brown II a year later that states and school boards merely needed to act with “all deliberate speed”.

Chief Justice John **Roberts** has already shown he is deeply concerned with maintaining the Supreme Court’s institutional strength. For years, he has sometimes provided the **liberals** with a fifth vote on questions where he felt the **court’s credibility** could be at stake, including a 2012 ruling that turned back the first major challenge to the Affordable Care Act (ACA) that established Obamacare, and on cases regarding abortion rights and young immigrants last spring.

Supreme Court watchers observe that its history can place a powerful weight on members

Early signs suggest he is still playing a **similar** role, even though Ginsburg’s death has **shifted the balance** on the court. At a time when the ACA is more popular than ever, he was openly sceptical in oral arguments of a new claim that Congress wanted the entire act to fail when it voted to change one part of it. In the New York Covid-19 religious services case, he defended his liberal colleagues from Justice Gorsuch’s criticism, saying “they simply view the matter differently after careful study”.

**But** Ms Barrett’s arrival means the **c**hief **j**ustice can **no longer make the difference on his own**: he must bring along **at least one conservative colleague** to make a **majority**. In a landmark LGBT+ case last year, that extra conservative was Mr Gorsuch, and at the ACA hearing Brett Kavanaugh sounded sympathetic to Mr Roberts’ efforts to limit the reach of the case. But on the New York Covid-19 restrictions, the conservative bloc held.

After the ACA, the biggest early tests are likely to be in social policy cases involving gun rights and abortion. There already were five votes for pro-business decisions, so Ms Barrett’s arrival is unlikely to change the outcome of financial and regulatory cases.

On guns, the court has not taken up a recent case, but four justices previously supported an expansive approach to the second amendment right to bear arms. Ms Barrett expressed similar views as an appeals court judge. On abortion rights, the conservative bloc has criticised Roe vs Wade, the 1973 decision that proclaimed a constitutional right to have an abortion. Ms Barrett has signed public letters opposing abortion, and on the appeals court she dissented when other judges declined to rehear an Indiana case where tough abortion restrictions had been blocked.

Still, Supreme Court watchers know the institution’s history can place a powerful weight on its members. **With the balance tilted to the political right**, and an incoming administration committed to changes on climate and **labour**, the left will hope one or more of the justices will **surprise**.

The question remains: **which could it be?**

**That provides a breathing room for conservative rulings**

**Bazelon 15** (Emily Bazelon is a staff writer for the magazine and the Truman Capote Fellow at Yale Law School, Marriage of Convenience, 2-1, New York Times, l/n, y2k)

More significant, if the court is seen as **transcending** partisan politics, Roberts will probably have more chances, over time, to accomplish what appears to be his primary long-term goal: to move the court in a **more conservative direction** on a **range** of issues. In particular, Roberts's brand of conservatism has manifested itself in two main areas. The first is in decisions that are sympathetic to corporations. A 2013 study found that he had been more likely to side with businesses than any justice in the previous 65 years, except for Samuel Alito. The second is in decisions that are antagonistic toward the idea of taking race into account in shaping law or policy. Roberts has voted repeatedly against affirmative action, writing last year that it was not hard to conclude that racial preferences may ''do more harm than good.'

When Roberts was nominated to be chief justice 10 years ago by President George W. Bush, he exuded calm neutrality at his confirmation hearing, comparing judges to umpires who call balls and strikes. At the end of his first term, he emphasized the importance of the court's **''credibility** and **legitimacy** as an institution,'' in an interview with the George Washington University law professor Jeffrey Rosen.

But in 2010, Roberts supplied the fifth vote for the court's remarkably unpopular ruling in Citizens United. By striking limits that Congress set on campaign spending by corporations, the court was perceived as favoring the interests of the wealthy. The court's approval rating fell 10 percentage points, to barely break even, from 61 percent.

Since then, the court has **fared better** with the public when it pairs **conservative decisions** with **progressive** ones. And same-sex marriage is part of that equation. In 2013, the term ended with a **splashy ruling** in which five justices -- Roberts not among them -- struck down part of the Defense of Marriage Act, which restricted federal benefits for spouses to **male-female couples**. This decision came **one day** after the court gutted a central component of the **Voting Rights Act**, in a 5-to-4 decision written by Roberts.

**Abortion ban collapses reproductive rights---extinction**

Paul **Ehrlich 18**, President, Center for Conservation Biology, Bing Professor of Population Studies, Stanford University, 3/24/18, quoted by Sputnik News, “Overconsumption, Inequity 'Lower Chances of Avoiding Global Collapse' – Scholar,” https://sputniknews.com/analysis/201803241062865525-overconsumption-inequity-global-collapse/

The collapse **of civilization** in the next few decades is **imminent**, and it could be triggered by a variety of factors, Paul Ehrlich told Sputnik. "It could be caused by a **nuclear war**, **droughts** and floods leading to mass **starvation**, a bursting of the debt bubble, political **unrest** from refugee flows or increasing economic inequity, **trade wars**, **terrorism** or synergizing **combinations** of these and other factors," the researcher said. The main reasons behind all these negative predictions are, according to the scientist, overpopulation and overconsumption. He is confident that these two factors will drive our civilization over the edge. "The basic problem is the wrecking of human **life-support systems** by growth in aggregate consumption — and that is a product of growth in **population** size and growth in per capita consumption. Various forms of inequity — gender, racial, religious could contribute by making it less likely that people will provide the cooperation required to give the chance of avoiding a collapse," the analyst argued. In Ehrlich's view, the situation has significantly worsened since he released a corresponding warning in his book "The Population Bomb" 50 years ago. "The population has doubled in size, climate disruption is now much more thoroughly understood and is already causing problems, there soon will be more weight of plastics in the oceans than fish; hormone-mimicking synthetic chemicals are now toxifying earth from pole to pole and are the likely cause of plunging sperm counts around the world; almost half of wildlife has been exterminated in the greatest mass extinction episode in the last 66 million years," the analyst said. According to him, the chances of a **global nuclear war** wiping out civilization are now also "higher than at any time during the Cold War except for the Cuban missile crisis." Although, there have been numerous warnings about the way humans are threatening life on earth, governments and the international community have so far failed to reduce this threat, and Ehrlich believes that there are several reasons for this. Among them are "the lack of education in basic science, especially among economists and politicians, who think economic growth is the cure for everything rather than what it is — the basic disease," the analyst said, adding that a key role is also being played by such negative traits if a human character as "greed, stupidity and arrogance." Answering the question about which measures he considers essential to change the situation for the better, the scientist said that, among other things, it's important to "**supply everyone with modern contraception** and backup **abortion**," "give women equal rights and opportunities with men," "end racial and religious discrimination so that all people are free to help solve the human dilemmas" and "redistribute wealth."

**1NC---CP**

Adv CP---

**The United States federal government should:**

* **Increase regulatory enforcement and streamlining of critical supply chains**
* **Support R&D and public private partnerships to secure supply chains**
* **Improve national infrastructure to boost innovation in supply chains**

**The supply chain efforts are sufficient to establish resiliency in them**

**Iakovou and White 20** – Eleftherios Iakovou is the Harvey Hubbell Professor of Industrial Distribution at Texas A&M University and the Director of Manufacturing and Logistics Innovation Initiatives at the Texas A&M Engineering Experiment Station.  
Chelsea C. White III is the Schneider National Chair in transportation and logistics and is a professor at the H. Milton Stewart School of Industrial and Systems Engineering at Georgia Tech.

Eleftherios Iakovou and Chelsea White, December 3 2020, “[How to build more secure, resilient, next-gen U.S. supply chains](https://www.brookings.edu/techstream/how-to-build-more-secure-resilient-next-gen-u-s-supply-chains/),” Brookings, https://www.brookings.edu/techstream/how-to-build-more-secure-resilient-next-gen-u-s-supply-chains/

Supply chain resilience has already emerged at the forefront of the United States’ research and development agenda. In identifying R&D priorities for federal agencies for fiscal year 2021, the Office of Science and Technology Policy at the White House [has called](https://www.whitehouse.gov/wp-content/uploads/2019/08/FY-21-RD-Budget-Priorities.pdf) for the development of resilient advanced military capabilities and **improved resilience of critical infrastructure and U.S. advanced manufacturing** to natural and man-made disasters, including cyber-attacks and **exploitation of supply chain vulnerabilities.**

Following the COVID-19 pandemic, policymakers are now calling for supply chains of critical goods, especially medical supplies and high-tech products, to be reshored to the United States. But the complete reshoring of such supply chains cannot be the answer. Domestic suppliers can also be disrupted. And such a move would make U.S. businesses less competitive, putting them at a disadvantage with businesses of other (often adversarial) nations that continue [to embrace globalization and support key industries](https://www.cornellpress.cornell.edu/book/9781501725913/chinese-economic-statecraft/#bookTabs=1) with aggressive industrial policies, including subsidies and currency manipulation. The result may be reduced appeal of U.S. products in foreign markets, increased costs to U.S. consumers, reduced shareholder value for investors, and the erosion of the United States’ global innovation leadership, as [complete reshoring would hinder](https://www.foreignaffairs.com/articles/2020-04-01/how-pandemic-proof-globalization) its openness to ideas, people, and sourcing of parts and [may not make](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3609677) the U.S. economy more resilient to pandemic-type shocks.

The design and operation of a supply chain is highly dependent on the product. Functional products with long life cycles and relatively small demand variability require cost efficient supply chains **that can be offshored**. Innovative products with short life cycles and relatively high demand variability [**require**](https://hbr.org/1997/03/what-is-the-right-supply-chain-for-your-product)**market-responsive supply chains with nearshored or domestic sourcing and production**. Products of critical importance to defense, security, health, and national competitiveness require the federal government to take a special interest in their supply chains. Today, such **products include rare-earth metals, artificial intelligence, hypersonic weaponry, 5G technology, semiconductors, pharmaceuticals, synthetic biology, and specialized medical equipment.**

The competitiveness, resilience, and security of these supply chains, **embracing holistically R&D, planning, procurement, manufacturing, distribution, and maintenance along with the cultivation of a national manufacturing ecosystem of small to medium enterprises is key to U.S. national security**. Achieving this requires an understanding of a given industry’s “[clock speed](https://books.google.com/books/about/Clockspeed.html?id=KlVvQgAACAAJ)”, which refers to the speed at which it introduces new products, processes and organizational structures; government and regulatory processes; and manufacturing operations for repair and maintenance, which are often not synchronized across these supply chains**. Federal government interventions to cultivate supply chain resilience must work in tandem with a given industry’s clock speed.**

As it responds to the pandemic, the United States has made some moves to improve its supply chain resiliency, including provisions in the CARES Act economic relief package to investigate U.S. medical supply chains. President-elect Joe Biden has announced a plan to rebuild U.S. supply chains that aims for broad-based resilience as opposed to pure self-sufficiency. Additionally, there have been multiple Senate hearings to examine the integrity and reliability of critical supply chains following the onset of the pandemic. There are a number of other policy interventions the U.S. government might take to promote more resilient and competitive supply chains. These interventions include:

Mapping supply chains that are critical to U.S. health and economic security in order **to identify potential vulnerabilities and threats**. Supply chain mapping provides visibility to “the suppliers’ suppliers” and can be laborious and time intensive, as it is often conducted on paper. Following the 2011 tsunami in Japan, for example, a team of 100 executives of a global semiconductor giant [needed](https://www.economist.com/special-report/2019/07/11/multinational-companies-are-adjusting-to-shorter-supply-chains) more than one year to complete this task. **Embracing novel digital approaches to illuminate the relevant extended supply networks**[**is imperative**](https://www2.deloitte.com/global/en/pages/risk/articles/covid-19-managing-supply-chain-risk-and-disruption.html)**to help identify what data are important for the development of well-informed policy interventions and operations.**

Investing to improve national logistics infrastructure, including its “hard” (ports, roads, rail networks) and “soft” infrastructure (the service industries that underpin logistics) **with a focus on improved customs performance, supply chain reliability and service quality, cybersecurity, environmental sustainability, and skills shortages**. These priorities [**would further raise**](https://openknowledge.worldbank.org/handle/10986/29971)**the United States’s ranking in supply chain performance, global logistics connectivity, and competitiveness**. Such long overdue investments unfortunately were not made in the globalization-driven economic boom of the 1980s, when policymakers [failed to embrace](https://www.basicbooks.com/titles/dambisa-moyo/edge-of-chaos/9780465097470/) long-term thinking.

Ensuring that IP law, R&D incentives, education and work force training infrastructure, and societal attitudes toward diversity and inclusion [**support**](https://www.hup.harvard.edu/catalog.php?isbn=9780674019942)**the**[**innovation ecosystem**](https://books.google.com/books/about/How_We_Compete.html?id=Va21AAAAIAAJ) to accelerate [idea creation](https://www.basicbooks.com/titles/richard-florida/the-rise-of-the-creative-class/9781541617742/) and the process of turning ideas into useful products, services, or processes.

Establishing a “one stop shop” federal agency for harmonizing relevant regulatory interventions (e.g. relevant efforts by the General Services Administration, the Defense Logistics Agency, NIST, Department of Labor, DHS, the Federal Trade Commission, and the State Department), an**d the development of comprehensive national strategies for competitive, secure, and resilient U.S. manufacturing supply chains.**

Further investing in public-private partnerships, such as the [Manufacturing USA](https://www.manufacturingusa.com/) program, supporting a continuum of research from early (basic research) to late technology readiness levels (commercialization) **to facilitate the transition of innovative technologies into scalable, competitive, and high-performing domestic manufacturing capabilities.**

**Case**

**Supply Chain Adv**

**Top level---the words “antitrust” and “anticompetitive” do not appear in the first advantage in context of their internal links---be highly skeptical of reverse causal claims**

**Alt causes---green**

**1AC Umbach 20** [Dr. Frank Umbach is the Head of research of the European Cluster for Energy and Resource Security (EUCERS)/ CASSIS at the University of Bonn, “THE NEW “RARE METAL AGE” NEW CHALLENGES AND IMPLICATIONS OF CRITICAL RAW MATERIALS SUPPLY SECURITY IN THE 21st CENTURY”, April 27, 2020, S. Rajaratnam School of International Studies, https://www.jstor.org/stable/resrep25385] IanM

Assessments of combined supply risks include concentration, current as well as future production rates of individual countries and regions, political stability in producing and mining countries, current recycling volumes and an estimate of the substitutability of each raw material in each relevant field of use.43

**They do not have an internal link---no connection between “market manipulation of price” and any of their impacts**

**That’s because the impact is empirically denied**

**Martyniszyn 12** (Dr. Marek, Senior Lecturer in Law at Queen’s University Belfast, PhD, University College Dublin, Export Cartels: Is it Legal to Target Your Neighbour?, Journal of International Economic Law, 3-29, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>, y2k)

It is acknowledged in the literature that **empirical data** on export **cartels** is **lacking**.16 This state of affairs seriously handicaps attempts to **analyze** this issue. It may well be that the greatest significance of export cartels, as seen through the lens of free trade, is symbolic. The principles underlying trade liberalization have been the antithesis of mercantilism, which is characterized by beggar-thy-neighbour policies. The fact of tolerance or even encouragement of **export cartels** may be seen, as Sweeney puts it, as a form of neo-mercantilism17 and thus contrary to the efforts of trade liberalisation. **At the same time**, Sokol rightly cautions that due to the **lack of empirical data** solutions to the issue of **export cartels** may be **too reliant on theory** with all the risks connected with the acceptance of various **assumptions**, which may be **misguided**.

**Their graphene and REMs scenarios are purely speculative---says it’s possible, but never that it is likely to happen in the squo**

**Their chips internal link is about natural disasters or China disrupting the industry---aff doesn’t affect Mother Nature nor increase deterrence of Taiwan**

**Supply chain relocation is inevitable – COVID and U.S.-China strategic rivalry ensure it.**

**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.

**Their ev says Taiwan controls the industry---zero chance that they cut off US access to because of their reliance on US military support**

**Global Development Adv**

**Narrow court interpretation decks solvency**

**Crane**, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, **‘21**

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts **frequently acknowledge** that the statutory texts have a plain meaning, **and then refuse to follow it.**

**But it gets worse**. The courts have **not merely abandoned** statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have **departed** from text and original meaning **in one consistent direction**—**toward reading down the antitrust statutes in favor of big business**. As detailed in this Article, this **unilateral process** began **almost immediately** upon the promulgation of the Sherman Act **and continues to this day**. In brief: within their first decade of antitrust jurisprudence, the courts **read an atextual rule of reason** into section 1 of the Sherman Act to **transform an absolute prohibition** on agreements restraining trade **into a flexible standard** often invoked to **bless large business combinations**; after Congress passed two reform statutes in 1914, the courts **incrementally** read much of the textual distinctiveness **out of the statutes** to **lessen their anticorporate bite**; the courts have read the 1936 Robinson-Patman Act **almost out of existence**; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to **textually unrecognizable levels** by judicial interpretation and **agency practice**. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has **bent always in favor of capital**.

**The plan can’t spur harmonized antitrust in developing countries**

**Buxbaum 18** – Professor of law and John E. Schiller Chair at Indiana University.

Hannah L. Buxbaum, “Transnational Antitrust Law,” *Indiana Legal Studies Research Paper*, no. 384, 18 January 2018, pp. 10-13, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3101038.

III. Economic Globalization and the Prospects for the Convergence of Antitrust Norms

**Transnational regulation rarely develops along an evolutionary pathway that begins with** an initial stage of **unilateral regulation**, moves through stages manifesting progressively higher levels of cooperation and integration, **and arrives at** an end stage of **complete harmonization**. More frequently, it constitutes a body of norms and enforcement practices generated at multiple sites, both within and outside the state. Yet changes in political or economic conditions can precipitate a move toward greater uniformity of law (whether achieved through top-down lawmaking or through convergence of disparate legal systems). To a significant degree, this has occurred in the area of antitrust regulation as a result of economic globalization.

Economic globalization promotes greater uniformity in antitrust regulation in two particular ways. First, it has produced an increasing degree of trade liberalization, achieved through multilateral instruments (most prominently the General Agreement on Tariffs and Trade), regional accords, and bilateral investment treaties. In order to realize the full benefits of that liberalization, states must prevent private anti-competitive behavior from creating new restraints on trade. This imperative generates pressure to develop basic competition policies, as is reflected in the wave of lawmaking that followed the opening of markets in the 1990s. It also generates pressure to converge around certain substantive norms that are particularly important to trade: for instance, those prohibiting exclusionary practices (both monopolistic exclusions, including by state-owned enterprises, and exclusionary vertical constraints) and hard-core cartels.

Second, economic globalization has produced an increase in cross-border business activity. This has created a new set of global regulatory challenges, including the formation of international cartels, an increase in cross-border merger activity, and the threat of global monopolies or oligopolies. As a result, the transaction costs of maintaining inconsistent antitrust regimes (including the aggregate costs of multiple investigations involving the same transactions or conduct) have increased. In addition, there is increased risk of both underdeterrence—that certain anti-competitive conduct may fall into a regulatory gap between legal systems—and overdeterrence—that the application of multiple laws might deter otherwise beneficial activity. These outcomes likewise produce pressure to harmonize local antitrust rules.

There are limits to the momentum these pressures create. Many **developing countries have** either **ideological or political reasons to resist adopting competition law regimes** at all. **In some, those regimes are viewed as opening the door to** a new form of **corporate imperialism; in others, they may be resisted by state or private actors** who are deriving rents from a controlled economy. Moreover, while global competition may generate economic growth, the benefits of that growth do not accrue to all economies—or to all participants within particular economies— on the same timeframe or to the same extent. **National decision-makers may conclude** that the potential **long-term gains expected from** the adoption of a full-fledged **antitrust** regime **are outweighed by the need to shield emerging industries**, protect local employment opportunities, preserve autonomous local governance, or limit the impact of foreign businesses on local constituencies.

Even assuming the desirability of antitrust regulation, significant debate remains regarding the feasibility of broad-scale harmonization. **Different countries remain differently situated in terms of their** own **economic policies and objectives**. As noted above, many systems seek not only to maximize consumer welfare, but also to serve other important domestic goals, such as building up emerging domestic industries. **It is** therefore **far from clear that a single set of substantive norms would be compatible with antitrust policy across all jurisdictions**. In this regard, one question is whether **states linked** not by geographic proximity but **by shared interests may form communities to** develop antitrust norms that **challenge the** orthodoxy of the **U.S.-EU model. The BRICS countries have recently taken steps in this direction**, as part of a broader effort to represent the interests of emerging and developing economies in international financial regulation. Furthermore, efforts to identify a shared core, and to develop standards that are broadly compatible with a range of different economic policies, have been criticized for yielding either a “minimal” set of rules or a “least common denominator” solution. In 1980, for instance, the U.N. General Assembly adopted UNCITRAL’s Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The principles were criticized on this basis, and have not had significant impact on the generation of cross-border norms.

Differing economic conditions also mean that **the incentives of individual countries to adopt** particular **norms are not fully aligned across jurisdictions**. For instance, vertical restraints are less harmful to buyers in large economies, where there is more competition, and so those regimes have less incentive to regulate them tightly. Indeed, in areas beyond those most critical to the promotion of competition, there may be an offsetting benefit flowing from the experimentation that characterizes the development of antitrust norms today, and the greater ability of individual systems to react quickly to changes in global economic conditions. Finally, **some of the countries currently lacking antitrust regimes are at a stage** of development **where the institutional capacity to implement and** then **enforce such laws is not sufficiently advanced**. That capacity depends not only on governmental institutions such as agencies and judiciaries, but also on other public- and private-sector entities including educational institutions, professional associations, and civil society organizations.

In this light, it is no accident that the area in which a fully effective transnational order has taken hold is hard-core price fixing. Hard-core cartels are purely welfare-diminishing, and harm all economies alike. Moreover, the operation of global cartels creates the risk that inadequate enforcement in some countries would lead to overall underdeterrence, which has helped to shift the legal response to the international plane. In 1998 the OECD adopted a Council Recommendation Concerning Effective Action Against Hard Core Cartels, and urged member states both to adopt laws prohibiting such conduct and to ensure effective enforcement of those laws. The ICN has published an Anti-Cartel Enforcement Manual, and hosts regular conferences in this area. Today, over 100 systems have enacted such legislation, and significant progress has been made in enforcement of those prohibitions.

**Further harmonization of antitrust norms might require a shift in philosophy** toward a “world welfare” goal— defined as “the aggregate level of consumer benefits and profits realized by consumers and firms in all pertinent countries.”8 **Short of that move**, the **settling of particular norms across multiple legal systems is likely to occur through continued regionalization** or in connection with individual substantive areas.

**Development a pre-req to antitrust application---need to resolve corruption, instability, etc**

**Their Cheng ev says that small businesses are critical for developing economies---cracking down on global supply chain conduct doesn’t affect that, especially in Africa**

**Instability in Africa doesn’t escalate – no nuclear states want war in the region**

- Insurgents lack resources and training

- Opposition groups moved away from violence into politics

- China improves growth and builds state resilience

- Peacekeeping is effective

**Straus 13**

Scott Straus is a professor in the Department of Political Science at the University of Wisconsin, The Guardian, January 30, 2013, "Africa is becoming more peaceful, despite the war in Mali", http://www.theguardian.com/world/2013/jan/30/africa-peaceful-mali-war

What explains the recent decline in warfare across Africa? I don't know for certain, but would point to geo-political changes since the end of the cold war.

**First**, the end of the cold war meant that the opportunities for rebels to receive substantial weaponry and training from big external states **declined.** To be sure, states across Africa still meddle in the affairs of their neighbors, but insurgent funding from neighbouring states is usually **enough to be a nuisance to, but not actually overthrow, existing governments.**

**Second**, the rise of multi-party politics has sapped the anti-government funding, energy, and talent away from the bush and into the domestic political arena.

**Third**, China is a rising external force in sub-Saharan Africa. China's goals are mainly economic, but their foreign relations follow a principle of non-interference. To my knowledge, China supports states, not insurgencies.

**Finally**, conflict reduction mechanisms, in particular international peacekeeping and regional diplomacy, have substantially increased on the continent. **Peacekeeping is more prevalent and** especially more **robust** than in the 1990s. Regional bodies such as the African Union, Eccowas, Eccas, IGAD, and SADC are quite active in most conflict situations. They have exhibited greater resolves in conflicts as diverse as Côte d'Ivoire, Sudan, the Central African Republic, and Madagascar.

The four posited mechanisms are hypotheses, each of which deserves greater scrutiny and empirical testing. But **taken together**, they **suggest plausible ways** in which **the incentives of insurgents and even state leaders to fight have been altered in recent years.** They give reason to expect that while war is clearly not over in sub-Saharan Africa, **we should continue to observe a decline in its frequency and intensity in coming decades.**

**No conflict impact to food insecurity – best models.**

**Buhaug et al, PhDs, 15**

(Halvard, Political Science from NTNU, Tor A Benjaminsen, Human Geography from Roskilde, Espen Sjaastad, Resource Economics from NMBU, and Ole Magnus Theisen, Political Science from NTNU, Climate variability, food production shocks, and violent conflict in Sub-Saharan Africa, Environmental Research Letters 10(12)) BW

**Across all models,** we find relatively **weak and insignificant effects** for domestic food production and we also note that the sign of the coefficients shifts between outcome types. In this sense, table 1 implicitly contrasts both claims that political violence is more prevalent when basic needs are met (Salehyan and Hendrix 2014) and claims that agricultural income shocks increase civil conflict risk (von Uexkull 2014). The results are consistent with Koubi et al (2012) and van Weezel (2015), however, who conclude that rainfall—a significant determinant of yields in SSA—has little impact on conflict either directly or through economic performance. The covariate that best and most consistently explains temporal variation in political violence is the time-lagged conflict incidence indicator. Models 1–2 show that a new civil conflict is unlikely to break out if another one is already ongoing in the same country whereas Models 3–6, which capture the occurrence of less organized conflict, demonstrate that violence begets violence. Coups d’état (Models 7–8) exhibit a comparatively weak temporal correlation pattern in our data and are generally regarded as a highly unpredictable phenomenon (Luttwak 1979). Next, we estimate the same set of models on a subsample of 14 countries in SSA where rainfall has a large and significant positive effect on food production (figure 2(b); see supplementary information, section B for details). To better capture the influence of climate variability and reduce concerns with endogeneity, we further replace the standard OLS model with twostage instrumental variable regression. The first stage in this model estimates the joint influence of annual rainfall (linear and squared terms) and temperature (linear) on contemporaneous food production. This effect then constitutes the exogenous instrument for food production in the second stage. The results are reported in table 2. Mirroring the results presented above, we fail to uncover a robust signal for agricultural performance, although the sign of the coefficient for food production now remains negative in seven of the eight specifications. Food production shocks may have different consequences depending on the socioeconomic context, so next we consider a series of interactive relationships. Specifically, we investigate the joint effect of food production and (i) low level of development, (ii) extent of discriminatory political system, and (iii) economic dependence on agriculture; three conditions whereby loss of income from agriculture might constitute a particular challenge to society. To model these interactions, we include time-varying regressors instead of country-fixed effects where (i) is represented by infant mortality rate (IMR; World Bank 2014), (ii) is captured using the Ethnic Power Relations v.1.1 data (Cederman et al 2010), while (iii) uses an index of agricultural contribution to GDP (World Bank 2014). Moreover, to preserve focus on temporal dynamics, food production is now operationalized as yearly deviation from the country mean, 1961–2009. We use additive inverse deviation values to ensure theoretical consistency among the components in the interaction terms. All models control for (ln) population size, conflict history, and a common time trend, and models without IMR and agricultural dependence additionally control for (ln) GDP per capita. The results are presented in table 3. Again, **we are unsuccessful in establishing a consistent covariation pattern between agricultural performance and political violence.** Interpreting the combined effect of interaction terms with continuous parameters is inherently difficult but figure 4 shows that food production is insignificantly related to all conflict outcomes across levels of socioeconomic development for all three interaction terms. The sole exception is the result in Model 24, where lower food production in highly discriminatory societies is negatively associated with non-state conflict. This result would seem to **contradict the standard scarcity thesis** (Homer-Dixon 1999) although it is consistent with observations that conflict is more prevalent during surplus years (Witsenburg and Adano 2009, Salehyan and Hendrix 2014). Mirroring earlier research, ethnopolitical exclusion is strongly related to higher civil conflict risk, but not necessarily to other forms of political violence. Infant mortality rate and economic dependence on agriculture appear largely irrelevant. While this may come as a surprise, recall that most countries in SSA are characterized by underdevelopment and a large agricultural sector, implying that the variation in values on these indicators is modest. Large parameter uncertainties and p-values above the conventional significance threshold (5%) may disguise substantively important effects (Ward et al 2010). Accordingly, as a final assessment, we conduct a set of out-of-sample simulations and compare predictions for models with and without food production. The models are estimated on a subset of the full sample, in this case all years before 2000, and the estimated effects are then used to predict conflict outcomes out of sample, i.e., the 2000–09 period. Figure 5 shows the predicted values from four pairs of models that are specified similarly to Models 17, 20, 23, and 26, except for the shorter time period and the fact that one model in each pair drops the food production deviation variable. For civil conflict and social unrest, the models generate very similar predictions, signaling that **agricultural performance adds little to the models’ predictive power.** There is more spread in the predictions for the remaining two outcome categories. Puzzlingly, **the model without food production performs better** in both cases—i.e., the Receiver Operating Characteristics curves have higher ‘Area Under the Curve’ scores. We hesitate to put too much emphasis on the ROC tests, given the rareness of the outcomes(notably Models 17 and 26) and the relatively small training samples (Models 20 and 23), but nonetheless the patterns observed in the out-of-sample simulations substantiate the regression results reported above; fluctuations in agricultural output **explain little** of the observed variation in political violence in post-colonial Sub-Saharan Africa. 5. Concluding remarks Emerging evidence suggests that food price shocks are associated with an increase in social unrest (Smith 2014, Bellemare 2015, Hendrix and Haggard 2015, Weinberg and Bakker 2015). Yet, the robust ‘non-finding’ presented here implies that so-called ‘food riots’ play out **largely isolated** from climate-sensitive production dynamics in the affected countries. Likewise, claims that adverse weather and harvest failure drive contemporary violence in Africa (e.g., Hsiang et al 2013, IFPRI 2015) are **not supported** by our analysis. Instead, social protest and rebellion during times of food price spikes may be better understood as reactions to poor and unjust government policies, corruption, repression, and market failure (e.g., Bush 2010, Buhaug and Urdal 2013, Sneyd et al 2013, Chenoweth and Ulfelder 2015).

**2NC**

**Public Enforcement CP**

**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, 20**07**, <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**.

**Line**

**1AC Cognetti 16** [Catherine Cognetti was a J.D. Candidate, 2017, Fordham University School of Law; B.A., 2012, College of William and Mary. They now work as an associate at Kelley Drye & Warren LLP, “A Single Call: The Need to Amend The Parent-Subsidiary Relationship Under the FTAIA In View of Motorola Mobility”, Fordham Journal of Corporate & Financial Law, Volume 21, number 4, 2016, article 3, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1432&context=jcfl] IanM

This Note will explore why the Seventh Circuit chose not to treat Motorola’s American parent company and wholly owned foreign subsidiary as a single economic unit. Part I of this Note outlines the history of the Sherman Act, focusing primarily on the rationale behind the creation of the FTAIA. Part II analyzes the treatment of the parent subsidiary relationship in other antitrust contexts; specifically, the indirect purchaser doctrine and the intra-enterprise conspiracy doctrine. Part III proposes that an **exception needs to be made** **under** the **FTAIA** to provide an **indirect** American **parent corporation** **standing** to **sue under** the **Sherman Act** when the **direct purchaser** is a **wholly owned** **foreign subsidiary** and the effects of foreign anticompetitive conduct have a direct impact on United States commerce.

**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.

**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.

**Private litigation creates pro-defendant precedent that undermines government enforcement---turns case**

**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)

Even if public enforcement proceeds unabated by an increase in private enforcement, the efficacy of public enforcement may be **hindered** if an increasing amount of **antitrust law is made in the context of private litigation** and then applied wholesale to public enforcement. The US experience contains **telling instances** in which antitrust principles created in private litigation **have been applied to defeat government claims in subsequent cases**. Predatory pricing provides a case in point. After many years in which the government brought no predatory pricing cases but a very pro-defendant legal reform was occurring in scores of private predatory pricing cases, the Justice Department finally brought a predatory pricing case against American Airlines, **which it then lost under the new predatory pricing case law**.48 Something similar occurred as to “pay-for-delay” patent settlements, where the FTC was **stuck for a decade** with a **very pro-defendant legal rule created in private litigation**.

**Private litigation fails at compensating for downstream injuries**

**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)

As jurisdictions outside the United States and Europe cautiously transition toward increased private enforcement, they will necessarily be confronted with similar choices. Early signs suggest that jurisdictions may tend to frame private enforcement around a compensation goal rather than thinking of private enforcement as a supplement to public enforcement designed to maximize deterrence. Jurisdictions such as Canada,23 Germany,24 and South Africa25 have decided in favor of indirect purchaser standing with the pass-on defense (although other jurisdictions, such as South Korea, have rejected the pass-on defense).26 Although the impulse toward compensation is understandable given continental assumptions about the public–private divide and the role of private law, antitrust litigation to date has done a **poor job of achieving a compensatory goal**, if by compensation we mean identifying an injured class for whose benefit the law exists – consumers – and providing financial redress in proportion to their injuries. As I have previously submitted,27 antitrust enforcement is **incapable** of compensating consumers for **two out of three major categories of injury** – **deadweight losses** and **dynamic injuries.** That leaves wealth transfers or overcharges as possibly compensable. Yet, even as to this third category of injury, the prospects for adequate compensation to large percentages of injured consumers are **remote**.

The difficulties with providing compensation for overcharges **are many**. As the Council Directive recognizes in providing for indirect purchaser standing, large shares of overcharges are ordinarily passed on **downstream** to household consumers, who absorb the majority of the loss. **They are the primary victims** in need of compensation. But, by the time it reaches the household consumer level, the overcharge is often spread widely over thousands or millions of persons, each of whom incurs a relatively modest injury. Practically speaking, locating and providing compensation to the majority of the injured consumers **is usually impossible**.

To illustrate this point, I refer to important empirical work by Bob Lande and Josh Davis, who argue that the United States antitrust system has been successful in pursuing compensation for injured victims.28 In a debate with Lande and Davis hosted by the American Antitrust Institute, I took their most recent study of sixty cases and provided an alternative perspective on the figures they reported. Lande and Davis report a total recovery of between $33.8 billion and $35.8 billion in these sixty cases,29 an impressive-sounding number. But when one scrutinizes the numbers closely, the compensation claim appears **much weaker**. Even though over half of the states allow indirect purchaser suits under state antitrust law, **only $2 billion out of the total pot was awarded** to indirect purchasers. Of the total, $13 billion went to competitors – whose welfare is at best an incidental focus of antitrust laws – and $15 billion to direct purchasers, many of whom may have passed on nearly the full overcharge and hence suffered no substantial injury. Attorneys’ fees ate up between 9 and 27 percent of the awards, and claims administration costs an additional 4 percent (notably, such costs went up by 50 percent in indirect purchaser cases).

Focusing now on the indirect purchaser claims, I calculated the average claims rate (meaning the percentage of all persons in the class who filled out the paperwork to be awarded a share of the judgment or settlement). In the seven cases for which this information was available, the average weighted (by magnitude of the award) claims rate was 12 percent, meaning that 88 percent of the injured class members did not partake in the damages at all. In sum, 12 percent of indirect purchasers received 6 percent of between 70 and 87 percent of damages awarded in the sixty cases. Accordingly, only a **small fraction of consumers received a share a small piece** (about 5 percent) of the total damages generated by the United States’ antitrust system, reflecting only one aspect of their injury.

**Private suits aren’t compensatory—entirely self interested**

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

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

Private parties who sue antitrust defendants **typically do not sue to vindicate the interests of the consumers** who stopped buying the goods because they were too expensive. Instead, only the purchasers who did buy and actually incurred an overcharge bring antitrust claims.'8 For example, imagine the difficulty of representing a class of purchasers who stopped buying vitamins because of a vitamins cartel or, even worse, who never started buying vitamins because of excessive prices. How could one prove who the consumers were or quantify their injury? It is much easier to recover damages on behalf of **purchasers** who made the purchase but paid too much. In this case, the formula is simply to posit a but-for price and use the difference between the actual price and the but-for price as damages.19 The fact that private damages are automatically trebled under the Clayton Act 2 0 (save for a few exceptional cases) **is no reason to believe that deadweight losses are being recovered after all.** One could rationalize the treble damages allowance as necessary to capture a set of damages that are difficult to identify or recover in private litigation, including the deadweight loss. 2 1 Although this may be an argument for the deterrent purpose of treble damages, **it is not a particularly good argument for their compensatory function**. A consumer who recovers treble damages may be entirely different from a consumer who forgoes the relevant purchase after the price increase. Private antitrust enforcement tends to focus on a set of purchasers and injuries that are secondary in the hierarchy of antitrust concerns. Private enforcement does not seek compensation for, nor does it meaningfully analyze, the **key concern of deadweight loss**. 22

**States CP**

**Yes uniformity solvency ev---**

**Clayton 94** – Director of the Thomas S. Foley Institute for Public Policy and Public Service at Washington State University

Cornell W. Clayton, “Law, Politics and the New Federalism: State Attorneys General as National Policymakers,” The Review of Politics, Vol. 56, No. 3, Summer 1994, https://www.jstor.org/stable/pdf/1407967.pdf

NAAG was originally established in 1907 to assist state attorneys general deliver legal services to their states. During the last two decades however NAAG has **consciously developed** a **more proactive role**, aiming at the **use of state laws** and **law enforcement policies** to **create national regulatory standards** and to **systematically challenge federal preemption**.48 One way NAAG has **facilitated** the **integration of state legal policy** is by **organizing interstate standing committees** which **address policy issues of common state concern**. These committees **encourage standardization of state enforcement standards** under federal laws and draft model state statutes. Environmental protection, public land management, **antitrust law**, consumer protection, charitable trusts and solicitations, securities regulation, regulation of the insurance industry, and utility rate-making are some of the areas **addressed by NAAG standing committees** since 1980.

This type of **integrated policymaking** by state attorneys general can **seriously threaten federal control** over important areas of regulation. In 1985 for instance, in a **challenge** to the **Reagan administration's antitrust law enforcement posture**, **all 50 states adopted a uniform set of antitrust enforcement guidelines** for nonprice vertical restraints. Two years later in 1987, **48 states** approved a set of horizontal merger guidelines for use in antitrust enforcement.49 Similarly in 1988, following the Carter administration's deregulation of the airline industry, **all 50 states adopted a set of guidelines** using state laws to **regulate airline fare and rate advertising**. These guidelines, opposed by both the Federal Trade Commission and the Department of Transportation, **placed strict new controls** on the advertising of fare and frequent flyer programs by the airline industry throughout the United States.50 **When uniformly enforced**, **coordinated state law enforcement policies** such as **NAAG's antitrust** and airline advertising **guidelines** **establish a de facto system of national law**, **having the effect of preemption in reverse**.

**States can apply antitrust statutes extraterritorially---federal courts defer to presumptions of state law**

**Dodge 20** – Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law, University of California, Davis, School of Law

William S. Dodge, "Presumptions Against Extraterritoriality in State Law ," University of California, Davis Law Review, Vol. 53: 1389, 2020, https://lawreview.law.ucdavis.edu/issues/53/3/53-3\_Dodge.pdf

II. Presumptions Against Extraterritoriality In State Law

States have many of the same kinds of statutes that the federal government does. States have **antitrust statutes**,69 securities (or “Blue Sky”) statutes,70 employment discrimination statutes,71 and RICO statutes.72 States also have unfair trade practices statutes,73 insurance statutes,74 dealer bond statutes,75 lis pendens statutes,76 wage and hours statutes,77 and workers’ compensation statutes.78 Courts have had to decide **when to apply** many of these statutes to cases that **cross borders**, both interstate and **international**.

Sometimes such cases **end up in federal** **court**, often because the parties are from different states or different countries.79 Federal courts sometimes assume that all states have presumptions against extraterritoriality,80 or that state presumptions mirror the federal presumption.81 Sometimes judges even assume that a presumption against extraterritoriality applies to state common law.82 Many federal courts **properly look to state interpretive rules** to **construe the geographic scope of state** **statutes**.83 But even then they sometimes rely on old cases articulating state presumptions against extraterritoriality that no longer reflect current state law.84

Not all states have presumptions against extraterritoriality. By my count, twenty states today apply a presumption against extraterritoriality to determine the geographic scope of state laws, sometimes in ways that depart from the federal presumption. Another seventeen states do not apply a presumption against extraterritoriality. In the remaining thirteen states, the status is unclear — one can find old cases articulating a presumption against extraterritoriality, but the highest court in each of these states has not applied such a presumption for at least fifty years. The states that have adopted presumptions do not distinguish between interstate and international cases when applying those presumptions. And no state applies its presumption against extraterritoriality to state common law.

**Talking about court interpretations of FEDERAL LAW---we read green**

**1AC Kava 19** [Samuel F. Kava is an associate at White and Case LLP and was a JD/MBA candidate at the University of Maryland Francis King Carey School of Law and Johns Hopkins University Carey School of Business, “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”, 15 J. Bus. & Tech. L. 135 (2019), https://digitalcommons.law.umaryland.edu/jbtl/vol15/iss1/5] IanM

**The Direct Purchaser Rule**

The **crux** of **whether** a **plaintiff** has **standing** to **bring** an **antitrust lawsuit** **centers** around the **Courts interpretation** of Section 4 of the Clayton Action, which states:

**They are just wrong---federal courts uphold Illinois Brick repealer laws, empirics prove solvency, and multistate coordinated action through NAAG solves best---most specific ev you’ll read**

**Finn 6** – Law Student at Columbia Law School

Liesl Finn, "The Developing Role of State Indirect Purchaser Statutes: The Current and Future Status of Indirect Purchaser Remedies using Mylan Laboratories as a Benchmark," Columbia Law, 2006 (date obtained from most recent citation), https://web.law.columbia.edu/sites/default/files/microsites/career-services/The%20Developing%20Role%20of%20State%20Indirect%20Purchaser%20Statutes.pdf

VI. The Future of **Indirect Purchaser Restitution**

The trend since Illinois Brick suggests that **there is a future role for state indirect purchaser recovery** in federal antitrust litigation. The success of state attorneys generals and private plaintiffs in bringing indirect purchaser actions has caused some negative reactions, including calls for the elimination of indirect purchaser recovery. Yet, rather than focusing on eliminating indirect purchaser recovery for the ill-founded reasons given in Illinois Brick, the focus should instead be how to improve the system since the increasing occurrence of **successful cases** like Mylan suggest that **multistate litigation** involving indirect purchaser actions are **here to stay.** States **can and should** continue to seek methods of increasing the efficiency of **multistate litigation**. Both supporting and opposing authorities who write on indirect purchaser restitution agree that improvements are needed. As Connors notes, “[a]lthough the present system appears to work reasonably well, a better-synchronized federal/state regime, premised on **repeal of Illinois Brick**, presents a **possible future alternative**.”109

Streamlining the coordination of multistate litigation depends on a wide range of factors. While some factors, such as willingness of plaintiffs, counsel, attorneys general, and courts to cooperate with one another, cannot be easily controlled, some may be accomplished through the implementation of procedural guidelines. Improving the system is especially important given that the public’s growing recognition of cases dealing with indirect purchaser recovery is bound to encourage future claims.110 There are several propositions.

One suggestion is that, before attempting coordination, it may be more efficient for defendants to litigate aggressively in states where plaintiffs’ claims are weakest.111 If plaintiffs litigate aggressively first in states where their claims are strongest, then they will create unfavorable momentum for defendants. Such a trend may discourage defendants early on, leading to quicker settlements.112 Encouraging settlement may be the best course of action for plaintiffs and defendants; multistate settlements allow defendants to obtain broader peace, reduce the litigation costs for both parties, and minimize disruption for clients.113

A second, and more obvious, suggestion is to establish a good working relationship with the other side.114 Involving all relevant decision makers early on in the coordination process improves the likelihood of establishing good working relationships and coordination. The National Association of Attorneys General (**NAAG**) may be able to **help states to better communicate** with each other, and with defendants.115 In doing so, parties may be able to negotiate case management orders that provide for the sharing of discovery.116

A third suggestion is to **reduce the disparity among state laws**, which should help to **improve the coordination of multistate litigation** and any resulting settlements. O’Connor notes that because of variations in state laws, it is possible that indirect purchasers in some states could obtain substantial recoveries and in others, nothing.117 This statement emphasizes the importance of narrowing the gaps between state laws. Authorities on the matter do not appear to have suggestions for achieving greater uniformity. Perhaps the most powerful incentive for state legislatures, which do not permit restitution for indirect purchasers, to change their laws would be further illustration that the concerns raised by the majority in Illinois Brick are ill-founded. Subsequent well-organized multistate litigation will yield such illustration. The suggestion that greater uniformity among state statutes would **improve the system** is a rather conditional one because it may depend on state legislatures observing improvements in the system first. However, it is an important one to keep in mind.

Finally, devising clear rules for apportioning damages among direct and indirect purchasers would improve the fairness and efficiency of multistate litigation involving indirect purchaser actions. O’Connor observes, “it seems logical to consolidate both direct and indirect actions in federal court with some clear rules on allocating damages among different layers of purchasers.”118 One main issue that needs attention is how to accomplish this in a manner fair to end-users who “usually bear the brunt of the overcharge but have the hardest time showing the pass through.”119 Though there is presently no known way to address this issue, the establishment of a clear set of rules will at least eliminate arbitrary damage apportionment and promote efficiency.

Given the increasing number of indirect purchaser claims in federal antitrust cases and courts’ **increasing permissiveness** **toward restitution** on behalf of indirect purchasers, the Supreme Court’s review of the indirect purchaser doctrine established by Illinois Brick is overdue, as journal editor Ronald Davis suggests.120 The Supreme Court should take the opportunity, when next presented with one, to formulate a new rule. However, in the meantime, **states should continue to increase** the efficiency of **multistate litigation** using the methods described above. In doing so, states can **build upon the success of Mylan** and create **more opportunities** for injured indirect purchasers to recover.

VI. Conclusion

By examining the role of attorneys general in multistate antitrust cases, tracing the history of federal courts’ treatment of state indirect purchaser statutes, and focusing on both the recent trend in indirect purchaser actions and the current controversy through the lens of FTC v. Mylan Laboratories, Inc., it is evident that **there is a future role for state indirect purchaser recovery in federal antitrust litigation**. As Calkins points out, state attorneys general play a **crucial role** in the future of multistate antitrust litigation, due to their comparative advantages. Though the Supreme Court should reconsider Illinois Brick and formulate a new rule that permits recovery on behalf of indirect purchasers, there is no need for states to postpone making improvements to the orchestration of multistate indirect purchaser actions. The Mylan case provides a procedural template for such actions, and the resulting criticism and praise of the case indicates the types of improvements that need to be made to future multistate indirect purchaser actions. The controversy sparked by Mylan has made evident a range of needed improvements; litigation should be undertaken in states where claims are weaken before national level settlements are reached, parties should emphasize communication and strong working relationships between one another, the disparity between state laws should be reduced, and clear rules for apportioning damages between direct and indirect purchasers should be established. The call for improvements in orchestrating multistate litigation involving indirect purchaser actions is not an indication that the indirect right of recovery should be eliminated; rather, it is an indication that our focus should be how to consolidate actions in federal court with clear guidelines that improve efficiency.

**Empirics prove that the counterplan would sufficiently deter anticompetitive conduct**

**Lande 10** – University of Baltimore School of Law

Robert H. Lande, "New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations," 61 Ala. L. Rev. 447, 2010, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1734&context=all_fac>

\*\*\*IBR = Illinois Brick Repealer Law\*\*\*

In Illinois Brick v. Illinois Co., 1 the Supreme Court held that, under federal antitrust law, only direct purchasers have standing to sue antitrust violators for damages. 2 Since most products travel through one or more intermediaries before reaching consumers,3 this decision left most true victims of illegal cartels and other antitrust violations without a remedy to compensate them. 4 Illinois Brick Co. also had the effect of undermining the objective of optimal deterrence of antitrust violations-because direct purchasers5 often have a suboptimal incentive to sue,6 the Court's decision often allows violators to escape paying significant damages. For this reason firms are insufficiently deterred from committing future violations. 7

Fortunately, states are able to **effectively overturn this decision** by **passing legislation** that gives indirect purchasers within that state the **right to collect damages from antitrust violators**. 8 Not surprisingly, many states enacted laws, called Illinois Brick Repealers ("**IBRs**"), to give indirect purchasers the **right to sue** when firms violate **analogous state antitrust laws**.9 The majority of states now have some form of IBR. 10

In recent years, state IBRs have become **more visible and important** in light of a number of **extremely large, successful recoveries** made under the laws of those states that have effective IBRs. These have totaled billions of dollars, including the $335 million paid by the vitamin cartel to settle private class actions and parens patriae cases brought by twenty-four states' attorneys general on behalf of indirect purchasers who were consumers in their states. ll These settlementsl2 have caused many legislators and others living in states without effective IBRs to consider legislation that would enable indirect purchasers in their state also to have the right to obtain compensation for antitrust injuries. Moreover, many have come to believe that the current overall effective levels of antitrust damages are too low to deter most violations. 13 New and more effective IBRs would be an additional way to help **prevent anticompetitive behavior**. For these and other reasons, during the next few years a number of states might want to enact new IBR legislation or pass laws to strengthen their existing IBR.14

**In fact, it concedes that foreign companies have to deal with state antitrust laws---green**

**2AC Bona 21** [Jarod M. Bona is the founder and CEO of Bona Law PC, an antitrust boutique law firm. He graduated cum laude from Harvard Law School in 2001, then clerked on the United States Court of Appeals for the Eight Circuit for Judge James B. Loken in Minneapolis, Minnesota. He then practiced law for a dozen years at DLA Piper and Gibson, Dunn & Crutcher, before founding Bona Law PC, “Five **U.S. Antitrust Law** Tips **for Foreign Companies**”, January 16, 2021, https://www.theantitrustattorney.com/five-u-s-antitrust-tips-foreign-companies/] IanM

Just because your **company isn’t based in the United States** **doesn’t** mean it can **ignore** **US antitrust law**. In this interconnected world, there is a good chance that if you produce something, the United States is a market that matters to your company.

For that reason, I offer five points below that attorneys and business leaders for non-U.S. companies should understand about US antitrust law.

But maybe you aren’t from a foreign company? Does that mean you can click away? No. Keep reading. Most of the insights below matter to anyone within the web of US antitrust law.

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

The United States government has two separate antitrust agencies—the [Federal Trade Commission](https://www.theantitrustattorney.com/category/ftc/) (FTC) and the [Antitrust Division of the Department of Justice](https://www.theantitrustattorney.com/category/department-of-justice/) (DOJ). The FTC is an independent federal agency controlled by several Commissioners, while the Antitrust Division of the DOJ is part of the Executive Branch, under the President.

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

The Antitrust Division of the DOJ is the only one of the two to enforce the [criminal antitrust laws](https://www.theantitrustattorney.com/category/criminal-antitrust-issues/), so if you are entangled in a cartel investigation, you will likely hear from them. By the way, if you want to learn about antitrust cartels, read my friend Bob Connolly’s excellent blog [Cartel Capers](http://cartelcapers.com/).

Both the DOJ and FTC review [mergers and acquisitions](https://www.theantitrustattorney.com/category/mergers-acquisitions/) (including [joint ventures](https://www.theantitrustattorney.com/both-during-and-after-covid-19-crisis-antitrust-law-wont-block-pro-competitive-joint-ventures/)), once again informally divided by subject. If you have a significant transaction in the United States, make sure you determine whether you must prepare [a Hart-Scott-Rodino Act filing](https://www.bonalaw.com/what-are-the-requirements-of-an-hsr-antitrust-filing-for-a-merge.html) with the US antitrust agencies.  And, in the meantime, [read this article about how to avoid ten minefields in your HSR filing to the antitrust agencies](https://www.theantitrustattorney.com/considering-a-merger-or-acquisition-avoid-these-10-minefields-in-your-hsr-filing-to-the-antitrust-agencies/). And [this article about private equity companies, small transactions, and HSR rules](https://www.theantitrustattorney.com/give-and-take-of-proposed-hsr-rules-private-equity-companies-and-small-transactions/).

Besides the federal antitrust laws, the Attorney Generals of the many states can enforce their own state antitrust laws. Many of these laws pattern or mimic the federal antitrust laws, [but some of them have important differences, like the Cartwright Act in California.](https://www.theantitrustattorney.com/files/2014/01/Executive_Counsel_Jan2011.pdf)

This federal/state distinction is particularly an issue when it comes to resale price maintenance agreements.

You should also know that the position of State Attorney General is often a stepping-stone to running for Governor. And you will often see politically ambitious attorney generals leading (or more accurately following) antitrust pursuits once a federal antitrust agency has announced an antitrust investigation. So if you are ensnared in a federal investigation, be ready for some state antitrust activity as well. If this is your situation, [read our article about what I call an antitrust blizzard](https://www.theantitrustattorney.com/avoid-antitrust-blizzard/).

3. **The Federal Courts ultimately decide antitrust cases**

The federal antitrust **agencies** **play** a significant **role** in US antitrust enforcement. **But** **compared** to the [EU](https://www.theantitrustattorney.com/category/european-union/) and other international jurisdictions, the **courts** in the US **are much more important**. In most jurisdictions, the antitrust agency is the center of the antitrust and competition universe. But **in the United States, the federal court decides everything.**

If a US antitrust agency wants **to pursue a claim**, **it must** ultimately either **file** a claim **in court** or have its claim upheld in court, perhaps after administrative proceedings in the case of the FTC. The latter may not necessarily differ from other jurisdictions, [but if you come from Europe or elsewhere](https://www.theantitrustattorney.com/2017/04/03/know-whether-company-abusing-dominant-position-european-union/), it might surprise you how relatively little the courts defer to the antitrust agencies.

Sure, there is some deference and if [an appellate court](https://www.bonalaw.com/appellate-litigation.html) is reviewing an FTC administrative ruling, they will formally defer on the facts to a certain extent. But the **courts** are **independent** and they **make the decisions**. And the **federal judges**—with **lifetime** appointments—**have no trouble concluding that** a **federal** antitrust agency (**or** **any** other **agency**, for that matter) **is wrong.**

**States have successfully prosecuted companies with international dimensions**

**Flexner & Racanelli 94** – Former Deputy Assistant Attorney General of the United States for the Antitrust Division of the Department of Justice, senior antitrust partner at Crowell & Moring; Associate in the antitrust group at Crowell & Moring

Donald L. Flexner, Mark A. Racanelli, “State and Federal Enforcement in the United States: Collision or Harmony?,” Connecticut Journal of International Law, Vol. 9, 1994, HeinOnline

3. State Enforcement in Cases of National and International Significance

Just as the states have not shied away from challenging transactions and conduct that the federal enforcers find unobjectionable, neither have they refrained from flexing their muscle in cases which have **effects** and **significance reaching far beyond their borders**. Indeed, a former head of the NAAG Task Force **specifically rebuffed** the notion that the “states should leave the prosecution of national cases to federal authorities and should concentrate their efforts on local conspiracies.”161 And more recently, a subsequent Task Force chief stated that the states **would not hesitate to challenge** even those mergers which are **international in scope**.162

In 1990, for instance, New York and thirteen other states brought suit against VISA and MasterCard seeking the termination of a joint venture to own and control a "point-of-sale" debit card system.163 The venture at issue was **national**, and **possibly international in dimension**, joining interstate banking, lending, automatic teller, retail, and communications institutions to provide a convenient service for consumers across the country. The complaint charged that the venture represented an attempt by the companies to obtain a monopoly.164 The **defendants settled**, **promising to seek state approval** for any future attempt to jointly own or control such a card system.165

In re Insurance Antitrust Litigation166 saw nineteen states - as well as various private plaintiffs - charge national insurers, reinsurers, and underwriters with a conspiracy to restrict the terms on which reinsurance would be offered for primary insurance risks in violation of the Sherman Act. The Ninth Circuit, reversing the district court's dismissal, held that the McCarran-Ferguson Act, which provides limited antitrust immunity for insurance companies, **was not a proper defense** since the reinsurers forfeited their immunity by conspiring with non-exempt foreign insurers.167

**Removal doesn’t mean that the law magically changes to federal law instead of state law---federal courts rule on state laws when they are removed**

**7Sage 19** – An LSAT Study Program

7Sage, "Federal vs. State Courts: An Introduction," 7sage, 10-18-2019, https://7sage.com/federal-vs-state-courts-an-introduction/#:~:text=of%20State%20Law%3F-,Yes.,on%20matters%20of%20state%20law.

**Can Federal Courts Decide Issues of State Law?**

**Yes.**

The Supreme Court can review decisions of each state’s highest court, but only insofar as a case raises a question of federal law. Decisions of a state’s highest court are final on questions of state law.

The lower federal courts also **regularly rule** on matters of state law. As we’ve discussed, even a case that **exclusively involves state law** can enter the federal system if the parties suing have **diversity of citizenship**. In cases like these, the court **must apply state law** to decide the issues. Determining which state’s laws to apply is a convoluted process, but the federal courts are theoretically better able to make impartial decisions than the state courts themselves.

**Specific to Illinois Brick repealer laws---courts have upheld them**

**Arteaga & Ludwig 21** – Partner at Crowell & Moring LLP; Counsel at Crowell & Moring LLP

Juan A. Arteaga, Jordan Ludwig, “The Role of US State Antitrust Enforcement,” Global Competition Review, Private Litigation Guide, Second Edition, January 2021, https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement

Moreover, state attorneys general can often seek relief on behalf of **indirect purchasers** when exercising their **state law parens patriae authority**. This is an important distinction between the parens patriae authority that state attorneys general enjoy under federal and state antitrust laws. The United States Supreme Court’s decision in **Illinois Brick** Co. v. Illinois precludes state attorneys general from seeking damages on behalf of indirect purchasers in parens patriae actions brought **under the federal antitrust laws**.[60] In direct response to this decision, nearly 25 states and the District of Columbia have passed ‘**Illinois Brick repealer**’ laws that **expressly authorise state attorneys general** to **recover damages on behalf of indirect purchasers** that were harmed by **state law antitrust violations**.[61] Notably, the United States Supreme Court has **rejected constitutional challenges** to these laws on the bases that states are **free to permit indirect purchasers to recover damages** given that (1) **Congress has not passed legislation that preempts such state laws** and (2) allowing indirect purchaser recovery under state law **does not frustrate the legislative purpose of the federal antitrust laws**.[62] The states that have passed Illinois Brick repealer laws include California, New York and Illinois.[63]

**Courts have refused to apply most recent rulings on indirect standings to state laws, but even if it is applied, it doesn’t preclude antitrust damages**

**Micheletti and Dugan 20** – Chris Micheletti is a partner and James Dugan is an associate at Zelle LLP

Christopher T. Micheletti and James S. Dugan, "Indirect Purchaser Antitrust Standing Heads In New Direction," Zelle LLP, 7-2-2020, https://www.zelle.com/Indirect\_Purchaser\_Antitrust\_Standing\_Heads\_In\_New\_Direction

Defendants in indirect purchaser price-fixing and market allocation cases in federal court **frequently challenge** plaintiffs' claims for lack of antitrust standing.

Relying on the U.S. Supreme Court decision in **Associated General Contractors of California** v. California State Council of Carpenters,[1] defendants assert that such plaintiffs' injuries are **too remote** from the defendants' unlawful conduct or are not the type of injury the antitrust laws were intended to prevent.

Since we last addressed this topic in a 2012 Law360 guest article,[2] courts have continued to grapple with whether the Associated General Contractors, or AGC, case should be applied to indirect purchaser state law claims and, if applied, how to do so.

This article reviews court decisions that may portend diminished application of AGC to state law and others that make clear that practitioners' grasp of what is required to plead antitrust injury under AGC in indirect purchaser cases remains essential.

Applicability of AGC to State Law Antitrust Claims

AGC directed federal courts to apply a five-factor test to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them to determine whether a plaintiff is a proper party to bring an antitrust claim."[3]

These factors are:

(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.[4]

Since the Supreme Court decision in Illinois Brick Co. v. Illinois, which limited indirect purchasers' claims for damages under federal antitrust law, indirect purchasers in federal court generally rely on **state** antitrust and consumer protection statutes, i.e., from states known as **Illinois Brick repealers**, when asserting damages claims.

While **AGC is the product of federal law**, antitrust injury or standing under state law is **a matter of state law**, and "[**s]tates are free** to **expand antitrust standing** under their laws **beyond what federal law permits**."[5] Thus, courts must first determine whether, and to what extent, AGC has **any application** under the **state's antitrust laws**.[6]

AGC (still) **does not automatically apply** to state-law claims in federal court.

We previously reported that the **vast majority of courts** have (1) **questioned the broad application** of AGC to indirect purchaser claims under state law, (2) held that the relevant **state's rules of antitrust standing should be applied**, and (3) held that **AGC should not be applied** in the absence of a clear directive from those states' legislatures or highest courts.[7]

With few exceptions, courts have continued to follow these guidelines in form or substance.[8] Recently, however, courts have gone further and **drawn bright-line rules** regarding the **inapplicability of AGC to state-law antitrust** claims.

**An Illinois Brick repealer alone may bar application of AGC or defeat antitrust standing challenges even if AGC is applied.**

Courts have recently recognized that, given the Supreme Court's decision in California v. ARC America Corp.,[9] any state legislative or court decision to repeal Illinois Brick fundamentally **conflicts with the application of AGC** to state-law antitrust claims. These courts have held that **AGC should not apply** in Illinois Brick repealer states, while others have held that if applied, AGC **does not defeat antitrust injury** in Illinois Brick repealer states.

The most emphatic statement of this bright-line rule can be found in In re: Broiler Chicken Antitrust Litigation, a sprawling multidistrict litigation involving indirect purchaser classes from numerous states alleging that defendant producers of chicken meat conspired to fix prices. The indirect purchaser plaintiffs alleged violations of state antitrust laws and defendants moved to dismiss for lack of antitrust standing. In analyzing whether AGC applied to these claims, the court reviewed decisions of the highest courts in four of the Illinois Brick repealer states at issue in the case.

Based on this review, the court held that "any state with an Illinois Brick repealer would reject application of AGC to this case."[10]

**Supply Chain 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.

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## Global Development Adv

**[C]---Even when statutes are initially upheld, they quickly become obsolete in case law**

**Crane**, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, **‘21**

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

Even where reform statutes are textually honored **in their immediate aftermath**, history shows a **creeping judicial tendency** to begin **integrating** the reform statutes **into the mainstream of antitrust jurisprudence** **within a few decades**. This **has been the fate** of the **four major antitrust reform statutes**— the FTC, Clayton, Robinson-Patman, and Celler-Kefauver Acts—each of which was meant to rein in capital in ways that the Sherman Act did not. **In all four instances**, however, the courts incrementally began mainstreaming the statutes **into Sherman Act precedent**, **creating a homogenous antitrust jurisprudence** that read the textual distinctiveness out of the reform statutes. Thus, today, **cases under the FTC Act**, section 3 of the Clayton Act, and the Robinson-Patman Act are **largely indistinct** from Sherman Act cases,256 and merger cases have been rolled into the **same modes of price-theoretic analysis** that would be employed in a Sherman Act case.257 Given that neither statutory text nor legislative history seems to have deterred the courts from this process within a few decades after the passage of the statutes, **there is little reason to believe that a “this time we mean it”** statutory reform **would not meet the same fate**. If the courts continue to understand aspects of the antitrust statutes as aspirationally motivated and operationally impracticable, **the previously observed pattern is likely to continue**.

**[B]---Their generic precedent doesn’t send a clear signal**

**Chopra**, Commissioner, Federal Trade Commission, **and** **Khan**, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, **‘20**

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

Antitrust law today is developed **exclusively through adjudication**. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. **But in practice**, the **reliance on case-by-case adjudication** yields a system of enforcement that generates **ambiguity**, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication **suffers** from these shortcomings is that courts analyze most forms of conduct under the **"rule of reason"** standard. The "rule of reason" involves a broad and **open-ended inquiry** into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges **struggle** to identify anticompetitive behavior 2 and to apply complex economic criteria **in consistent ways**. 3 Indeed, judges themselves have **criticized antitrust standards** for being highly difficult to administer. 4 And if a standard isn't administrable, it **won't yield predictable results**. The dearth of clear standards and rules in antitrust **means that market actors face uncertainty and cannot internalize legal norms into their business decisions**. 5Moreover, ambiguity deprives market participants and the public of **notice about what the law is**, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be **too slow and** **cumbersome** to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules **from a patchwork of individual court opinions**. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded **on unique sets of facts**. All too often, the resulting picture is **unclear**. This ambiguity is **compounded** when the Supreme Court assigns to lower courts the task of **fleshing out how to structure and apply a standard**, **potentially delaying clarity and certainty for years or even decades**. 8

#### Which is why they’ll focus on other reforms instead of competition law – countries that connect to an impact don’t have the infrastructure necessary to model antitrust

Waked 8 – Dina Waked is an SJD Candidate at Harvard Law School and a Senior Teaching Fellow at the Department of Law, American University in Cairo.

Dina Waked, 2008, “Competition Law in the developing world: The why and how of adoption and its implications for international competition law,” http://www.icc.qmul.ac.uk/media/icc/gar/gar2008/Waked.pdf

Developing countries are generally reluctant to adopt competition rules. This stems from various challenges they face in adopting these rules. At the outset, enacting competition legislation is not considered a priority on their reform agendas. This is due to the high cost and low returns associated with adopting these rules compared to other reform-oriented policies, such as removing trade restrictions. The costs are related to the need to acquire, reform, or implement lacking administrative apparatuses, effective judiciary and appeal systems, independent investigating authorities, expertise, people with technical and legal skills, etc.

#### This means at best enforcement takes decades which is too slow to solve concentration

Waked 8 – Dina Waked is an SJD Candidate at Harvard Law School and a Senior Teaching Fellow at the Department of Law, American University in Cairo.

Dina Waked, 2008, “Competition Law in the developing world: The why and how of adoption and its implications for international competition law,” http://www.icc.qmul.ac.uk/media/icc/gar/gar2008/Waked.pdf

Also, most of these countries lack a reliable administrative enforcement system and a qualified independent judiciary, which can enforce the adopted models of competition rules.50 Also, the process of adjudicating is slow and in some cases almost a decade can pass before a ruling is final.

## Court Ptx DA

**Magnitude.**

Damian **Carrington 17**, environment editor @ the Guardian, citing Paul Ehrlich, Professor @ Stanford, "Earth's sixth mass extinction event under way, scientists warn," Guardian, https://www.theguardian.com/environment/2017/jul/10/earths-sixth-mass-extinction-event-already-underway-scientists-warn

The scientists conclude: “The resulting **biological annihilation** obviously will have serious ecological, economic and social consequences. **Humanity** will eventually **pay a very high price** for the decimation of the **only assemblage of life that we know of in the universe**.” They say, while action to halt the decline remains possible, the prospects do not look good: “All signs point to ever more powerful assaults on biodiversity in the next two decades, painting a dismal picture of the future of life, including human life.” Wildlife is **dying out** due to habitat destruction, overhunting, toxic **pollution**, invasion by alien species and **climate change**. But the **ultimate cause of all of these factors is** “human **overpopulation** and continued population growth, and overconsumption, especially by the rich”, say the scientists, who include Prof Paul Ehrlich, at Stanford University in the US, whose 1968 book The Population Bomb is a seminal, if controversial, work. “The serious warning in our paper needs to be heeded because civilisation **depends utterly** on the **plants**, **animals**, and **microorganisms** of Earth that supply it with **essential ecosystem services** ranging from crop pollination and protection to supplying food from the sea and maintaining a livable climate,” Ehrlich told the Guardian. Other ecosystem services include **clean air** and **water**.

#### AND, fetal tissue from abortions key to development diseases

Nidhi Subbaraman 21, , “NIH reverses Trump-era restrictions on fetal-tissue research”, 16 April 2021 | Nature

The US National Institutes of Health (NIH) announced the changes on 16 April. “That’s good news,” says Lawrence Goldstein, a neuroscientist at the University of California, San Diego, who was a member of the Trump-era board that carried out the additional ethics reviews. Researchers use fetal tissue, obtained from elective abortions, to study a range of conditions, from infectious diseases to human development, and say it is crucial to studying some illnesses.

Some restrictions on fetal-tissue research remain in place and could continue to pose hurdles. For example, in 2019, the NIH began requiring that a literature review be added to grant proposals; Goldstein says that this threatens to overwhelm the page limit on applications.

Irving Weissman, director of the Institute of Stem Cell Biology and Regenerative Medicine at the Stanford University School of Medicine in California, agrees. “You don’t have enough space in any grant to do both the comprehensive review and anything you planned to do,” he says.

In 2019, following pressure from anti-abortion groups, the Trump administration announced a series of changes limiting fetal-tissue studies, upsetting many researchers. The rules directed government scientists to stop such projects once their tissue supplies ran out. Also, the Department of Health and Human Services (HHS), which includes the NIH, announced that it would appoint an ethics-review board to vet academic scientists’ proposals seeking NIH funding for projects that required fetal tissue. This was in addition to scientific evaluations already carried out during normal grant review at the NIH.

When the NIH listed members of the board in 2020, scientists pointed out that it was stacked with anti-abortion advocates. At its first and only meeting, in July last year, the group recommended funding just one of the 14 proposals it reviewed.

“I was very worried — I was on the ethics advisory board and saw some highly meritorious projects get killed because of the bias,” says Goldstein, who has used fetal tissue in his research and has spoken up to support such work.

Last year, in the early months of the COVID-19 pandemic, The Washington Post reported that restrictions had barred a researcher at the NIH’s Rocky Mountain Laboratories in Hamilton, Montana, from conducting experiments to develop treatments for coronavirus infections, because the work would have used a mouse model created using human fetal tissue.

Working in a scientific discipline that’s perennially caught up in politics can be challenging “when you can’t rely on consistent funding, when you can’t rely on support — even if you’re doing good research”, says Kirstin Matthews, a science-policy scholar at Rice University’s Baker Institute for Public Policy in Houston, Texas. “There’s not a lot of groups that do fetal-tissue research, but what they do is pretty vital, and so it’ll be good to be able to continue that research.”

The International Society for Stem Cell Research (ISSCR), which petitioned the current and past administrations to lift the limits, praised the change. “Research grants should be based on the scientific and ethical merit of each proposal. The ISSCR welcomes the return to evidence-based policymaking,” said the society’s president, Christine Mummery, in a statement.

#### Human brain development diseases will mutate and cause extinction by reversing brain evolution

Wickramasinghe & Steele 16 (Chandra Wickramasinghe, PhD from Cambridge University Buckingham Centre for Astrobiology (BCAB), Buckingham University,& Institute for the Study of Panspermia and Astroeconomics & EJ Steele, O'Connor ERADE Village Foundation, “Dangers of Adhering to an Obsolete Paradigm: Could Zika Virus Lead to a Reversal of Human Evolution?”, https://www.omicsonline.org/open-access/dangers-of-adhering-to-an-obsolete-paradigm-could-zika-virus-lead-to-a-reversal-of-human-evolution-2332-2519-1000147.pdf)

It is generally agreed that a virus or bacterium that is endogenous to Earth could acquire new characteristics, not only from random mutations, but also by incorporating new genetic sequences from ambient virions. The Zika virus, that is much in the news, appears to have undergone precisely such a change in recent months. Before 2000 the Zika virus was in circulation, but did not cause microencephaly in new born babies - this suggests a major change in the virus. The altered Zika virus, which is now spreading in many countries via a mosquito vector, has been found to affect fetuses in pregnant women, causing babies to be born with reduced brain and skull size. It is also of interest to note that at least one case of transfer of the virus to gametes has been noted in an infected male. The isolation of the virus in semen may be an indication of the soma-to-germline feedback process already occurring in this instance. More are to be expected, much like the peculiar and unexpected seminal transmission mode of HIV when it exploded on the scene unexpectedly in 1981. This epidemic, if it proceeds unchecked, will eventually lead to the emergence of a new human phenotype with reduced brain size and greatly diminished cognitive capacity. It is to be hoped, however, that modern medical science will intervene in time to prevent such a tragic outcome.

We note in this connection that the human brain has seen dramatic changes of volume in the past. Between 2 million and 500,000 years ago, skull volumes in human skeletons appear to have doubled, possibly in several discrete steps [43]. Over the same period it seems likely that our cognitive abilities including the development of speech with the acquisition of the FOXP2 genes had grown [44,45]. In all these acquisitions we might assume they have been integrated into preexisting ancestral haplotype assemblies akin to the targeted integration processes already discussed.

Villarreal [44] and Ryan [45] have shown that viral footprints can be identified in human brain tissue to mark important steps that led up to its present condition. The possibility that Zika-virus induced microencephalitis might represent a retrogression of this trend is an alarming prospect that medical science will have to avert besfore it is too late.

**Ideological crossing---unexpected departure from the conservative turn is central to Robert’s vision to shield the court from partisan backlash**

**Abelite 21** (Isabella Abelite, Fordham University School of Law, Protecting the Supreme Court: Why Safeguarding ding the Judiciary’s Independence is Crucial to Maintaining its Legitimacy, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2108&context=faculty_scholarship>, y2k)

**Ideological Predictability**

In recent years, many justices now arrive at the Court with **already-established** judicial ideologies.155 This is because presidents have been selecting their Supreme Court nominees almost exclusively from the Courts of Appeals.156 The underlying strategy of selecting federal appellate judges as Supreme Court nominees is to ensure some semblance of ideological reliability.157 By selecting justices with a clear ideology, certain views may disproportionately influence the Court and the greater legal community, even if those views represent a minority outlook when a justice comes to the Court.158 Despite this strategy, several justices throughout history have appeared to **depart** from the ideologies they held when they were appointed. Justice James McReynolds, who was appointed by the Democratic President Woodrow Wilson, became one of the “four horsemen” who threatened to completely derail Democratic President Franklin Roosevelt’s **New Deal** legislation.159 Justice Harry Blackmun, whom Republican President Richard Nixon nominated, became more liberal during his tenure and even authored the majority opinion in Roe v. Wade. 160 Justice Blackmun later defended the importance of the decision, which held that the Constitution protects a woman’s right to obtain an abortion, and continued to vote to preserve the right to choose.161 This phenomenon of **unexpected**, **ideological aisle-crossing** has become rarer.162 More predictable rulings indicates that presidents are nominating individuals who are more ideologically consistent in their decision-making and less moderate in their ideology.163 In fact, President George W. Bush’s appointees, Chief Justice John Roberts and Justice Samuel Alito, have been described as “impeccably conservative.”164 Meanwhile, President Bill Clinton’s and President Barack Obama’s appointees, Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor, have maintained a liberal presence on the Court.165 With the additions of Justices Neil **Gorsuch**, Brett **Kavanaugh** and Amy Coney **Barrett**, it seems to many that the Court has a solidified **conservative** majority, renewing concerns of **partisan imbalance** on hot-button issues for the foreseeable future.166 Nonetheless, Chief Justice **Roberts’** institutionalist inclinations to **shield the Court**’s independence from political capture **may** reduce the likelihood that a definitive **conservative majority** has **unilateral decision-making** authority on the Court.167 And Justices Gorsuch and Kavanaugh have recently shown signs of independence on major issues before the Court.168

**That’s key to save the reputation of the courts**

**Pomerance 20** (Benjamin Pomerance serves as a Deputy Director with the New York State Division of Veterans' Services. J.D., summa cum laude, Albany Law School, THE KING IN HIS COURT: CHIEF JUSTICE JOHN ROBERTS AT THE CENTER, 83 Alb. L. Rev. 169, y2k)

Yet Roberts has long been a master of winning wars even when losing battles was necessary to accomplish his ultimate aim. 465 In the cases where he votes with the Court's **liberal wing**, the **C**hief **J**ustice may be utilizing this same **cagy discretion** that he has employed for much of his life. 466 He oversees a Court in which the majority of the public lacks faith, a Court that commentators frequently accuse of political partisanship, a Court that indeed often does divide in **split decisions** along **conventional political lines** with Justices on both sides of the aisle frequently staking out extreme positions and issuing verbally **stinging opinions**. 467 Historians would likely look back upon such a Court with **criticism**, a fate that Roberts **fears**. 468 The **only way** to avoid such an outcome [criticism], it seems, is for the **C**hief **J**ustice to [\*231] take a leadership role in moving the Court in **a direction of** moderation, **bipartisanship**, and dignity. 469

**In crossing the aisle**, Roberts appears to be doing exactly that. With each **swing vote** comes a new round of **commentaries** speculating that the Chief Justice's jurisprudence is **not as** **politically motivated** as people initially suspected. 470 Such commentaries help both Roberts's own reputation and **the reputation of** his **Court**, weakening the oft-repeated claim that a case brought before the Court is **virtually a foregone conclusion** depending on the **political interests** at stake. 471

#### Perceived as hipster antitrust AND socialism.

Yoo ’17 [John; 2017; Professor of Law at the University of California at Berkeley, Visiting Scholar at the American Enterprise Institute; University of Chicago Law Review, “Taming Judicial Activism: Judge Robert Bork's Coercing Virtue,” vol. 80]

Judge Bork describes that as law crosses borders, judicial activism spreads with it.11 He sees both phenomena as two sides of the coin, where the legalization of global affairs encourages judges to impose their own policy preferences.12 Extending a theme that runs consistently through his work on antitrust and constitutional law, Bork argues that judges possess neither democratic legitimacy nor special expertise to incorporate international norms. 13 Anyone who cares about democratic accountability should pay attention when unaccountable judges use judicial review to advance policy goals that would never survive at the ballot box. 14 Naturally, Bork does all this in his characteristically acerbic style.

Coercing Virtue is noteworthy for challenging internationalists-those who favor automatic American adoption of international law-on their own turf. Judge Bork does not only rely on the intentions of the Framers of the Constitution. He also looks at jurisprudence abroad to evaluate judicial decisions at home. Coercing Virtue is a comparative study that examines the convergence of judicial activism in the United States, Canada, and Israel.15 It shows that a dialogue among legal elites in these countries has led to both the import and export of judicial activism. 16 Judicial activism, indeed, has gone global.

Coercing Virtue influenced my work. In Taming Globalization, Professor Ku and I build on Judge Bork's legacy by examining globalization's effects on American constitutional law.17 We argue that globalization has placed pressure on federalism and separations of powers. 18 Like Judge Bork, we find several recent Supreme Court cases in the field wanting, particularly those relying on international and foreign legal sources as authority.19 To preserve the American bedrock principle of popular sovereignty, we argue for rejuvenating non-self-executing treaties and limiting Missouri v Holland.20 These foreign-affairs doctrines would limit judicial discretion and place the authority to adopt international law in the elected branches of government. Where Coercing Virtue diagnosed the problem, we hoped to identify solutions for the American constitutional and political system.

II. The Antidemocratic New Class

Coercing Virtue goes beyond the analysis of doctrine to seek the political underpinnings of the movement toward judicial activism on a global scale. Judge Bork takes issue with the cultural left, which he believes has commandeered the courts to advance its policy agenda.21 Members of the New Class, as Judge Bork calls it, "traffic, at wholesale or retail, in ideas, words, or images and have at best meager practical experience of the subjects on which they expound."22 According to Judge Bork, the New Class possesses an "impulse toward socialism" that manifests itself in both economic and cultural aspects of life.23 Because the New Class often operates as a political minority in individual countries, it must find ways to circumvent the results of elections.24 The judiciary makes for an ideal weapon because it allows a minority to win policies that cannot command majorities of the electorate.25

If confined to the ivory tower, socialist programs would pose little danger. But, Judge Bork argues, activist judges have taken up the New Class's agenda.26 Without any authority to make political choices, the courts must invent constitutional meaning to advance the cause of the New Class.27 Activist judges, he explains, "decide cases in ways that have no plausible connection to the law they purport to be applying, or [ ] stretch or even contradict the meaning of that law."28 "They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law."29

The critical question for conservatives is, why do judges adopt the New Class's agenda in the first place? Even if judges have discretion to choose between adopting an international law norm or not, they could always choose to defer to the political branches. It is here that Judge Bork's foray into political science and sociology becomes necessary. Lawyers and judges, he believes, have fallen sway to the siren song of the professoriate.30 Indeed, judges are "certified members of the intelligentsia," having passed through its training grounds of colleges and law schools.31 "The prestige of a judge depends on being thought well of in universities, law schools, and the media, all bastions of the New Class."32 Professors may think up destructive socialist ideas, and pundits may popularize them, but without the judges they would remain the fodder of debate societies. 33 Judges are the sharp end of the intellectuals' spear.

Judge Bork believes that judges became the engine room for the New Class. When activist judges take hold in a country, they shift its culture faster to the left.34 And when activist judges begin to copy similar examples from other countries, they accelerate the process even faster. The defects of judicial activism, he explains, will only become magnified, including the loss of democratic self-rule, the imposition of cultural values held by a minority, and the politicization of law.35 International law in the hands of such judges will be used to outmaneuver the US democratic process. 36 Judge Bork suspects that a kind of "sinister element" may exist in international law because the New Class may hope to have their views adopted abroad and then imposed here in the United States.37

**Normal means for the AFF would be a 5-4 ruling with Kavanaugh and Roberts voting with the liberals---this link is extremely unique to antitrust and resolves court backlash**

**Stohr 20** (Greg Stohr, Bloomberg News, Kavanaugh Emerges as Man-in-Middle With Court Set to Shift Right, 9-23, <https://news.bloomberglaw.com/us-law-week/kavanaugh-emerges-as-unlikely-liberal-hope-for-court-swing-vote>, y2k)

“**Kavanaugh** would by default become the most logical person to play the **pivot role**,” said Carter Phillips, a lawyer at Sidley Austin who has argued 79 Supreme Court cases.

That would mean to some degree supplanting Chief Justice John **Roberts**, who has held the **balance of power** for the past two years, largely backing **conservative** results **but** joining with the **liberal wing** to strike down an abortion regulation and preserve the DACA deferred-deportation program.

Confirmed in 2018 after a bitter fight, Kavanaugh is hardly an ideal choice for Democrats, even if they ignore the lingering raw feelings stemming from the sexual assault allegations that almost derailed his nomination. Kavanaugh angrily denied the allegations before winning confirmation on a 50-48 vote.

In his two terms on the court, Kavanaugh has established himself as a consistent conservative. He has backed religious freedoms, voted against LGBT workers and sided with Trump on presidential powers and immigration issues. Kavanaugh has also supported property rights and the death penalty and voted to shield partisan gerrymanders from constitutional challenges.

Unlike fellow Trump appointed Justice Neil **Gorsuch**, Kavanaugh hasn’t shown any inclination to side with the liberal wing and flip the outcome of a blockbuster case. Only **once**, in **an antitrust dispute,** has he joined the court’s liberals in **a 5-4 ruling** in an argued case.

When Gorsuch and Roberts voted to interpret federal job-discrimination law as protecting gay and transgender workers this year, Kavanaugh was in dissent. Even as he wrote that gay people “have advanced powerful policy arguments and can take pride in today’s result,” Kavanaugh said Congress would have to change the law to give them job protections.

The Eight Remaining Supreme Court Justices: Who Are They?

In other areas, Kavanaugh has emerged as more of a centrist and an incrementalist than fellow Trump appointee Gorsuch. Kavanaugh has agreed with Roberts more than with any other justice so far, **according to statistics** compiled by Scotusblog.

Abortion Opinion

When he voted in favor of a Louisiana abortion regulation this year, Kavanaugh wrote separately to underscore that he wasn’t offering an ultimate verdict on the law. Doctors were challenging a requirement that they get privileges at a local hospital, and Kavanaugh said they hadn’t yet proven they would be unable to obtain those rights.

“In my view, additional factfinding is necessary to properly evaluate Louisiana’s law,” he wrote. Kavanaugh had previously urged his colleagues in a private memo to sidestep the abortion dispute, CNN’s Joan Biskupic reported in July.

Kavanaugh has also suggested he is less willing than Gorsuch to overturn the court’s past decisions, says David Strauss, a constitutional law professor at the University of Chicago School of Law. That could prove important when the court is inevitably asked to overturn the 1973 Roe v. Wade decision, which legalized abortion nationwide.

“Justice Kavanaugh is more committed to what you might call traditional judging -- following precedent, deferring to the political branches, doing what Congress wanted to do even if it didn’t express itself perfectly,” Strauss said. “Justice Gorsuch is more inclined just to reject positions that he thinks are wrong.”

Health-Care Fight

Kavanaugh has proven reluctant to throw out an entire statute just because one part is unconstitutional. That will be a central issue when the court on Nov. 10 takes up a Trump-backed bid to throw out the Affordable Care Act and its protections for people with pre-existing conditions.

“Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute,” Kavanaugh wrote in July in a case involving the federal ban on robocalls to mobile phones.

Ginsburg’s Death Injects New Doubt Into Fate of Obamacare

In other areas of the law as well, Kavanaugh has shied away from absolutist positions. This year he joined a 6-3 decision that said the Clean Water Act applied to some pollution discharges that don’t go directly into a major body of water. In 2019 he joined Roberts and the liberals in halting the death sentence of a man unless he was allowed to have a Buddhist spiritual adviser in the death chamber with him.

And after the court heard its first gun-rights case in a decade last year, Kavanaugh joined Roberts and the liberals by voting to drop the case because New York City and the state of New York changed the handgun-transportation laws that were being challenged.

Kavanaugh, however, later said the court should have heard a challenge to a New Jersey law that requires people to show a “justifiable need” to get a carry permit.

**Court’s Legitimacy**

All that could leave Kavanaugh as an occasional, if not frequent, supporter of **Roberts’s efforts** to protect the **court’s institutional legitimacy** by trying to avoid **polarizing rulings.**

Kavanaugh isn’t likely to change his approach just because the court gets a new member, said Helgi Walker, a Washington lawyer with Gibson Dunn & Crutcher and a former law clerk to Thomas.

“I think he has a firm jurisprudence of his own, and he’s committed to what he believes is the right approach, and I don’t see changes in the composition of the court changing his course,” Walker said.

But a new justice could put Kavanaugh in a **different position**, forcing him to decide whether conservatives will accomplish long-sought legal goals, or at least how quickly.

“There was some speculation when Justice Kavanaugh was appointed that he would give the chief ‘**cover’** by voting **with him** when he agreed with the liberals in **5-4 cases**,” Strauss said. “That didn’t happen very much last term, but **if there is a real threat to the court**, I can see that **changing**.”

**The court *wants* to reverse Roe BUT the threat of court reform causes the conservatives to back off---it’s working now**

**Ziegler 9-3** (Mary Ziegler is a professor at the Florida State University College of Law, The Justices Are Telling Us What They Think About Roe v. Wade, <https://www.theatlantic.com/ideas/archive/2021/09/scotus-roe-political-fallout/619969/>, y2k)

The five justices who upheld **Texas’s** anti-abortion law in the middle of the night this week insisted that their **hands were tied**: Texas had invoked sovereign immunity, and abortion providers had not proved that the state was wrong. Above all, the majority warned people not to overreact. Women in Texas might not be able to get an abortion anymore, and abortion providers might have already shut down, but **worry not**. The Supreme Court had not drawn “any conclusion about the **constitutionality** of Texas’s law.”

For anyone paying attention, **the upshot of this was clear**. For starters, Texas lawmakers had not kept their intentions secret: They wanted to ban almost all abortions and skirt the consequences. The law raised “complex and novel” “procedural questions,” according to the Court majority, but only because the law’s designers had homed in on a creative strategy for achieving their goals.

That the Court pretended this **wasn’t** about the **fate** of abortion rights tells us that the justices **may** be **ready** to strike down **Roe** v. Wade—**but** are less prepared for the **havoc** such a decision would wreak. Reversing Roe would not be a mere part of the legacy of John Roberts’s Court and the justices sitting on it—it would define that legacy.

And it could have enormous **institutional** and **political consequences**: Court reform—which remains a matter of abstract inquiry rather than an earnest legislative push—would be more **seriously** on the table. Pro-abortion-rights voters in 2022 and 2024 could make their discontent known at the polls.

The justices who allowed Texas’s law to go into effect **hardly** seem to love the thought of that **backlash**. Their order tried to **reassure** the public by spelling out what was not being decided—and tried to signal that the Court takes all of this very seriously. And even before this particular question arose, during their confirmation hearings, Brett **Kavanaugh** and Amy Coney **Barrett** repeated that when it came to **Roe**, they would keep an **open mind**. After all, they are neutral arbiters of the law, not pre-committed ideologues.

The justices desperately want the public to believe that is true, even though similar procedural hurdles did not stop the Court from blocking COVID-19 stay-at-home orders that affected in-person worship, and even though the Court’s overnight order made a laughingstock of what is still supposedly a constitutional right. The message was clear: Texas wanted to pass a legal-consequence-free abortion ban, and the Supreme Court wanted to find a political-consequence-free way to uphold one.

Transparency has never been a hallmark of the Court’s abortion jurisprudence. In 1992, when the Court declined an invitation to reverse Roe, the justices held that states could not unduly burden women seeking abortions. What an undue burden meant was rarely clear to anyone—and often depended on which judge was considering a law. In the years since, the Court has changed the value attached to fetal life—describing the dignity of unborn children—without clearly explaining how this shift has affected abortion jurisprudence.

Anti-abortion leaders blame this opacity on Roe, which they argue is a hopelessly muddled, unworkable decision. The real explanation is present in yesterday’s decision: The Supreme Court may want to **reverse** Roe, but it is **afraid** of what will happen when the decision is gone. This fear makes it attractive to hem and haw, to deny and obfuscate. Clarence **Thomas** may not miss a chance to denounce Roe, **but his colleagues are less keen to do so.**

**The court won’t overturn Roe now---fear of backlash deters judges**

**Bokat-Lindell 9-2** (SPENCER BOKAT-LINDELL, a staff editor in the Opinion section, Reviews | Did Texas announce the end of abortion rights in America? <https://www.nytimes.com/2021/09/02/opinion/abortion-texas-roe-supreme.html>, y2k)

**Roe v. Is Wade dead?** Does he even need it?

As the Times’ David Leonhardt explained recently, the public has complicated and in many cases conflicting views on abortion: A majority of Americans say they support restrictions on abortion that Roe v. reign himself.

Indeed, toppling Roe could **energize** abortion rights advocates and **fuel the cause** for court reform, which is why many legal experts speculate that Supreme Court justices are **loath** to do so explicitly. “He’s the genius of Texas strategy,” Mary Ziegler, a professor at Florida State University College of Law in Tallahassee, wrote in The Times last week. “There doesn’t seem to be a trade-off between building on precedents and phasing out abortion rights.”

And eliminate abortion rights this law goes, say the suppliers. Even those who comply with the law can face lawsuits from plaintiffs seeking a reward of $ 10,000, and they will bear the financial burden of defending themselves in court. Abortion service providers who filed to block the law said it would ban care for at least 85% of Texas abortion patients, “likely forcing many abortion clinics to close. “. As of mid-August, the 11 Planned Parenthood health centers in Texas that offer abortions have stopped scheduling those prohibited by law, NBC reports.

Texas law could still be temporarily blocked by the Supreme Court, says my colleague Lauren Kelley. But for now, at least, abortion is almost illegal in Texas. And “it now seems likely that more laws like SB 8 will be passed, as other anti-abortion heads of state will surely try to follow Texas’ lead,” she predicts. “Why wouldn’t they do it?” The Supreme Court may not yet have ruled on the merits of the Texas law, as some anti-abortion activists no doubt would prefer, but the state’s savage ploy has clearly succeeded in threatening the future of clinics across the state. In this way, the court gave the green light to lawmakers around the world who have been eager for decades to overturn Roe v. Wade.

Even bigger than abortion

Orion Rummler notes in The 19th that Texas law could involve miscarriage management, which often uses the same procedure – dilation and evacuation, which Texas became the first state to ban last month – as second trimester abortions. . While miscarriage management is theoretically still legal if no cardiac activity is detected, the wording of the law does not directly address the issue and could create a deterrent among providers fearing civil liability.

“Any doctor who is going to remove a fetus from a uterus, after a miscarriage or without a miscarriage, will have to document that he has tested a fetal heart rate”, Rachel Rebouché, professor of law at Temple University and expert in jurisprudence on reproductive rights, said Rummler.

The Supreme Court also blessed a legal tactic that could be used to undermine virtually any constitutional right, Ian Millhiser of Vox explains, “Imagine, for example, New York City passed an SB 8 style law allowing individuals to sue for a $ 10,000 bounty against anyone who owns a gun. Or, for that matter, imagine if Texas passed a law allowing similar lawsuits against anyone who criticizes the governor of Texas. “

Times columnist Michelle Goldberg argues that one party is much more likely to maintain such vigilance than the other. She notes that in addition to touting the endangerment and even shooting of suspected liberals, Republican lawmakers have taken steps in recent years to legalize various forms of intimidation: Several states have given partisan conspiracy theorists access. election materials to find ways to corroborate the accusations. electoral fraud, for example, while others have granted immunity to drivers who hit people protesting in the street. “Texas law must be seen in this context,” she wrote.

And after

The Supreme Court will look into this and other **abortion cases** in more detail when he returns from vacation in **October**. In addition to Texas law, judges should consider a law in **Mississippi** that **prohibits abortions** after 15 weeks of pregnancy (or about 13 weeks after conception).

There will be **little room** for judges to **cover up** in this case, predicted legal journalist Linda Greenhouse in July:. Maintaining a **ban** on abortion **before viability** is tantamount to **overturning Roe v. Wade and Planned Parenthood v. Casey**. It is that simple. And for once, a state says yes, that’s exactly what it wants.

**Every “liberal” rulings of the court so far has been decided on a narrow ground---it doesn’t signal a shift to the left**

**Piper 6-24** (Greg Piper has covered law and policy for 15 years, with a focus on tech companies, civil liberties and higher education, SCOTUS consensus on divisive issues, including student speech, undermines court-packing push, 6-24, https://justthenews.com/government/courts-law/scotus-consensus-divisive-issues-including-student-speech-undermines-court

One thing is clear from the recent spate of **lopsided majorities** in high-profile and potentially divisive cases: The Supreme Court can find **agreement** when it wants to. All but Justice Clarence Thomas agreed Wednesday that **K-12 schools** can't regulate student speech in contexts that are not school-supervised, including social media outside of of school hours, simply on the assertion that it could conceivably disrupt the learning environment. The 8-1 tally followed unanimous votes June 21 against the **NCAA's limits** on educational benefits for student athletes and June 17 against Philadelphia's revoked contract with a Catholic foster care agency that refuses to consider same-sex couples. Another 8-1 ruling June 18 threw out a lawsuit alleging **child slave trafficking** in Africa by cocoa product makers Nestle and Cargill. The June 17 vote upholding **Obamacare** against its latest challenge was 7-2, with Barrett and Kavanaugh in the majority. Many of the lopsided majorities reached agreement on **fairly narrow grounds**. The Obamacare challenge failed on conservative states' **lack of standing** to sue, while student athletes didn't challenge the NCAA's ban on **non-educational** compensation. George Washington University constitutional law professor Jonathan Turley saw the same pattern in the student speech case, known as Mahanoy. He wrote that he had hoped for a "bright-line decision protecting student speech" but the court achieved near-unanimity by limiting its reach. "I do believe that the Court is speaking through these [lopsided] decisions to its critics" who are open to court-packing, Turley told Just the News in an email. While it often issues "non-ideological and unanimous opinions ... these are some major cases where greater divisions were expected," he said. "The Court is leaving critics with simply outcome-determinate court packing as a rationale for these proposals." Other legal scholars told Just the News it wasn't clear if recent decisions including Mahanoy reflected the pursuit of unanimity at the expense of useful and conclusive holdings. "I think the Court is really more of a 3-3-3 institution," Josh Blackman of South Texas College of Law wrote in an email. "The 9-0 topline votes mask a lot of disagreement." The Philadelphia, Africa and Obamacare rulings revealed "a conservative wing, a moderate wing, and a principle-fluid progressive wing," Blackman argued in a blog post last week. While Roberts "may have been conservative at one point ... he has embarked on a life-long odyssey to pilot the Court to middling moderation," and Kavanaugh is "cut from the same cloth." "**It's hard to read the tea leaves**" on whether there was a "conscious effort to get a broad coalition" for Justice Stephen Breyer's opinion in the student speech case, Adam Steinbaugh of the Foundation for Individual Rights in Education (FIRE) wrote in an email.

**The NCAA decision proves the court is hostile towards antitrust now**

**Sammon 6-22** (Alexander Sammon is a staff writer at The American Prospect, The Supreme Court Is Closer to a 9-0 Corporatist Supermajority Than a 3-3-3 Split, 6-22, <https://prospect.org/justice/supreme-court-reform-corporatist-supermajority/>, y2k)

Or take Monday’s unanimous decision, in which the Court upheld the lower court’s ruling in **NCAA** v. Alston striking down the NCAA’s rules prohibiting education-related payments, like computers and graduate scholarships, to players. That decision even had Justice Kavanaugh talking about **antitrust** in his concurrence, writing that “[a]ll of the restaurants in a region cannot come together to cut cooks’ wages on the theory that ‘customers prefer’ to eat food from low-paid cooks.” Again, reading Justice Kavanaugh invoke monopsony comes as a shock to many who expected him to stake out the Court’s farthest-right bounds (though he does proceed to condemn “price-fixing labor,” which reads more like an anti-union sentiment than anything else).

**But the Court’s actual ruling is hardly a send-up of corporatist policy**. “Don’t be **deceived**: The Supreme Court just did the **bare minimum** that it could for college athletes. And, in doing so, it implicitly affirmed the **lower courts’** use of **cross-market balancing**, which potentially opens the door for employers across the economy—whether colleges in the NCAA, Uber, or Amazon—to impose **restraints on workers** and **escape liability** by pointing to theoretical **benefits to consumers**,” wrote Sandeep Vaheesan, legal director of the Open Markets Institute, in a statement after the ruling. “The Court also expressed **general skepticism** about **antitrust rules** governing business conduct—language that could have adverse effects on **future antitrust action** against powerful corporations **across the economy**.”

**The court has so far shielded big corporations from antitrust**

**Blum 8-2** (Bill Blum is a Los Angeles lawyer and a former state of California administrative law judge. He is a columnist with Truthdig.com, and a regular contributor to The Progressive, “Taking Back the Supreme Court,” <https://progressive.org/magazine/taking-back-supreme-court-blum/>, y2k)

“With their majority on the court, the **Republican Justices** have undermined labor unions, unleashed money in politics, protected **corporations** from class-action litigation and punitive-damage awards, curbed **antitrust law**, eroded the Constitutional right to abortion, invalidated gun-control measures, struck down voluntary efforts by school boards to achieve integration through race-conscious means, and threatened to abolish race-based affirmative action.” (See sidebar for some of the Roberts Court’s worst rulings.)

Klarman’s assessment raises another crucial question: What, if anything, can be done to reverse the high court’s lurch to the right?

In his article, Klarman called for expanding the number of Justices from nine to thirteen, with the four newcomers to be appointed by President Joe Biden while the Democrats control the Senate, albeit by the slimmest of margins. Such a move would create a center-left court that in Klarman’s view would match the center-left orientation of the country as a whole.

The Supreme Court is broken. The court was stolen in 2016 when a vacancy opened after Antonin Scalia died, and Mitch McConnell and Senate Republicans would not allow President Obama to fill that vacancy with Merrick Garland.

Klarman sits on the advisory board of the progressive advocacy group Take Back the Court, founded in 2018 by San Francisco State University professor Aaron Belkin. The board is co-chaired by Harvard Law School professor Mark Tushnet and Color of Change board of directors chair Heather McGhee. It also includes CNN host W. Kamau Bell, former Federal Election Commission chair Ann Ravel, and Yale Law professor Samuel Moyn.

“The Supreme Court is broken,” says Belkin, expounding on his organization’s origin and purpose. “The court was stolen in 2016 when a vacancy opened after Antonin Scalia died, and Mitch McConnell and Senate Republicans would not allow President Obama to fill that vacancy with Merrick Garland.”

Surveying the state of the nation in the aftermath of Trump’s three high-court appointments and the chaos created by the forty-fifth President, he says, “American democracy is hanging by a thread.”

And the Supreme Court, he argues, is a big part of the problem.

“For years now, the court has been **sabotaging** democracy on behalf of **big corporations**, the Republican Party, and the party’s donor class,” Belkin says. “With the retirement of Justice Anthony Kennedy in 2018, the entire **regulatory administrative state** has been placed at **risk**, throwing everything **progressives** care about, including the need to respond to the existential crisis of climate change, into jeopardy.”

These are long-term trends, he stresses, rejecting suggestions that big changes at the court are unwarranted because of a handful of recent rulings that uphold LGBTQ+ rights, preserve Obamacare, and reject efforts to overturn the results of the 2020 presidential election. In the final days of this past term, the court also ruled in favor of the off-campus free speech rights of public high school students and sided with college athletes in a dispute with the NCAA that could eventually lead to athletes getting paid for their skills and hard work.

Belkin dismisses the idea that the court is best described as having a 3-3-3 split and a generally moderate orientation. “That’s bullshit,” he counters. “Even the **most** conservative court **sometimes** issues **progressive** rulings. **But** this remains an exceedingly **pro-business court**.”

**Maintaining a credible threat of reform causes the courts to moderate**

**Block 20** (Daniel Block, executive editor of the Washington Monthly, The Case for Threatening the Courts, December, <https://washingtonmonthly.com/magazine/november-december-2020/the-case-for-threatening-the-courts/>, y2k)

Throughout modern U.S. history, the Supreme Court has proved **susceptible** to outside **pressure**. FDR’s proposal is just one of many successful institutional attacks. In the mid-1950s, the liberal Warren Court backed away from protecting victims of McCarthyism because a popular Senate bill threatened to strip the Court’s powers. Throughout the 1970s and ’80s, conservative politicians flooded Congress with legislation to stop the Court from ruling on racial integration. The justices retreated from enforcing busing regulations.

For Democrats worried about being railroaded by **a 6–3 conservative bench**, these conflicts should be **instructive**. In **none** of these instances did Congress or the president truly enact laws that changed the Court. In each of them, **the Court changed anyway**. These attacks can **exact costs**, as FDR discovered; his particularly aggressive push weakened his power within Congress. But they also have clear payoffs. Threats to expand, strip, or otherwise **limit the Court**—done with **credibility**—can **influence** judicial behavior.

“**Historically**, I think we have found that the Court gets the **message**,” Keith Whittington, a political scientist at Princeton University who studies the politics of the judiciary, told me. “When conservatives are pressing these types of bills, the Court becomes a little more conservative. When liberals are pressing these types of bills, the Court becomes a little more liberal.”

If Joe Biden takes office in January, he will confront a landscape not unlike the one FDR faced in 1937. Biden, like Roosevelt, will grapple with an economic downturn of historic dimensions. He’ll have won promising to enact a variety of sizable spending and welfare programs. In interviews, Biden has explicitly cited the Roosevelt presidency as a template.

But, much like FDR, Biden will have to contend with a Supreme Court stacked with six conservatives. For Roosevelt, these six men were perhaps his most powerful enemies. With large majorities in both the House and Senate, the president moved transformative economic legislation—from minimum wages to maximum hours—with remarkable ease, only to have it struck down by justices who didn’t abide by the bromide of not “legislating from the bench.” These activist rulings infuriated Roosevelt, who in 1935 declared that the Court was creating a “ ‘no-man’s-land’ where no government—state or federal—can function.” They also stirred up popular sentiment. Much like today, the Supreme Court hung over the 1936 presidential election.

FDR won that election with more than 60 percent of the vote. Emboldened, he decided to confront the Court. Within weeks of his inauguration, Roosevelt announced an initiative to add six justices to the body. The Supreme Court was furious. Privately, Chief Justice Charles Hughes remarked that the bill would “destroy the Court as

an institution.”

At first, the public was closely divided over Roosevelt’s plan, as was Congress. Republicans, southern conservatives, and some liberals came out against the idea. But Senate Majority Leader Joseph Robinson, who was promised a seat on the expanded bench, backed the president. After a fireside chat on March 8, so did a large plurality of Americans. “We cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present,” Roosevelt said.

As FDR spoke, the Court was preparing to rule on perhaps the biggest case of his tenure, National Labor Relations Board v. Jones & Laughlin Steel Corporation. The decision would determine the constitutionality of the National Labor Relations Act, landmark New Deal legislation that made it significantly easier to join and form a union. Legal observers widely expected that the act, like its predecessors, would fall. So did the president.

Instead, in mid-April, the Court upheld it in a 5–4 decision, with Hughes and Roberts in the majority. Almost immediately afterward, public support for adding justices dipped. Then, at the end of May, the Court upheld the creation of Social Security, again in a surprise 5–4 ruling. The plan grew even more unpopular. In a May 25 cartoon in the Rochester Times-Union, Roosevelt’s “Supreme Court Packing Case” was depicted as a large crate, collapsing as the Court’s various liberal decisions, each representing an underlying plank, toppled beneath it. By the end of July, FDR’s proposal was dead.

There’s a vigorous academic debate about the extent to which the Court’s pivot had to do with pressure from Roosevelt versus organic jurisprudential development. There’s no doubt that the Court’s constitutional doctrine was already evolving in ways that made siding with the president easier. The Court that had struck down child labor laws and FDR’s National Recovery Act was evolving into a body more deferential to Congress. But it’s **hard** to see how the swing justices **couldn’t** have been touched by Roosevelt’s **attacks** and the resulting **public discourse**. As The New Yorker sarcastically wrote in 1937, the only way the Supreme Court could not have been impacted was if its then-new building, completed in 1935, “has a soundproof room, to which the Justices retire to change their minds.”

Does that mean that if Democrats win in November, they could be equally effective by threatening to expand the size of the bench? There are reasons to be skeptical. If he wins, Biden will not enter the White House backed by more than 500 electoral votes. If Democrats control 52 Senate seats come 2021, they will consider it a roaring success. In 1937, the party held more than 70. (It’s also unclear if the Roberts Court will aggressively strike down Biden legislation.)

But some of the differences between Roosevelt’s era and today’s could actually work to the advantage of modern Democrats. In the 1930s, the Democratic Party was a sprawling entity, featuring both New Deal liberals and the southern right. The latter were some of the most tenacious opponents of court expansion. They included, for example, former Texas Congressman John Nance Garner—Roosevelt’s own vice president.

Today, the Democratic Party is far more **unified**. The southern conservative constituencies that once fought Roosevelt now almost all vote Republican. Unlike FDR’s vice president, Kamala Harris won’t go AWOL. She expressed openness to **expanding** the size of the Supreme Court during the Democratic primaries, well before the death of Ruth Bader Ginsburg led Biden to soften his opposition.

FDR was not the first person to intimidate the Supreme Court. In the Progressive Era, major politicians put forth all kinds of proposals to curb the power of a judiciary they viewed as in thrall to big businesses, from allowing voters to override Supreme Court decisions to making it easier to recall justices. None passed, but scholars believe that the clamor may have kept the Court from making it impossible for reformers to reshape economic power. They’re not alone in that assessment. “I may not know much about law,” President Theodore Roosevelt remarked in 1905, “but I do know that one can put the fear of God in judges.”

In the latter half of the 20th century, politicians toyed with more targeted attacks. According to Article III, Section 2 of the Constitution, the Supreme Court has appellate jurisdiction over all cases “with such exceptions, and under such regulations as the Congress shall make.” Conservative congressmen and senators seized on this language to propose bills that would “strip” the Court of its right to rule on racial integration. These bills, for the most part, went nowhere. But, much like FDR’s court-expansion attempt, they still made a difference. During the tenure of Chief Justice Warren Burger from 1969 to 1986, the justices kept careful track of “jurisdiction-stripping” legislation, circulating them to one another whenever they came up. Burger himself kept a file of all these proposals as they moved through Congress. In both the 1970s and 1980s, the Court retreated from many attempts to force integration, even as it gave a yellow light to affirmative action.

Part of that change, no doubt, stems from personnel; the Burger Court had more conservative membership than the Warren Court that preceded it. But academics argue that congressional pressure also had a clear role. In a memo to eight of the Court’s justices, for example, one law clerk noted that a major busing case had attracted great political and congressional controversy. He recommended that the judges deny a petition to hear it. They followed his advice.

“The clerk is writing for eight of the nine justices,” said Tom Clark, a political scientist at Emory University and the author of The Limits of Judicial Independence. “[It] tells me that the clerk was aware the justices would want to know that.”

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It’s unclear exactly why John Roberts decided in 2012 to uphold the Affordable Care Act, but it’s entirely possible that his vote was one of institutional deference: He didn’t want to nullify a sitting president’s greatest accomplishment. And so far, under Donald Trump, Roberts has sided with liberals on a number of surprising occasions, including an abortion case. Perhaps that’s to keep the Court from being dragged into the country’s partisan slugfest. Perhaps, and relatedly, it’s because of Democrats’ heated rhetoric about the need to bend the judiciary.

“I think he takes those threats seriously,” Princeton’s Whittington said.

But once Amy Coney Barrett is confirmed (her nomination is pending as of this writing), Roberts will no longer be the Court’s swing justice. That title will instead likely belong to either Neil Gorsuch or Brett Kavanaugh. Both were elevated to their jobs by a conservative judicial movement increasingly incensed that the Supreme Court won’t tack further right, even though Republicans have appointed 12 of the last 16 justices. Barrett clerked for Antonin Scalia. With such a rock-solid conservative majority, this bench will be more hostile to liberal policies than the one that came before. Can we really expect it to show any restraint?

The behavior of some leading jurists suggests that the answer is no. In a speech before Notre Dame Law School (where Barrett used to teach), Attorney General Bill Barr summarized much of the legal right’s thinking in astonishingly blunt terms. “Militant secularists,” he warned, “seem to take a delight in compelling people to violate their conscience.” He cited as evidence a now-struck-down Affordable Care Act provision requiring that employers cover contraception.

On the other hand, many of the justices who fought Roosevelt’s New Deal had similarly apocalyptic visions. The sweeping programs FDR thought necessary for the economy were, to them, a tyrannical violation of the Constitution. Dissenting from a case that upheld Congress’s power to heavily regulate gold, four of the era’s justices declared that the government’s actions “annihilate its own obligations” and destroy “the very rights” the Constitution was supposed to protect. That passion didn’t stop two justices from bowing to popular reality. As Justice Owen Roberts said after Roosevelt’s reelection, “the Court took cognizance of the popular will.”

Today’s Chief Justice **Roberts** is also clearly concerned with the Court’s **legitimacy** and does not want it to be seen as a **purely partisan body**. And despite their **impeccably** conservative credentials, **Kavanaugh** and **Gorsuch** have both shown a willingness to **break** with orthodoxy on **high-profile occasions**—including, in the case of Gorsuch, a seismic expansion of LGBTQ rights.

Whether the Court can be pressured, then, may **ultimately** come down to just how much muscle Democrats are willing to employ. To truly **constrain** the Court, the party must, of course, win both the presidency and the Senate. But winning is not enough. They must be willing to **credibly** threaten the Court, something that requires a **bold**, **unified front** on the judiciary. Right now, such tenacity and unity are lacking. But that may well be changing. Senate Minority Leader Chuck Schumer, a procedural moderate, told reporters in late September that should Republicans fill Ginsburg’s seat, “nothing is off the table.” Biden, a former court-expansion opponent, now ducks court-expansion questions. Even Pennsylvania Senator Bob Casey, one of the only congressional Democrats who support overturning Roe v. Wade, told reporters he wants “to get through the election” before taking a stance.

Barrett’s confirmation is not the only thing radicalizing Democrats. Support for **reining in** the Supreme Court will become **fevered** if it actually strikes down, rather than “simply” menaces, cornerstone **liberal policies**. Not long after the election (and during whatever chaos comes next), the bench will hear its third challenge to the Affordable Care Act. If Democrats win the White House and Senate, and the Court still invalidates the ACA in the midst of a pandemic, the party of FDR may not be able to resist retaliatory measures. Biden famously called the act’s passage, which came while he was vice president, a “big fucking deal.” It is unlikely that he will let it go gentle into that good night.

Today’s justices, of course, know this. Like their counterparts in the 1930s, they do not exist in a soundproof room. If they nonetheless begin an aggressive assault on whatever New Deal–style social policies liberals enact—like a public health insurance option, major climate change legislation, or heavy regulations on internet giants—they will be wagering that Democrats are just full of hot air. They may well be right. The Court is generally more popular than Congress or the president, making attacks on it very risky. Even Roosevelt, operating at the peak of his powers, paid a political cost for battling the bench. Roosevelt’s plan helped save laws he had already passed. But it alienated many congressional Democrats, and his New Deal was effectively ended by the election of conservatives in 1938.

Nonetheless, **modern Democrats cannot shy away from intimidation**. The justices FDR confronted were almost all in their 70s; he might have been able to wait them out. Today’s conservatives are substantially younger. Barrett is 48, and if she’s confirmed and stays on the Court until Ginsburg’s age, she’ll be ruling until 2059. And as the 1970s showed, politicians don’t need to threaten the Court with expansion to get a response. Stripping legislation that limits the Court’s powers could also help Democrats send a powerful message. The party may not need to go as far as Roosevelt did to make their point.

But if they face serious defeat at the Court, they can learn from his resolve. “You’ve got to really **rattle the saber**,” Whittington said. “Then you get the **justices to respond**.”

**The Texas decision didn’t evaluate substantive merits of rights to abortion---the court is staying away from it now**

**Feldman 9-8** (Noah Feldman, a professor of law at Harvard University who was a clerk to U.S. Supreme Court Justice David Souter, We don't know if the Supreme Court is ready to overturn Roe, <https://pressofatlanticcity.com/opinion/columnists/we-dont-know-if-the-supreme-court-is-ready-to-overturn-roe-by-noah-feldman/article_b2af3a97-7b33-5a38-94fe-56890f40db3e.html>, y2k)

Every **nonlawyer** on the planet — and no doubt a few lawyers, too — is likely to read this outcome as prefiguring a 5-to-4 vote to **overturn** Roe v. Wade, the 1973 precedent that made abortion a constitutional right. Later this year, the court will address a **Mississippi** anti-abortion law that lacks the cleverly diabolical enforcement mechanism of the Texas law but is equally unconstitutional. Indeed, the day after the law went into effect and before the Supreme Court ruled, many non-lawyers who were unfamiliar with court procedures had already concluded that they knew how the upcoming Mississippi case would come out.

That’s a possible interpretation of the latest opinion, to be sure. But the opinion for the five conservatives explicitly **denied** it. “We stress,” said the justices, “that we do not purport to resolve **definitively** any **jurisdictional** or **substantive** claim in the applicants’ lawsuit.” That’s lawyer-speak for saying both that the law could **still** be **unconstitutional** and that there might still be some **procedural way** to block its operation. For good measure, the opinion said the challengers “have raised serious questions regarding the constitutionality of the Texas law.”

These formulations indicate that at least some of the five conservatives who joined it wanted to **take pains** not to send the message that **Roe v. Wade** is sure to be **overturned**. What is less clear is whether anyone on the political battlefield wants to hear that message. The pro-choice camp will doubtless spend the months until the court term ends in June whipping up public sentiment, either in the hopes of changing the outcome or turning any decision overturning Roe into the impetus for packing the court or producing a heavy Democratic turnout in the 2022 midterm elections. The pro-life camp has an equal interest in making the overturning of Roe seem inevitable.

Consequently, neither side cares much for dispassionate analysis. But the fact remains that the majority in the Texas ruling did not address the underlying issues, so it would be **premature** to **predict the outcome** in the Mississippi case based on it.

**AND, it will be inevitably re-litigated---maintaining the constitutional rights to abortion under Roe is key to make it successful**

**Snead 9-6** (O. Carter Snead is a law professor at the University of Notre Dame, Opinion: Critics of Texas’s convoluted abortion law have a point, 9-6, <https://www.washingtonpost.com/opinions/2021/09/06/texas-abortion-law-overturn-roe-v-wade-o-carter-snead/>, y2k)

**The Texas strategy** was ingenious in that it evaded the usual **pre-enforcement** injunction by a federal court, which **only** has the constitutional power to act when the parties before them are involved in a **real** dispute. Because neither the state officials nor the private citizen **sued** in the case were involved in the enforcement of the law, the Supreme Court **lacked** the power to intervene.

Should any citizen **initiate a suit**, the defendant **abortion provider** will almost certainly raise the defense that the law constitutes **an “undue burden” to** its **patients** — an affirmative defense explicitly created by the statute — and may well **prevail**, **so long as the Supreme Court has not overruled Roe** and Casey. Thus, claims of the demise of the right to **abortion** in the United States have been somewhat **exaggerated**. In fact, a Texas state court just issued a **temporary restraining order** against more than 100 potential claimants (some unnamed), before they even filed suit.