**NDT R6 Disclosure**

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**“Expand the scope” means broadening the range of claims that can be brought legitimately---that’s distinct from changing what is prohibited**

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

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

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

**The only way to do that is by reducing or eliminating an antitrust immunity or exemption---the scope of antitrust laws is *only limited* by sectoral exemptions, state action immunity, and Noer-Pennington immunity**

**Kobayashi and Wright 20** – Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason, University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University and holds a courtesy appointment in the Department of Economics

Bruce H. Kobayashi and Joshua D. Wright, "Antitrust Exemptions and Immunities in the Digital Economy," Global Antitrust Institute, 5-28-2020, https://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/

Introduction

The **antitrust laws** were designed to **regulate private conduct** in order to promote competition and protect consumer welfare from exercises of monopoly power by firms. In other words, the antitrust laws, as “the magna carta of free enterprise,”[1] are designed primarily to regulate private conduct, not government conduct and public restraints of trade.[2] Private activity may still fall **outside the scope of the antitrust laws** when it is **exempted specifically** by Congress, heavily guided or **influenced by the governmen**t, or relates to **attempts to petition the government** to take action.

**Antitrust laws’ outer boundaries** fall into **three categories**: (1) **sectoral** or **industry-level exemptions**, which single out an industry or business line from antitrust scrutiny; (2) **state action immunity**, which provides immunity for anticompetitive behavior by state governments and municipalities under certain conditions; and (3) **Noerr-Pennington immunity**, which aims to protect speech in the form of petitioning activity from antitrust liability.[3] The digital economy interfaces with the government in many respects; therefore, the **antitrust laws’ reach**—shaped by these **exemptions** and **immunities**—plays a clear role in guarding consumer welfare.

**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---CP**

Civil RICO CP---

**The United States federal government should expand the scope of the civil RICO statute to prohibit forms of predatory innovation that have no economic sense**

**Counterplan solves by prohibiting the same conduct via civil RICO---avoids legal antitrust barriers but carries the effect because civil RICO mirrors antitrust treble damages remedies**

**Kennedy**, Council Member of the Section of Antitrust Law, Ohio Bar, **‘86**

(James P., “Civil RICO in the Antitrust Context,” *Antitrust Law Journal*, Vol. 55, No. 2, 34th Annual Meeting, pp. 463-498)

II. POTENTIAL USE OF CIVIL RICO IN THE ANTITRUST CONTEXT

With the large number of offenses which qualify as "racketeering activities" under the statute,22 particularly mail and wire fraud, it that many fact patterns **which give rise to liability under the antitrust laws would also be found to violate civil RICO.** This is illustrated use of RICO in various cases involving **anticompetitive conduct**, alleged horizontal and vertical **price-fixing**,23 **monopolization attempts**, anticompetitive **mergers**,25 Robinson-Patman Act violations,26 and other **forms of unfair competition**.27 When the alleged antitrust violation is firmly grounded on the traditionally established antitrust theories recovery, RICO provides few discernible benefits to the plaintiff of the remedies available although it may be easier to proceed under RICO.28 The principal **advantage**, however, of RICO's civil remedies—**mandatory treble damages** and **attorneys' fees**—is particularly inviting to plaintiffs who are **facing one or more barriers** such as **standing** problems, **substantive deficiencies** in their **antitrust claims**, or **exemptions** under the antitrust laws, obstacles which **might not be present in private civil actions under RICO**. In these **flawed antitrust cases,** RICO provides the would-be plaintiffs **with another option** **for treble damages** might not otherwise have been available.

A. Circumventing Standing Barriers in Antitrust Law through Civil RICO

Under its seminal decision in Illinois Brick Co. v. Illinois,29 the Supreme Court undertook to limit the ripple effect of anticompetitive injury held that only those directly injured in their business have standing to pursue an action for treble damages Conversely, plaintiffs suffering only indirect to pursue antitrust theories of recovery.

The literal terms of RICO do not require direct no uniform judicial application of the principles to civil RICO actions. For example, the Eighth Association, Inc. v. Terre Du Lac9 Inc.,51 pronounced allege a "racketeering injury" does not destroy to bring suit under RICO even where the plaintiff injury.32

Likewise, the Supreme Court in Sedima, although it did not expressly consider the degree of injury required, did not impose any distinction between direct and indirect injury but concluded that a "plaintiff . . . has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."33

The Seventh Circuit, however, reached a contrary finding in Carter v. Berger,54 where certain taxpayers pursued a RICO claim against an in- dividual who had bribed county tax assessors for his own personal benefit. The court held that the county was the proper plaintiff, not the taxpayers, based upon the principles of Illinois Brick.

A similar result was reached in Rand v. Anaconda-Ericsson.55 In that case, Ericsson was the chief supplier of telephone equipment to Teltronics and also its principal creditor. Teltronics financed equipment purchases through the issuance of notes to the defendant banks. Ericsson guar- anteed payment on the notes, in return for which it held a security interest in revenues generated by Teltronics' lease of equipment.

Plaintiffs, shareholders of Teltronics, alleged that Ericsson led Tel- tronics to believe that it need not make interest payments on the loans until the end of February, 1979. When Teltronics failed to make such payments, however, they were declared in default and the loans were accelerated forcing Teltronics into involuntary bankruptcy. Plaintiffs brought suit alleging both antitrust (Sherman Act) and RICO claims. The court granted summary judgment for the defendant on both counts for lack of standing, on the ground that the legal corporation, Teltronics, and not to the individual shareholders.

The Carter and Rand decisions provide a basis for defendants to challenge the standing of RICO plaintiffs who have suffered injury, on the same policy considerations upon which founded. Success, however, is by no means assured, the viability of the Illinois Brick doctrine is not firmly cases.

The Supreme Court, however, has clearly eliminated another barrier which is firmly entrenched in antitrust law - the "antitrust requirement articulated in Brunswick Corp. v. Pueblo Bowl-There, the Supreme Court recognized that in a competitive market certain entities inevitably will not survive or will be damaged and that the antitrust laws were not designed to protect petitors per se. Rather, the Court reasoned that the purpose antitrust laws was much broader in nature so as to protect not competitors, and if no injury to competition can be antitrust action can be maintained. The Court defined "antitrust as that which is "more than [an] injury causally linked to an illegal presence in the market" and which "flows from that which makes acts unlawful."37

Prior to Sedima, several courts analogized Brunswick's "antitrust to RICO claims and required plaintiffs to demonstrate a injury" beyond that which resulted from the alleged predicate also caused by activity RICO was designed to deter.38 In Sedima, the Supreme Court struck down this contention and held from the pattern of racketeering activities, i.e., the predicate selves, suffice to confer standing under civil RICO.39 The on to state "there is no room in the statutory language for amorphous 'racketeering injury' requirement."40 Hence, the court rejected in RICO cases its own special injury requirement antitrust cases. Accordingly, those claims which would failed under antitrust laws because the plaintiff did not allege an “anti- trust injury" remain potentially viable assuming the other essential elements of RICO claims have been met.

B. Use Of Civil RICO To Bypass Substantive Provisions Under the Antitrust Laws

In many situations, parties injured by anticompetitive conduct face **jurisdictional** and **substantive barriers** which forestall recovery under the antitrust laws. With increasing frequency, plaintiffs in these flawed anti- trust actions are using RICO as a **viable alternative** to **subvert the limitations** on causes of action **under traditional antitrust theories**.

1. The Intracorporate Conspiracy Doctrine

A violation under Section 1 of the Sherman Act requires a showing of unlawful concerted activity among the defendants. However, certain parties, by virtue of their intracorporate status, do not constitute multiple perpetrators engaged in concerted activities as contemplated under the Sherman Act. This theory was adopted by the Supreme Court in Cop- perweld Corp. v. Independence Tube Corp.41 In that case, the plaintiff maintained that an alleged conspiracy between a corporation and its wholly- owned subsidiary, was actionable under the antitrust laws. The Court disagreed, finding that an agreement or conspiracy among officers, em- ployees, or wholly-owned subsidiaries of the same corporate entity, does not give rise to the unlawful concerted activity against which the Sherman Act is intended to protect. Hence, the anticompetitive conduct of a single firm, although arguably equivalent in effect to the conduct of two sep- arate corporate entities, is nonetheless outside the reach of Section I.42

With the exception of Section 1962(d), violations under civil RICO, unlike the antitrust laws, are not predicated upon conspiring activity. Accordingly, a RICO plaintiff may allege that a parent corporation is the culpable "person" engaged in the proscribed racketeering activity and its subsidiary is the "enterprise" or vice versa.43 Hence, the Copperweld doctrine has no application in a RICO context.44

RICO plaintiffs may also be able to avoid the pitfalls of the Copperweld doctrine by labelling the parent corporation as both the "enterprise" and the "person" under Section 1962(c). At least one circuit theory.45 However, the majority position is that under "the corporate entity may not be simultaneously the 'person' who conducts the affairs of the enterprise through racketeering activity," but must be distinct entities.46 Civil may be able to sidestep this requirement by pursuing 1962(a) rather than Section 1962(c). Some courts "person" and the "enterprise" as the same entity under Section 1962(a).

2. Using Civil RICO to Bypass the Competitive Impact Element to Antitrust Actions

As previously discussed, the sine qua non of conduct antitrust laws is its **deleterious impact on competition**, whether such impact be expressly demonstrated, presumed to exist, or otherwise shown to be imminent. There is no such market effect required under RICO so that **cases not otherwise cognizable** under the antitrust laws for **failure to establish the necessary impact on competition** through market share, **conspiracy**, or otherwise, **may meet a much different fate under civil RICO.** For example, a party injured by the predatory acts of a single competitor may not seek relief under the antitrust laws absent evidence that the predator occupied a share of the market sufficient to create a dangerous probability of success in attaining monopolization. However, by properly asserting the requisite predicate acts of racketeering predictably mail or wire fraud, **the injured party may recover under RICO treble the damages sustained** as a result of the unlawful attempt to monopolize.

Such a scenario was presented in Gregoris Motors v. Nissan Motor Corporation USA.4S In that case, plaintiff, the owner of a Nissan dealership, alleged that four other dealerships had submitted false sale documents to the American branch manufacturer of Nissan vehicles and bribed certain officials to increase their allotment of new cars in an attempt to monopolize the Nissan market in the area. The plaintiff further alleged that the manufacturer acquiesced in or abetted the activities. Plaintiff brought suit under Sections 1 and 2 of the Sherman Patman Act, and RICO.

The court dismissed the Section 1 violation noting there was no evidence that plaintiff's existence was in peril and failed to establish the necessary anticompetitive claim met with similar demise because plaintiff that the defendant wielded the requisite monopoly sufficient market command to control or restrict competition in the area.

Another example where a RICO claim could be used to **salvage an action that failed under antitrust** laws for lack of competitive impact is seen in Summerwood v. Cado Systems.50 There, Summerwood agreed to purchase from Small Business Computers, Inc. (“SBC”), a distributor of Cado, a computer hardware and software package particularly designed for its fast food business. Summerwood claimed that while it desired only the software package, it was forced to purchase the hardware as well. Dissatisfied with SBC's performance under the agreement, Sum- merwood brought suit alleging inter alia, a Section 1 violation of the Sherman Act, a Clayton Act violation, and a RICO claim.

The court dismissed the Section 1 claim finding that the complaint failed to allege a conspiracy adequately. Moreover, the court dismissed the claim under the Clayton Act because there was no explicit tie-in agreement and no showing of individual coercion. The court disposed of the RICO claim as well, with leave to amend, principally because the plaintiff did not state which provision of Section 1962 the defendant violated. However, given the **substantive deficiencies** noted by the court with respect to the antitrust claim (failure to allege an injurious impact on competition through conspiracy), as opposed to the **merely technical insufficiency** stated in connection with the RICO claim, it is reasonable to assume that upon amendment of the complaint specifying the particular subsection of Section 1962 which was violated, **the RICO claim would survive while the antitrust claims would not.**

In addition to the areas discussed above, commentators have predicted that that determined plaintiffs will **forge similar inroads** **into other areas of antitrust** law by **asserting RICO violations in lieu of antitrust claims.** For instance, it was suggested that plaintiffs might bring suit under RICO to **contest mergers** having **insufficient anticompetitive effect** to invoke Section 7 of the Clayton Act.51 Moreover, a plaintiff injured by discimination in delivery of commodities, although unable to bring suit under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, because it prohibits discrimination only in "service or facilities," could conceivably challenge the delivery practices under RICO by simply alleging mail and wire fraud or any other predicate act.53

**Expanding civil RICO to competition-related cases is key to address regulatory fraud and financial misrepresentations that drive crises**

**Gleiser**, JD, St. Louis University Law School, **‘10**

(Ephraim Samuel, “A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape Civil Rico into the Ideal Free Market Safeguard,” 54 St. Louis U. L.J. 609)

Nearly a year later, on June 19, 2008, a month after Bear Steams' collapse, two former Bear Steams managers, Matthew Tannin and Ralph Cioffi, became the first executives of many to be charged criminally in the wake of the current subprime market crisis. 5 Following a federal investigation, both men were indicted for **securities and wire fraud**.6 Over three months later, with markets plummeting, Christopher Cox, head of the Securities and Exchange Commission (SEC), testified before the Senate banking panel, conceding the SEC's performance in monitoring Bear Steams was "fundamentally flawed."7

Although from widely disparate industries, Merck and Bear Steams both faced allegations of **misleading federal regulators** and extracting market advantage in the process. The stories of these two **corporate giants** illustrate the **vulnerability** and **inefficacy of regulatory agencies**. Merck's settlement was the result of thousands of private claims for damages caused by its drug. 8

Such private claims **provide disincentive[s]** for companies willing to **deceive government regulators**. Yet, **the future availability of these claims is far from certain**. In a 2008 decision, Riegel v. Medtronic, Inc.,9 the Supreme Court held that because the FDA's pre-market approval process contained federal requirements, FDA approval of medical devices preempted state common-law claims of negligence, strict liability, and implied warranty against the manufacturer of a faulty medical device.' 0 More recently, in Wyeth v. Levine," the Court held that the FDA's approval of the defendant-drug manufacturer's label did not preempt an injured consumer's failure to warn claim.12 The Court focused on the manufacturer's post-FDA approval duty to inform consumers of new risks.' 3 This means claims based on pre-FDA approval actions remain subject to preemption. 14 The larger question still looms: to what extent the public must rely on regulatory bodies in a post-Wyeth landscape.

What if the same free market forces that led these actors astray could be **redirected** in a way to entice companies to **keep industry competitors honest**? What if businesses had to play by the rules **because failing to do so would mean giving up market share** and filling the coffers of competitors? Do honest businesses have **a viable** and powerful cause of action against competing businesses that attain economic advantage through **misleading behavior?** The answers to these anticipated questions lie within the Supreme Court decision, Bridge v. Phoenix Bond & Indemnity Co.,15 which has the **potential to transform civil RICO from an unwieldy weapon into a powerful corporate instrument for maintaining industry-wide honesty**.6

In Bridge, the Supreme Court unanimously held that a plaintiff raising a claim based on mail fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1964 is not required to demonstrate reliance on the defendant's alleged misrepresentations.17 RICO provides a private **right of action for treble damages** to "[a]ny person injured in his business or property by reason of a violation" of the Act.' 8 In Bridge, each year the Cook County, Illinois, Treasurer's Office auctioned tax liens acquired on the property of delinquent taxpayers. 19 These liens proved to be smart investments, since many property holders would be unable to redeem their property, and thus allowed the purchasers of the liens to acquire the property and collect significant gains. 2 0 The auction proved so lucrative that the County began limiting the number of bidders through its "Single, Simultaneous Bidder Rule." 21 The plaintiff, a regular customer at the auction (along with the defendant), brought suit under RICO against the defendant alleging the defendant company filed false attestations that it was in compliance with the County's rule.22

The issue decided in Bridge, "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud, 23 exists within the proximate cause requirement first established in Holmes v. Securities Investor Protection Corp.,24 and later affirmed in Anza v. Ideal Steel Supply Corp.25 Since Holmes, decided in 1992, the Court has read a proximate cause requirement 26 into the language of § 1964. At the same time, the Court has continually recognized that "[p]roximate cause... is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.', 27 **Despite** this **flexibility**, Anza incorporated a "**directness" element** into the civil RICO proximate cause requirement that limits recovery only to the "immediate" 28 victims of a predicate act. Often, the most immediate victims of consumer fraud are injured consumers. Yet, the effect of legislative and judicial "tort reform" efforts have left **injured consumers** without the ability to seek damages from corporate wrongdoers. 29 Given the inability of consumers to recover damages, corporate wrongdoers are able to **take advantage** of **imperfect regulatory oversight** in order to **gain the market share of its competitors**.

This comment proposes the Court address this problem by reshaping its proximate cause analysis to recognize the intended victims of corporate fraud: honest competitors that have lost market share due to fraud, deception, and misrepresentation. **The Court must allow honest corporations**, **injured by a competitor's wrong**, **to bring civil RICO claims based on the wrongdoer's intended outcome**, as determined using a means-end analysis. Doing so means filling the gap left by individual consumers **unable to act as private attorneys general**. The following hypothetical may help to illustrate how a corporation may invoke civil RICO that will, perhaps, invite the Court to directly address this very issue in the future.

Suppose ABC Corp. and XYZ Corp. are competing pharmaceutical device companies. Both are engaged in a fierce competition to begin marketing their own versions of an insulin delivery device. Both companies also began the FDA's pre-market approval process almost simultaneously. And nearly a year later, FDA granted full approval to ABC's insulin delivery device Apulert and to XYZ for its equivalent, Exulert.

Following the approval of both drugs, advertising became heated. In fact, XYZ produced marketing materials received by physicians that flaunted what it claimed were "superior trial results." A few weeks later, evidence arose that XYZ had withheld information from federal regulators, fabricating a large portion of its trials. A resulting investigation revealed the fabrication began five months prior to Exulert's release.

Following the evidentiary disclosure, patients who used Exulert began complaining of harmful side effects. These individuals seeking relief through the courts were dismayed by the the plaintiffs' firms hesitance and often outright refusal to agree to provide representation. Prior to refusing, attorneys explain that individuals harmed by Exulert are unable to invoke state consumer fraud acts. With these tort reform measures in place, attorneys are reluctant to invest the massive resources needed for pursuing individual claims, much less bringing mass action of individual claims.

Moreover, although FDA representatives promise closer scrutiny, the public is wary to rely yet again on a regulation process that allowed Exulert onto the market. So, what prevents corporate actors like XYZ from cutting corners in the future? More immediately, how helpful is the causal analysis from Holmes, Anza, and Bridge? Who, if anyone, is in the best position to right the wrong caused by XYZ?

This Comment explores the future benefits Bridge may provide to corporations and society at large. This exploration will begin with a brief introduction to the legislative inception and judicial expansion and contraction of RICO. While doing so, the comment will lay out the causal analysis set out in Holmes and affirmed in Anza. Next, the Comment will discuss Justice Thomas' causation analysis, which, while excising reliance as an element, leaves room for further helpful direction involving future invocations of RICO in civil actions. Finally, the Comment examines the significance of the Court's decision amidst political pressure to **remove RICO as a tool for civil litigators**. The Court's adoption of proximate causation suggests civil RICO can be **tailored** in a way that creates a **powerful instrument** for businesses **injured by third party misrepresentations** and that will keep businesses honest and compensate business for damages caused by **deceptive, fraudulent, and dishonest competitors**.

**Regulatory fraud is empirically most significant contributor to systemic financial crises—ex post litigation key**

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(John M., “Ten Years of Evidence: Was Fraud a Force in the Financial Crisis?” *Journal of Economic Literature*, 59(4), 1293–1321)

A careful examination of the empirical academic evidence indicates that conflicts of interest, **misreporting**, and **fraud** were **central features** of the **securitization chain** leading up to the 2007–09 **financial crisis**. The academic evidence shows that the issues were widespread, as most firms engaged in underwriting, credit rating, originating, appraising, and CDO managing, which together facilitated massive amounts of securitization. Within origination practices there was large cross-sectional variation in the extent of fraudulent practices, and these practices, along with subprime lending more generally, strongly predict zip code level variation in both the 2003–06 boom and 2007–10 bust.

Given that securitized products facilitated a massive and costly dislocation in housing prices in the run-up, a subsequent economic recession, **and near banking meltdown in the collapse**, the unintended consequences of such practices can be **far costlier than gains from the initial activity**. While it would be difficult to estimate the total profits made from securitization in the precrisis boom, the entire combined revenue of Standard & Poor’s and Moody’s from 2003 to 2007 was $37 billion, whereas the total cost of the financial crisis is estimated to be over $22 trillion,25 or approximately 600 times that amount. Despite being difficult to detect and quantify, financial economists should not ignore the potential costs of conflicts of interest and fraud to our financial system.

Given that the statute of limitations had already passed on many legal claims by the time the specific evidences of fraud were made public in the Financial Crisis Inquiry Report (FCIC 2011), and that the $137 billion fines paid by banks led to no detectable labor market discipline of the responsible employees, policy makers may need to **reconsider enforcement**, statute of limitations length, and fines. **Tougher punishments** and **more resources for the legal system** may be necessary in a world of **increasing financial complexity** that makes detection more difficult and costly. Since regulators have historically been **largely unable to identify schemes ex ante**, increased enforcement and **larger penalties** may create **better forward-looking incentives**. Policy makers should consider the forward-looking implications of bailing out banks seemingly struggling from shortterm liquidity issues that may later be linked to wide-scale fraudulent activity. Forensic financial research may also be able to detect questionable activity in its early stages, when the cumulative spillover costs of fraud can hopefully be less severe.

Although **all of us had hoped** history would not repeat the same mistakes, the conflicts of interest regarding underwriters, rating agencies, originators, and appraisers at the heart of 2003–07 RMBS and CDO securitizations **appear to be of a similar nature** and an item of concern in **other securitized** (**collateralized loan obligation** and commercial mortgage-backed securities) and non-securitized markets **even recently**. As the financial crisis revealed serious structural issues in the prior period, the current COVID economic crisis could reveal the extent to which conflicts of interest and malfeasance have been **hiding in financial markets today**.

**Extinction---unique given structural vulnerability from COVID**

**Partnoy 20** – Law professor at UC Berkeley, international research fellow at Oxford University, member of the Financial Economists Roundtable

Frank Partnoy, "Will the Banks Collapse?," The Atlantic, July/August 2020, https://www.theatlantic.com/magazine/archive/2020/07/coronavirus-banks-collapse/612247/

After months of living with the coronavirus pandemic, American citizens are well aware of the toll it has taken on the economy: broken supply chains, record unemployment, failing small businesses. All of these factors are serious and could mire the United States in a deep, prolonged recession. But there’s **another threat** to the economy, too. It **lurks on the balance sheets** of the big banks, and it could be **cataclysmic**. Imagine if, in addition to all the uncertainty surrounding the pandemic, you woke up one morning to find that the **financial sector had collapsed**.

You may think that such a crisis is unlikely, with memories of the 2008 crash still so fresh. But banks learned few lessons from that calamity, and new laws intended to keep them from taking on too much risk have failed to do so. As a result, we could be on the **precipice of another crash**, one different from 2008 **less in kind than in degree. This one could be worse.**

The financial crisis of 2008 was about **home mortgages**. Hundreds of billions of dollars in loans to home buyers were repackaged into securities called collateralized debt obligations, known as **CDOs**. In theory, CDOs were intended to shift risk away from banks, which lend money to home buyers. In practice, the same banks that issued home loans also bet heavily on CDOs, often using complex techniques hidden from investors and regulators. When the housing market took a hit, these banks were doubly affected. In late 2007, banks began disclosing tens of billions of dollars of subprime-CDO losses. The next year, Lehman Brothers went under, taking the economy with it.

The federal government stepped in to rescue the other big banks and forestall a panic. The intervention worked—though its success did not seem assured at the time—and the system righted itself. Of course, many Americans suffered as a result of the crash, losing homes, jobs, and wealth. An already troubling gap between America’s haves and have-nots grew wider still. Yet by March 2009, the economy was on the upswing, and the longest bull market in history had begun.

To prevent the next crisis, Congress in 2010 passed the Dodd-Frank Act. Under the new rules, banks were supposed to borrow less, make fewer long-shot bets, and be more transparent about their holdings. The Federal Reserve began conducting “stress tests” to keep the banks in line. Congress also tried to reform the credit-rating agencies, which were widely blamed for enabling the meltdown by giving high marks to dubious CDOs, many of which were larded with subprime loans given to unqualified borrowers. Over the course of the crisis, more than 13,000 CDO investments that were rated AAA—the highest possible rating—defaulted.

The reforms were well intentioned, but, as we’ll see, they haven’t kept the banks from **falling back into old, bad habits**. After the housing crisis, subprime CDOs naturally fell out of favor. Demand shifted to a **similar**—**and similarly risky**—**instrument**, one that even has a similar name: **the CLO**, or collateralized loan obligation. A CLO **walks and talks like a CDO**, but in place of loans made to home buyers are loans made to businesses—specifically, troubled businesses. CLOs bundle together so-called leveraged loans, the subprime mortgages of the corporate world. These are loans made to companies that have maxed out their borrowing and can no longer sell bonds directly to investors or qualify for a traditional bank loan. There are more than $1 trillion worth of leveraged loans currently outstanding. The majority are held in CLOs.

I was part of the group that structured and sold CDOs and CLOs at Morgan Stanley in the 1990s. The two securities are remarkably alike. Like a CDO, a CLO has multiple layers, which are sold separately. The bottom layer is the riskiest, the top the safest. If just a few of the loans in a CLO default, the bottom layer will suffer a loss and the other layers will remain safe. If the defaults increase, the bottom layer will lose even more, and the pain will start to work its way up the layers. The top layer, however, remains protected: It loses money only after the lower layers have been wiped out.

Unless you work in finance, you probably haven’t heard of CLOs, but according to many estimates, the CLO market is **bigger** than the subprime-mortgage CDO market was **in its heyday**. The Bank for International Settlements, which helps central banks pursue financial stability, has estimated the overall size of the CDO market in 2007 at $640 billion; it estimated the overall size of the CLO market in 2018 at **$750 billion**. More than **$130 billion** worth of CLOs have been created **since then**, some even in recent months. Just as easy mortgages fueled economic growth in the 2000s, cheap corporate debt has done so in the past decade, and many companies have binged on it.

Despite their obvious resemblance to the villain of the last crash, CLOs have been praised by Federal Reserve Chair Jerome Powell and Treasury Secretary Steven Mnuchin for moving the risk of leveraged loans outside the banking system. Like former Fed Chair Alan Greenspan, who downplayed the risks posed by subprime mortgages, Powell and Mnuchin have downplayed any trouble CLOs could pose for banks, arguing that the risk is contained within the CLOs themselves.

These sanguine views are hard to square with reality. The Bank for International Settlements estimates that, across the globe, banks held at least $250 billion worth of CLOs at the end of 2018. Last July, one month after Powell declared in a press conference that “the risk isn’t in the banks,” two economists from the Federal Reserve reported that U.S. depository institutions and their holding companies owned more than $110 billion worth of CLOs issued out of the Cayman Islands alone. A more complete picture is hard to come by, in part because banks have been inconsistent about reporting their CLO holdings. The Financial Stability Board, which monitors the global financial system, warned in December that 14 percent of CLOs—more than $100 billion worth—are unaccounted for.

I have a checking account and a home mortgage with Wells Fargo; I decided to see how heavily invested my bank is in CLOs. I had to dig deep into the footnotes of the bank’s most recent annual report, all the way to page 144. Listed there are its “available for sale” accounts. These are investments a bank plans to sell at some point, though not necessarily right away. The list contains the categories of safe assets you might expect: U.S. Treasury bonds, municipal bonds, and so on. Nestled among them is an item called “collateralized loan and other obligations”—CLOs. I ran my finger across the page to see the total for these investments, investments that Powell and Mnuchin have asserted are “outside the banking system.”

The total is $29.7 billion. It is a massive number. And it is inside the bank.

Since 2008, banks have kept more capital on hand to protect against a downturn, and their balance sheets are less leveraged now than they were in 2007. And not every bank has loaded up on CLOs. But in December, the Financial Stability Board estimated that, for the 30 “global systemically important banks,” the average exposure to leveraged loans and CLOs was roughly **60 percent of capital on hand**. Citigroup reported $20 billion worth of CLOs as of March 31; JPMorgan Chase reported $35 billion (along with an unrealized loss on CLOs of $2 billion). A couple of midsize banks—Banc of California, Stifel Financial—have CLOs totaling more than 100 percent of their capital. If the leveraged-loan market imploded, their liabilities could **quickly become greater** than their assets.

How can these banks justify gambling so much money on what looks like such a risky bet? Defenders of CLOs say they aren’t, in fact, a gamble—on the contrary, they are as sure a thing as you can hope for. That’s because the banks mostly own the least risky, top layer of CLOs. Since the mid-1990s, the highest annual default rate on leveraged loans was about 10 percent, during the previous financial crisis. If 10 percent of a CLO’s loans default, the bottom layers will suffer, but if you own the top layer, you might not even notice. Three times as many loans could default and you’d still be protected, because the lower layers would bear the loss. The securities are structured such that investors with a high tolerance for risk, like hedge funds and private-equity firms, buy the bottom layers hoping to win the lottery. The big banks settle for smaller returns and the security of the top layer. As of this writing, no AAA‑rated layer of a CLO has ever lost principal.

But that AAA rating is deceiving. The credit-rating agencies grade CLOs and their underlying debt separately. You might assume that a CLO must contain AAA debt if its top layer is rated AAA. Far from it. Remember: CLOs are made up of loans to businesses that are already in trouble.

So what sort of debt do you find in a CLO? Fitch Ratings has estimated that as of April, more than 67 percent of the 1,745 borrowers in its leveraged-loan database had a B rating. That might not sound bad, but B-rated debt is lousy debt. According to the rating agencies’ definitions, a B-rated borrower’s ability to repay a loan is likely to be impaired in adverse business or economic conditions. In other words, two-thirds of those leveraged loans are likely to lose money in economic conditions like the ones we’re presently experiencing. According to Fitch, 15 percent of companies with leveraged loans are rated lower still, at CCC or below. These borrowers are on the cusp of default.

So while the banks restrict their CLO investments mostly to AAA‑rated layers, what they really own is exposure to tens of billions of dollars of high-risk debt. In those highly rated CLOs, you won’t find a single loan rated AAA, AA, or even A.

How can the credit-rating agencies get away with this? The answer is “default correlation,” a measure of the likelihood of loans defaulting at the same time. The main reason CLOs have been so safe is the same reason CDOs seemed safe before 2008. Back then, the underlying loans were risky too, and everyone knew that some of them would default. But it seemed unlikely that many of them would default at the same time. The loans were spread across the entire country and among many lenders. Real-estate markets were thought to be local, not national, and the factors that typically lead people to default on their home loans—job loss, divorce, poor health—don’t all move in the same direction at the same time. Then housing prices fell 30 percent across the board and defaults skyrocketed.

For CLOs, the rating agencies determine the grades of the various layers by assessing both the risks of the leveraged loans and their default correlation. Even during a recession, different sectors of the economy, such as entertainment, health care, and retail, don’t necessarily move in lockstep. In theory, CLOs are constructed in such a way as to minimize the chances that all of the loans will be affected by a single event or chain of events. The rating agencies award high ratings to those layers that seem sufficiently diversified across industry and geography.

Banks do not publicly report which CLOs they hold, so we can’t know precisely which leveraged loans a given institution might be exposed to. But all you have to do is look at a list of leveraged borrowers to see the potential for trouble. Among the dozens of companies Fitch added to its list of “loans of concern” in April were AMC Entertainment, Bob’s Discount Furniture, California Pizza Kitchen, the Container Store, Lands’ End, Men’s Wearhouse, and Party City. These are all companies hard hit by the sort of belt-tightening that accompanies a conventional downturn.

We are not in the midst of a conventional downturn. The two companies with the largest amount of outstanding debt on Fitch’s April list were Envision Healthcare, a medical-staffing company that, among other things, helps hospitals administer emergency-room care, and Intelsat, which provides satellite broadband access. Also added to the list was Hoffmaster, which makes products used by restaurants to package food for takeout. Companies you might have expected to weather the present economic storm are among those suffering most acutely as consumers not only tighten their belts, but also redefine what they consider necessary.

Even before the pandemic struck, the credit-rating agencies may have been underestimating how vulnerable unrelated industries could be to the same economic forces. A 2017 article by John Griffin, of the University of Texas, and Jordan Nickerson, of Boston College, demonstrated that the default-correlation assumptions used to create a group of 136 CLOs should have been three to four times higher than they were, and the miscalculations resulted in much higher ratings than were warranted. “I’ve been concerned about AAA CLOs failing in the next crisis for several years,” Griffin told me in May. “This crisis is more horrifying than I anticipated.”

Under current conditions, the outlook for leveraged loans in a range of industries is truly grim. Companies such as AMC (nearly $2 billion of debt spread across 224 CLOs) and Party City ($719 million of debt in 183 CLOs) were in dire straits before social distancing. Now moviegoing and party-throwing are paused indefinitely—and may never come back to their pre-pandemic levels.

The prices of AAA-rated CLO layers tumbled in March, before the Federal Reserve announced that its additional $2.3 trillion of lending would include loans to CLOs. (The program is controversial: Is the Fed really willing to prop up CLOs when so many previously healthy small businesses are struggling to pay their debts? As of mid-May, no such loans had been made.) Far from scaring off the big banks, the tumble inspired several of them to buy low: Citigroup acquired $2 billion of AAA CLOs during the dip, which it flipped for a $100 million profit when prices bounced back. Other banks, including Bank of America, reportedly bought lower layers of CLOs in May for about 20 cents on the dollar.

Meanwhile, loan defaults are already happening. There were more in April than ever before. Several experts told me they expect more record-breaking months this summer. It will only get worse from there.

If leveraged-loan defaults continue, how badly could they damage the larger economy? What, precisely, is the worst-case scenario?

For the moment, the financial system seems relatively stable. Banks can still pay their debts and pass their regulatory capital tests. But recall that the previous crash took more than a year to unfold. The present is analogous not to the fall of 2008, when the U.S. was in full-blown crisis, but to the summer of 2007, when some securities were going underwater but no one yet knew what the upshot would be.

What I’m about to describe is necessarily speculative, but it is rooted in the experience of the previous crash and in what we know about current bank holdings. The purpose of laying out this worst-case scenario isn’t to say that it will necessarily come to pass. The purpose is to show that it could. That alone should scare us all—and inform the way we think about the next year and beyond.

Later this summer, leveraged-loan defaults will increase significantly as the economic effects of the pandemic fully register. Bankruptcy courts will very likely buckle under the weight of new filings. (During a two-week period in May, J.Crew, Neiman Marcus, and J. C. Penney all filed for bankruptcy.) We already know that a significant majority of the loans in CLOs have weak covenants that offer investors only minimal legal protection; in industry parlance, they are “cov lite.” The holders of leveraged loans will thus be fortunate to get pennies on the dollar as companies default—nothing close to the 70 cents that has been standard in the past.

As the banks begin to feel the pain of these defaults, the public will learn that they were hardly the only institutions to bet big on CLOs. The insurance giant AIG—which had massive investments in CDOs in 2008—is now exposed to more than $9 billion in CLOs. U.S. life-insurance companies as a group in 2018 had an estimated one-fifth of their capital tied up in these same instruments. Pension funds, mutual funds, and exchange-traded funds (popular among retail investors) are also heavily invested in leveraged loans and CLOs.

The banks themselves may reveal that their CLO investments are **larger** than was previously understood. In fact, we’re already seeing this happen. On May 5, Wells Fargo disclosed $7.7 billion worth of CLOs in a different corner of its balance sheet than the $29.7 billion I’d found in its annual report. As defaults pile up, the Mnuchin-Powell view that leveraged loans can’t harm the financial system will be **exposed as wishful thinking**.

Thus far, I’ve focused on CLOs because they are the most troubling assets held by the banks. But they are **also emblematic** of other complex and artificial products that banks have stashed on—**and off**—their balance sheets. Later this year, banks may very well report quarterly losses that are much worse than anticipated. The details will include a dizzying array of transactions that will recall not only the housing crisis, but the Enron scandal of the early 2000s. Remember all those subsidiaries Enron created (many of them infamously named after Star Wars characters) to keep risky bets off the energy firm’s financial statements? The big banks use similar structures, called “**variable interest entities**”—companies established largely to hold **off-the-books** positions. Wells Fargo has more than $1 trillion of VIE assets, about which we currently know very little, because reporting requirements are opaque. But one popular investment held in VIEs is securities backed by commercial mortgages, such as loans to shopping malls and office parks—two categories of borrowers experiencing **severe strain** as a result of the pandemic.

The early losses from CLOs will not on their own erase the capital reserves required by Dodd-Frank. And some of the most irresponsible gambles from the last crisis—the speculative derivatives and credit-default swaps you may remember reading about in 2008—are less common today, experts told me. But the **losses from CLOs**, combined with losses from **other troubled assets** like those commercial-mortgage-backed securities, will lead to **serious deficiencies in capital**. Meanwhile, the same economic forces buffeting CLOs will hit **other parts of the banks’ balance sheets hard**; as the recession drags on, their traditional sources of revenue **will also dry up**. For some, the erosion of capital could **approach the levels** Lehman Brothers and Citigroup suffered in 2008. Banks with insufficient cash reserves will be forced to sell assets into a dour market, and the proceeds will be dismal. The prices of leveraged loans, and by extension CLOs, will spiral downward.

You can perhaps guess much of the rest: At some point, rumors will circulate that one major bank is near collapse. Overnight lending, which keeps the American economy running, will **seize up**. The Federal Reserve will try to arrange a bank bailout. All of that happened last time, too.

But this time, the bailout proposal will likely face **stiffer opposition**, from both parties. Since 2008, populists on the left and the right in American politics have grown suspicious of handouts to the big banks. Already irate that banks were inadequately punished for their malfeasance leading up to the last crash, critics will be outraged to learn that they so egregiously flouted the spirit of the post-2008 reforms. Some members of Congress will question whether the Federal Reserve has the authority to buy risky investments to prop up the financial sector, as it did in 2008. (Dodd-Frank limited the Fed’s ability to target specific companies, and precluded loans to failing or insolvent institutions.) Government officials will hold frantic meetings, but to no avail. The faltering bank **will fail, with others lined up behind it.**

And then, sometime in the next year, we will all stare into the **financial abyss**. At that point, we will be **well beyond the scope** of the previous recession, and we will have either **exhausted the remedies** that spared the system last time or found that they **won’t work this time** around. What then?

Until recently, at least, the U.S. was rightly focused on finding ways to emerge from the coronavirus pandemic that prioritize the health of American citizens. And economic health cannot be restored until people feel safe going about their daily business. But health risks and economic risks must be considered together. In calculating the risks of reopening the economy, we must understand the true costs of remaining closed. At some point, they will become more than the country can bear.

The financial sector isn’t like other sectors. If it fails, **fundamental aspects of modern life** could fail with it. We could lose the ability to get loans to buy a house or a car, or to pay for college. Without reliable credit, many Americans might struggle to pay for their daily needs. This is why, in 2008, then–Treasury Secretary Henry Paulson went so far as to get down on one knee to beg Nancy Pelosi for her help sparing the system. He understood the alternative.

**1NC---DA**

**The plan and perm are rooted in a new antitrust “theory of harm” bereft of “limiting principles”. That spills over because it “provides cover” for massive “doctrinal distortion”—But the counterplans avoid it.**

--\*Italics in original

**Ohlhausen 15** – Commissioner, FTC

Maureen K. Ohlhausen, Federal Trade Commission, and Alexander P. Okuliar, Attorney Advisor to Commissioner Ohlhausen, COMPETITION, CONSUMER PROTECTION, AND THE RIGHT [APPROACH] TO PRIVACY, 80 *Antitrust Law Journal* No. 1 (2015), <https://www.ftc.gov/system/files/documents/public_statements/686541/ohlhausenokuliaralj.pdf>

B. CHOOSING THE RIGHT APPROACH **Rather than expanding antitrust law** as some have proposed, we instead recommend applying three screens to discern the best body of law to handle a potential privacy issue. First, we suggest that **the type of harm** **should continue to guide the choice of law, as set out** by **Congress** and developed by the **agencies** and **courts** for **decades.** That is, the **application of competition law is appropriate only where the potential harm** is **grounded in** the actual or potential **diminution of economic efficiency**. If there is likely no efficiency loss because of the conduct or transaction, **another legal avenue** for enforcement is more appropriate and efficient. Second, the scope of the potential harm also should aid in the choice of law. **Antitrust laws** are focused on **broader macroeconomic harms**, mainly the maintenance of efficient price discovery in the markets, **whereas** the **consumer protection** laws are preoccupied with ensuring the **integrity** of each **specific** contractual bargain. These are complementary, but **discrete, enforcement goals**. Third, and finally, the available remedies must be able to address effectively the potential harm. Enjoining a merger may do little to prevent a privacy violation if the parties can simply share the same consumer information under a contractual arrangement. 1. Focus on the Type of Harm John Locke noted, “The great and chief end [ ] of . . . government, is the preservation of [citizens’] property,” which includes their “lives, liberties, and estates.”146 As we have shown, the government has **over time** pursued **specific** laws **narrowly** tailored to address **particular harms**. This **trend** to more **nuanced and sophisticated legal mechanisms** has allowed for deepened expertise and **greater analytical precision** in **both** competition **and** consumer protection. **Splicing them together** again, and **using the modern antitrust laws, which are empirically focused on economic efficiency**, **to remedy harms relating to normative concerns** about informational privacy **contradicts** the **specialized nature** of these laws and **risks distorting them in ways** that would **leave** **both** the law and consumers **worse off**. The **better approach** would be to **continue** the measured improvement of **precise legal tools** directed to **specific harms**. A **blended approach to antitrust** that **encompasses normative** privacy **concerns** also **would provide cover for** the **injection of other noncompetition factors into the analysis**. As a **normative** matter, privacy is **conceptually unsettled** and, depending on who you ask, could **include other rights**, like property rights or human dignity.147 The **introduction of these factors** could **shift antitrust law’s focus away from efficiency** and **alter** **its** relatively **predictable and transparent application**. **Arguments in response** to this concernabout **doctrinal distortion** **posit** that, for example, the merged entity will have an increased incentive to break privacy promises it made to consumers when it collected the information, **making the issue cognizable under the antitrust laws**.148 [Footnote 148] 148 **While** the Clayton Act allows for the pursuit of **certain** prospective violations of the law, **the issues that it confronts**, for example supracompetitive pricing resulting from an undue concentration of suppliers, are **fundamentally different** than **what the consumer protection laws contemplate**. Whereas the Clayton Act is **quantitative and agnostic** in its characterization of a merger as a violation of law, the **consumer protection standards are** **qualitative**, requiring that an “act or practice” be either **deceptive** or both **unfair** **and** cause substantial harm to the consumer. [End FN] Or that the aggregation of consumer data represents a reduction in quality, diminution in consumer choice, or a heightened barrier to entry.149 **Although** these **concerns** could be relevant **where** privacy is **an actual dimension of competition**, a **substantial body of literature** **challenges** **application of these arguments more broadly** by pointing out **the lack of limiting principles** for **theories of harm** **tethered** toreductions of **choice** and the **heterogeneous** consumer demand for privacy.150 But, for our purposes, perhaps the **most important** point is that **attempting to distort the antitrust laws** to **pursue** **subjective** **noncompetition harms** is ***unnecessary*** and **would take us back to a less sophisticated approach to law enforcement.**

**That obliterates innovation—The key is what theories of competitive harm are legally cognizable**

**COC 21** – U.S. Chamber of Commerce

The Role & Responsibility of Antitrust: What antitrust is and what it is not, September 20, 2021, https://www.uschamber.com/regulations/the-role-responsibility-of-antitrust

The **economic success** of the United States is **built** on the fact that the market, not the government, **maximizes economic efficiency for the benefit of consumers.** Antitrust therefore relies on **competitive forces** to police the market, and **avoids picking winners and losers**, and **only** actsto **ensure competitive conditions**. It is **not a form of regulation** designed to **deliver a particular outcome** in the market. Antitrust IS NOT a tool for political change Concerns over **jobs**, **speech**, income **inequality**, corporate political **power**, and **other social interests**, are **political** conversations, **not antitrust** matters. **Antitrust does not play a role**, **nor do we** really **want** antitrust playing a role. Antitrust can **protect competitive markets**, but it is **not designed to address** the concerns above. **Instead**, we should look to legislatures to **pass separate laws** that **specifically address** these concerns. Antitrust IS about protecting competition and consumers **Consumers** are the **sole concern** of antitrust. Consumers win when there is robust competition in the market. When alleged anti-competitive activity is linked to **price** going up, or **output** going down without any counter weighting pro-competitive benefit **the economics are very straight forward**. Antitrust analysis is **also well suited** to evaluating other forms of **non-price competition** such as **quality**, **innovation**, or **consumer choice**. Though some have claimed that antitrust is too focused on price and output, a long history of antitrust enforcement involving various forms of non-price competition shows otherwise. Antitrust IS NOT about fairness or competitors “Fairness” is not a legal standard. What is fair can often be highly subjective. The role of economic analysis and the consumer welfare standard in antitrust are central to making enforcement decision as objective as possible. For this reason competitor’s complaints of “unfairness” are met with skepticism by antitrust enforcers for good reason. Inefficient competitors often attempt to seek protection from a more efficient competitor rather than competing on the merits. Where competitor complaints are turned away by enforcers, those competitors have often sought a political audience or friendlier foreign jurisdictions that conflate these complaints with market failure or seek to use antitrust enforcement as a tool for industrial policy. Antitrust IS highly technical Antitrust **cannot be divorced** from **sound economic analysis**. Economics is a highly technical trade that is not easily suited to the amateur enthusiast. **Theories of competitive harm rise and fall on supporting** economic **analysis**, which requires careful analysis of the market, reams of discovery, and a careful type of cost-benefit analysis, commonly known as the rule of reason. **Just because** one can **point to an anti-competitive harm,** **doesn’t mean** there are not **pro-competitive justifications that outweigh that harm**. **Economic analysis weighs these factors** and **only** where the harms **clearly outweighs** the benefits does an **enforcer feel the need to act.** Antitrust IS NOT political Antitrust is **not** **well-suited** for **armchair quarterbacking**, rooting for the underdog, or speaking in 30 second sound bites. It is a **form of law enforcement** and should be conducted in a highly professionalmannerwith **due process.** Sadly, efforts to **politicize antitrust efforts** are all too common in foreign jurisdictions. **The U.S. has had a long and proud history of** largely **steering clear from efforts to politicize enforcement**. This tradition is **well worth keeping**. Antitrust **IS highly fact-specific** and **evidence driven** (rule of reason) Some antitrust cases can be close calls, economic analysis might not always produce a clear answer, and judgements will need to be made. This is why we have courts. Just because some cases one may or may not agree with, one **should not abandon** the role of **economics** or **circumvent** the **rule of reason**. **Antitrust does not punish those that build a successful business – even a monopoly – through competition on the merits.**

**Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Tech innovation prevents nuclear conflict---US leadership is key**

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

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

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

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

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

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

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

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

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

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

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

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

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

**1NC---CP**

Non-Antitrust CP---

**The United States federal government should:**

1. **establish light-handed pro-competitive regulations of platform conduct, including at least interoperability requirements and limits on discrimination.**
2. **adopt a compulsory patent licensing scheme for patents that create substantial risk of predatory innovation.**

**Solves the case better**

William **Rogerson 20**, the Charles E. and Emma H. Morrison Professor of Economics at Northwestern University; and Howard Shelanski, Professor of Law at Georgetown University, June 2020, “ANTITRUST ENFORCEMENT, REGULATION, AND DIGITAL PLATFORMS,” Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911

Both authors come to the topic of this Article with experience in regulatory agencies and with practical understanding of the difficulties and potential drawbacks of regulation. We nonetheless find three main reasons why, despite the challenges in getting regulation right, **limited regulation** might **have advantages over traditional antitrust adjudication** **in the context of large-scale industries with network effects.** First, and at the broadest level, the adjudicative model for antitrust enforcement and doctrinal development has been met with well-founded criticism. This does not mean that regulation is the right alternative, but it does provide a good reason to ask whether under some circumstances a different approach might lead to better outcomes. Second, traditional antitrust remedies might not effectively address the competitive challenges of digital platform markets. **Neither structural remedies like break-up** or divestiture, nor the limited kinds of conduct remedies that antitrust courts and agencies have been willing or able to implement, can effectively reduce barriers to competition **without diminishing network benefits for consumers**. In contrast, an expert agency can potentially bring the experience and resources required to make **more granular, detailed decisions** about the costs and benefits of certain types of commercial behavior. Third, because of network effects, conduct that courts ordinarily judge under antitrust law's general rule of reason might have different presumptive effects, and therefore be better governed by a more specific set of standards, in digital platform industries. An **expert agency** [\*1915] might be particularly suited to determine when "outer-boundary" theories of harm that courts **rightly disfavor for general application**--theories of harm like predation, refusals-to-deal, or **acquisition of nascent competitors**--should apply in specific contexts.

Below, we discuss why certain forms of what we call "light handed pro-competitive" (LHPC) regulation could increase levels of competition in markets served by digital platforms while helping to clarify the platforms' obligations with respect to interrelated policy objectives, notably privacy and data security. Key categories of LHPC regulation could include interconnection/**interoperability requirements** (such as access to application programming interfaces (APIs)), **limits on discrimination**, both user-side and third-party-side data portability rules, and perhaps additional restrictions on certain business practices subject to rule of reason analysis under general antitrust statutes. These types of regulations would **limit the ability of dominant digital platforms to leverage their market power into related markets** or insulate their installed base from competition. In so doing, they would **preserve incentives for innovation** by firms in related markets, increase the competitive impact of existing competitors, and **reduce barriers to entry** for nascent firms.

The regulation we propose is "**light handed**" in that it largely **avoids the burdens and difficulties of a regime**--such as that found in public utility regulation--that regulates access terms and revenues based on firms' costs, which the regulatory agency must in turn **track and monitor**. Although our proposed regulatory scheme would require a dominant digital platform to provide a baseline level of access (interconnection/interoperability) that the regulator determines is necessary to promote actual and potential competition, we believe that this could avoid most of the information and oversight costs of full-blown cost-based regulation, for reasons we will discuss below. 14 The primary regulation applied to price or non-price access terms would be a nondiscrimination condition, which would require a dominant digital platform to offer the same terms to all users. Such regulation would **not**, like traditional rate regulation, attempt to tie the level or terms of access to a platform's underlying costs, to regulate the company's terms of service to end users, or to limit the incumbent platform's profits or **lines of business**. **Instead of imposing monopoly controls**, LHPC regulation aims to protect and promote competitive **access to the marketplace** as the means of governing firms' behavior. In other words, its primary goal is to increase the viability and incentives of **actual and potential competitors**. As we will discuss, the Federal Communication Commission's (FCC) successful use of similar sorts [\*1916] of requirements on various telecommunications providers provides one model for this type of regulation. 15

**Solves patent abuses without altering antitrust or hindering innovation**

**Nielsen and Samardzija 7** – shareholder in the Intellectual Property Section in the Houston Office of Winstead PC; Director of Intellectual Property at the Office of Technology Commercialization at the University of Texas M.D. Anderson Cancer Center

Carol M. Nielsen and Michael R. Samardzija, "Compulsory Patent Licensing: Is It a Viable Solution in the United States?,"  13 Mich. Telecomm. & Tech. L. Rev. 509, 2007, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1095&context=mttlr

8. What are the Appropriate Terms of the CPL?

Once a **determination is made** to issue a CPL, the terms of the CPL should follow those provided by TRIPS.' The CPL should be a **nonexclusive**, **non-transferable license** which **may be revoked** if circumstances change. The royalty should be a **reasonable royalty** that takes into account the fact that the patent at issue is merely one of many in a **patent thicket**. Factors that would decrease the royalty rate are the number of other required licenses and their royalty rates, the margin on the product sold, and the inventive contribution of the patent to the product.

Conclusion

While **different abuses** of the patent system challenge the efficacy of the system to **promote innovation**, different efforts are underway on many fronts to **stifle such exploitation**. The legislature has put forward four draft bills that would dramatically alter the patent system. The USPTO has proposed different ways in which it would tackle this issue. These efforts are too intrusive and not narrowly tailored enough to address the problem of hold-ups. These drastic and at times draconian changes would likely have an adverse effect on innovation. While patent pools and patent clearinghouses can work, these approaches require that all players voluntarily enter into such engagements. As such, these alone cannot prevent patent system abuses. Permitting **compulsory patent licenses** in extreme situations, where **clearly required** by the public interest, may offer a **narrowly crafted solution** specifically designed to address the problem of **hold-ups**, **trolls** and the like, with a **minimal impact on innovation**.

**1NC---DA**

Innovation DA---

**Frenzy of M&A now because Biden’s executive order won’t be implemented for years**

David **French and** Sierra **Jackson**, Reuters, July 12, 20**21**, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown, https://www.reuters.com/business/dealmakers-see-ma-rush-then-chills-bidens-antitrust-crackdown-2021-07-12/

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

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

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

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

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

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

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

**The aff signals a new era with a substantive shift in antitrust application---that chills biopharma mergers and decks efficient pharmaceutical innovation**

**Abbott 2/21** – senior research fellow with the Mercatus Center at George Mason University and a law and economics research fellow with the Scalia Law School. He formerly served as the Federal Trade Commission’s general counsel

Alden Abbott, "The FTC Should Keep Its Hands Off Innovative Biopharma Mergers," National Review, 2-21-2022, https://www.nationalreview.com/2022/02/the-ftc-should-keep-its-hands-off-innovative-biopharma-mergers/

Our nation’s biopharmaceutical companies are a **great American success story**. They are the **world leaders** in discovering the **drugs and vaccines** that are generating the cures and treatments for **diseases that plague humanity**. Strong U.S. government protection for patents and less-intrusive regulation than is found overseas have sparked the massive volume of R&D that has brought forth this bounty. What’s more, the biopharma sector is responsible for more than 4 million good American jobs and contributes over $1.1 trillion annually to the U.S. economy.

The “warp speed” development in 2020 of Covid-19 vaccines and the imminent release of effective Covid antiviral drugs are just two of the many path-finding achievements by American biopharma firms. But a **government crackdown** on biopharma mergers led by the Federal Trade Commission (FTC) could **undermine future accomplishments**, harming the American economy and American (and foreign) patients alike.

Biopharma Merger Review in a Nutshell

While the FTC and the Department of Justice share authority over antitrust enforcement, the FTC is primarily responsible for overseeing pharma-industry business practices, including mergers. It reviews all biopharma merger proposals with an eye on preventing acquisitions that would substantially reduce competition among drugmakers.

Biopharma mergers are **particularly good** at **facilitating new-product introductions** that advance medical science. They do this in two ways:

First, they allow for the **scaling up of remedies** that are developed by small biotechnology and research firms. **Small entities** that specialize in the initial R&D that yields innovative cures **cannot scale up efficiently**. Larger acquiring firms have the **capabilities to undertake the trials**, **regulatory work**, and **marketing** that **speed up** the **release** and **broad dissemination** of innovative drugs.

Second, they **create synergies**. Proprietary data and intellectual property brought together by a merger give the new entity **access to greater** pools of technically important **information**, **laying the groundwork for innovations** without spending increases. This new information resource may **improve the quality** of product-related research, thereby raising the **probability of new-product breakthroughs** without increasing risk.

Until very recently, the FTC invoked general merger guidelines applicable to all industries (jointly issued with DOJ) in assessing biopharma consolidations. Reviews of Biopharma mergers proceeded in a manner that was well understood by the private sector. But recent FTC **policy changes** may **threaten** **these** socially desirable mergers.

The FTC Is Jettisoning Sound Merger Policy

Last March, the FTC set up an interagency working group (including the DOJ and foreign and state antitrust agencies) to “build a new approach” to biopharma mergers. The FTC’s press release stressed an interest in “**going beyond” traditional merger analysis** and exploring “**new or expanded theories of** [merger-related] **harm**.” And a recent FTC challenge to a vertical merger shows that **the risks these changes pose** to good biopharma acquisitions **are real**, not just theoretical.

Illumina is a leader in “next generation sequencing” (NGS) platforms used to support genetic-testing programs that it and other companies develop. In 2015, it established and then later spun off Grail, a small firm dedicated to developing a blood test for the very early detection of cancer. The spinoff helped Grail attract capital and great management, a key to its successful creation of a unique “liquid biopsy” test that detects up to 50 cancers before symptoms appear.

In September 2020, Illumina sought to reacquire Grail. This would allow rapid scaling up and distribution of the new test and cost reductions in marketing it. These undoubted efficiencies echo the benefits of biopharma mergers that involve the acquisition of small R&D-specialist firms.

But in March 2021, the FTC sued to block the merger, claiming a theoretical threat to competition in some future market for “multi-cancer early detection tests.” Such purely speculative concern about a market that does not yet even exist is at odds with accepted antitrust norms, which focus on likely harm in actual markets. It also gives short shrift to the clear benefits of the transaction.

A former FTC chair and chief economist together condemned this lawsuit. They explained that “it would be tragic if the FTC’s misapplication of the appropriate standards for evaluating a vertical merger were to delay the American people[’s] access to such an important lifesaving breakthrough in cancer treatment for the benefit of a hypothetical future competition.” Their words serve as a dire warning applicable to future biopharma mergers.

Conclusion

Uncertainty generated by the FTC’s new threat to beneficial mergers **threatens to reduce U.S. biopharma R&D**, slowing the creation of **breakthrough drugs and vaccines.** This will **undermine** American leadership in **producing the cures of the future**, which is vital to our nation and to millions of people around the world.

The solution is simple. The FTC should back off its recent threats against innovative biopharma mergers by publicly and explicitly restoring pre-2021 merger policies. If it does not, Congress should consider stepping in.

**Continued pharmaceutical innovation is key to survival---COVID was only the first warning shot**

EID = Emerging Infectious Disease

**Excler et al. 21** – Jean-Louis Excler, International Vaccine Institute, Seoul, Republic of Korea; Melanie Saville, Coalition for Epidemic Preparedness Innovations (CEPI), London, UK; Seth Berkley, Gavi, the Vaccine Alliance, Geneva, Switzerland; Jerome H. Kim, International Vaccine Institute, Seoul, Republic of Korea

Jean-Louis Excler, Melanie Saville, Seth Berkley, and Jerome H. Kim, "Vaccine development for emerging infectious diseases," Nat Med 27, 591–600, 4-12-2021, <https://www.nature.com/articles/s41591-021-01301-0>

**Newly emerging** and **reemerging infectious viral diseases** have **threatened humanity** throughout history. Several **interlaced** and **synergistic factors** including **demographic trends** and high-density **urbanization**, modernization favoring **high mobility** of people by all modes of transportation, **large gatherings**, altered human behaviors, **environmental changes** with modification of ecosystems and **inadequate global public health** mechanisms have **accelerated** both the **emergence** **and** **spread of animal viruses** as **existential human threats**. In 1918, at the time of the ‘Spanish flu’, the world population was estimated at 1.8 billion. It is projected to reach 9.9 billion by 2050, an increase of more than 25% from the current 2020 population of 7.8 billion (https://www.worldometers.info). The novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) responsible for the coronavirus disease 2019 (COVID-19) pandemic1,2,3 engulfed the entire world in less than 6 months, with high mortality in the elderly and those with associated comorbidities. The pandemic has severely disrupted the world economy. Short of lockdowns, the only means of control have been limited to series of mitigation measures such as self-distancing, wearing masks, travel restrictions and avoiding gatherings, all imperfect and constraining. Now with more than 100 million people infected and more than 2 million deaths, it seems that the addition of **vaccine(s)** to existing countermeasures **holds the best hope** for pandemic control. Taken together, these reasons compel researchers and policymakers to be vigilant, reexamine the approach to surveillance and management of **emerging infectious disease threats**, and revisit global mechanisms for the control of pandemic disease4,5.

Emerging and reemerging infectious diseases

The appearance of new infectious diseases has been recognized for millennia, well before the discovery of causative infectious agents. Despite advances in development of countermeasures (diagnostics, therapeutics and vaccines), **world travel** and **increased global interdependence** have added **layers of complexity** to containing these infectious diseases. **Emerging infectious diseases** (EIDs) **are threats to human health and global stability6**,7. A review of emerging pandemic diseases throughout history offers a perspective on the emergence and characteristics of coronavirus epidemics, with emphasis on the SARS-CoV-2 pandemic8,9. As human societies grow in **size and complexity**, an **endless variety of opportunities** **is created** **for infectious agents to emerge** into the unfilled ecologic niches we continue to create. To illustrate this constant vulnerability of populations to emerging and reemerging pathogens and their respective risks to rapidly evolve into devastating outbreaks and pandemics, a partial list of emerging viral infectious diseases that occurred between 1900 and 2020 is shown in Table 1.

[[Figure Omitted]]

Although nonemerging infectious diseases (not listed in Table 1), two other major mosquito-borne viral infections are yellow fever and dengue. Yellow fever, known for centuries and an Aedes mosquito-borne disease, is endemic in more than 40 countries across Africa and South America. Since 2016, several yellow fever outbreaks have occurred in Angola, Democratic Republic of Congo, Nigeria and Brazil to cite a few10, raising major concerns about the adequacy of yellow fever vaccine supply. Four live attenuated vaccines derived from the live attenuated yellow fever strain (17D)11 and prequalified by the WHO (World Health Organization) are available12.

Dengue is an increasing global public health threat with the four dengue virus types (DENV1–4) now cocirculating in most dengue endemic areas. Population growth, an expansion of areas hospitable for Aedes mosquito species and the ease of travel have all contributed to a steady rise in dengue infections and disease. Dengue is common in more than 100 countries around the world. Each year, up to 400 million people acquire dengue. Approximately 100 million people get sick from infection, and 22,000 die from severe dengue. Most seriously affected by outbreaks are the Americas, South/Southeast Asia and the Western Pacific; Asia represents ~70% of the global burden of disease (https://www.cdc.gov/dengue). Several vaccines have been developed13. A single dengue vaccine, Sanofi Pasteur’s Dengvaxia based on the yellow fever 17D backbone, has been licensed in 20 countries, but uptake has been poor. A safety signal in dengue-seronegative vaccine recipients stimulated an international review of the vaccine performance profile, new WHO recommendations for use and controversy in the Philippines involving the government, regulatory agencies, Sanofi Pasteur, clinicians responsible for testing and administering the vaccine, and the parents of vaccinated children14.

Two bacterial diseases, old scourges of humanity, are endemic and responsible for recurrent outbreaks and are increasingly antimicrobial resistant. Cholera, caused by pathogenic strains of Vibrio cholerae, is currently in its seventh global pandemic since 1817; notably, the seventh pandemic started in 196115. Global mortality due to cholera infection remains high, mainly due to delay in rehydrating patients. The global burden of cholera is estimated to be between 1.4 and 4.3 million cases with about 21,000–143,000 deaths per year, mostly in Asia and Africa. Tragic outbreaks have occurred in Yemen and Haiti. Adding to rehydration therapy, antibiotics have been used in the treatment of cholera to shorten the duration of diarrhea and to limit bacterial spread. Over the years, antimicrobial resistance developed in Asia and Africa to many useful antibiotics including chloramphenicol, furazolidone, trimethoprim-sulfamethoxazole, nalidixic acid, tetracycline and fluoroquinolones. Several vaccines have been developed and WHO prequalified; these vaccines constitute a Gavi-supported global stockpile for rapid deployment during outbreaks16.

Typhoid fever is a severe disease caused by the Gram-negative bacterium Salmonella enterica subsp. enterica serovar Typhi (S. Typhi). Antimicrobial-resistant S. Typhi strains have become increasingly common. The first large-scale emergence and spread of a novel extensively drug-resistant (XDR) S. Typhi clone was first reported in Sindh, Pakistan17,18, and has subsequently been reported in India, Bangladesh, Nepal, the Philippines, Iraq and Guatemala19,20. The world is in a critical period as XDR S. Typhi has appeared in densely populated areas. The successful development of improved typhoid vaccines (conjugation of the Vi polysaccharide with a carrier protein) with increased immunogenicity and efficacy including in children less than 2 years of age will facilitate the control of typhoid, in particular in XDR areas by decreasing the incidence of typhoid fever cases needing antibiotic treatment21,22.

A model of vaccine development for emerging infectious diseases

The understanding of emerging infectious diseases has evolved over the past two decades. A look back at the SARS-CoV outbreak in 2002 shows that—despite a small number of deaths and infections—its high mortality and transmissibility caused significant global disruption (see Table 1). The epidemic ended as work on vaccines was initiated. Since then, the disease has not reappeared—wet markets were closed and transmission to humans from civets ceased. Consequently, work on vaccines against SARS-CoV ended and its funding was cut. Only a whole inactivated vaccine23 and a DNA vaccine24 were tested in phase 1 clinical trials.

Following a traditional research and development pipeline, it takes between 5 and 10 years to develop a vaccine for an infectious agent. This approach is not well suited for the needs imposed by the emergence of a new pathogen during an epidemic. Figure 1 shows a comparison of the epidemic curves and vaccine development timelines between the 2014 West African Ebola outbreak and COVID-19. The 2014 Ebola epidemic lasted more than 24 months with 11,325 deaths and was sufficiently prolonged to enable the development and testing of vaccines for Ebola, with efficacy being shown for one vaccine (of several) toward the end of the epidemic25,26. What makes the COVID-19 pandemic remarkable is that the whole research and development pipeline, from the first SARS-CoV-2 viral sequenced to interim analyses of vaccine efficacy trials, was accomplished in just under 300 days27. Amid increasing concerns about unmitigated transmission during the 2013–2016 Western African Ebola outbreak in mid-2014, WHO urged acceleration of the development and evaluation of candidate vaccines25. To ensure that manufacturers would take the Ebola vaccine to full development and deployment, Gavi, the Vaccine Alliance, publicly announced support of up to US$300 million for vaccine purchase and followed that announcement with an advance purchase agreement. Ironically, there had been Ebola vaccines previously developed and tested for biodefense purposes in nonhuman primates, but this previous work was neither ‘ready’ for clinical trials during the epidemic nor considered commercially attractive enough to finish development28.

[[Figure Omitted]]

From these perceived shortcomings in vaccine development during public health emergencies arose the Coalition for Epidemic Preparedness Innovations (CEPI), a not-for-profit organization dedicated to timely vaccine development capabilities in anticipation of epidemics29,30. CEPI initially focused on diseases chosen from a list of WHO priority pathogens for EIDs—Middle East respiratory syndrome (MERS), Lassa fever, Nipah, Rift Valley fever (RVF) and chikungunya. The goal of CEPI was to advance candidate vaccines through phase 2 and to prepare stockpiles of vaccine against eventual use/testing under epidemic circumstances. CEPI had also prepared for ‘disease X’ by investing in innovative rapid response platforms that could move from sequence to clinical trials in weeks rather than months or years, such as mRNA and DNA technology, platforms that were useful when COVID-19 was declared a global health emergency in January 2020, and a pandemic in March 202031,32.

CEPI has been able to fund several vaccine development efforts, among them product development by Moderna, Inovio, Oxford–AstraZeneca and Novavax. Providing upfront funding helped these groups to advance vaccine candidates to clinical trials and develop scaled manufacturing processes in parallel, minimizing financial risk to vaccine developers. The launch of the larger US-funded Operation Warp Speed33 further provided companies with funding—reducing risks associated with rapid vaccine development and securing initial commitments in vaccine doses.

Vaccine platforms and vaccines for emerging infectious diseases

**Vaccines** are the **cornerstone** of the management of **infectious disease outbreaks** and are the **surest means** to defuse pandemic and **epidemic risk**. The faster a vaccine is **deployed**, the faster an outbreak can be **controlled**. As discussed in the previous section, the standard vaccine development cycle is **not suited** to the needs of **explosive pandemics**. **New vaccine platform technologies** however may **shorten that cycle** and make it possible for multiple vaccines to be more **rapidly developed**, **tested** and **produced34**. Table 2 provides examples of the most important technical vaccine platforms for vaccines developed or under development for emerging viral infectious diseases. Two COVID-19 vaccines were developed using mRNA technology (Pfizer–BioNTech35 and Moderna36), both showing safety and high efficacy, and now with US Food and Drug Administration (FDA) emergency use authorization (EUA)37,38 and European Medicines Agency (EMA) conditional marketing authorization39,40. While innovative and encouraging for other EIDs, **it is too early to assert that mRNA vaccines represent a universal vaccine approach that could be broadly applied to other EIDs** (such as bacterial or enteric pathogens). While COVID-19 mRNA vaccines are **a useful proof of concept**, gathering lessons from their **large-scale deployment** and **effectiveness** studies still **requires more work** and time.

**1NC---CP**

Cognizable Efficiency CP---

**The United States federal government should expand the scope of its core antitrust laws which pass cognizable efficiency to include forms of predatory innovation that have no economic sense.**

**Solves the aff better---preserves predictability, targets enforcement efforts, and prevents chilling of procompetitive conduct**

**Wright 13** – Commissioner, Federal Trade Commission

Joshua D. Wright, "Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority," Remarks of Joshua D. Wright at the Executive Committee Meeting of the New York State Bar Association’s Antitrust Section, 6-19-2013, https://www.ftc.gov/sites/default/files/documents/public\_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf

In **articulating a framework** for prosecuting conduct under Section 5, it is important for the Commission to use a standard that clearly distinguishes between acceptable business practices and business practices that constitute an unfair method of competition in order to **provide firms with adequate guidance** as to what conduct may be unlawful. Articulating a clear and predictable standard for what constitutes an unfair method of competition is particularly important because the Commission’s authority to condemn unfair methods of competition allows it to break new ground and challenge conduct based upon theories not previously enshrined in Sherman Act or Clayton Act jurisprudence.35 As I have already mentioned, under my proposed Policy Statement, Section 5 would not be used for conduct for which there is well‐forged case law under the traditional federal antitrust laws because the Commission does not have an institutional advantage beyond that of the courts in such cases and prosecuting conduct under varying standards raises questions about fairness. Section 5 therefore most commonly will be used where the Commission has devoted its institutional research and reporting capabilities to investigate business practices unexamined by the courts and has determined that those business practices harm consumers. Under circumstances where the conduct in question has **not been analyzed** by the courts, there is a **particularly great risk** that, in the absence of a **clear and predictable standard**, firms may engage in conduct **without any meaningful notice t**hat they **may be prosecuted**. The efficiency screen thus **provides firms with certainty** that conduct can be challenged as an unfair method of competition **only when the conduct lacks cognizable efficiencies**.

Moreover, because the Commission is an administrative body with changing membership, there is a **significant risk** that different Commissions may apply Section 5 **differently**. The efficiency screen **significantly reduces this problem** by linking the definition of an unfair method of competition to the Commission’s analytical framework for mergers as articulated in the Horizontal Merger Guidelines. The Commission has developed significant expertise and articulated clear standards in the merger context for which efficiencies are cognizable and which are not. 36 **Relying upon those standards** in the efficiency screen contemplated in unfair methods analysis **reduces the risk** that different Commissions will reach **different results.**

Another reason to use an efficiency screen when identifying unfair methods of competition is to more efficiently target the business conduct that is most likely to harm consumers. As with all law enforcement agencies, the Commission must allocate its scarce resources in a manner that best achieves its mission. Congress has charged the Commission with promoting competition and furthering consumer welfare by preventing anticompetitive business practices **without unduly burdening legitimate business activity.** Given the **size of the national economy** and the **range of business practices** employed by firms within it, the Commission must identify those patterns of conduct that are **most likely to harm consumers** so that it can **target enforcement efforts** to maximize consumer welfare. Anticompetitive conduct that lacks cognizable efficiencies is the most likely to harm consumers because it is without any redeeming consumer benefits.37

The efficiency screen also works to ensure that welfare‐enhancing conduct is **not inadvertently deterred**. Firms engage in a **variety of business practice** that **create efficiencies** and thus enhance the firm’s ability and incentive to compete. These efficiencies can result in **lower prices**, **improved quality**, **better services**, **new products**, and other benefits that enhance consumer welfare. Some of these practices also may harm competition and consumers under certain specific circumstances. Where conduct **plausibly produces both costs and benefits** for consumers it is **fundamentally difficult** to identify the net competitive consequences associated with the conduct.38 This is **particularly true** if business **conduct is novel** or is being applied to an **emerging** or rapidly changing **industry**, and thus where there is little empirical evidence about the conduct’s potential competitive effects.39 The Supreme Court has long recognized that erroneous condemnation of procompetitive conduct **significantly reduces** consumer welfare by **deterring investment** in efficiency‐enhancing business practices.40 To **avoid deterring** consumer welfare‐enhancing conduct, my proposed Policy Statement **limits** the **use** of Section 5 to **conduct that lacks cognizable efficiencies.**

**Adv 1**

**Their internal links are baseless nonsense---no essential barriers to entry and other factors thump**

**Dolmans 19** – Partner, Cleary Gottlieb Steen & Hamilton

Maurits Dolmans, partner at Cleary Gottlieb Steen & Hamilton, distinguished by Chambers "The World’s Leading Lawyers" and other publications as a leading lawyer in the areas of Competition/Antitrust and Communications, Tobias Pesch, Should We Disrupt Antitrust Law?, Cleary Gottlieb Steen & Hamilton LLP, 2019, <https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf>

Most recommendations focus on less restrictive and more targeted measures than break-up, such as **data sharing, to reduce barriers to entry** based on superior access to user or usage data.37

**Competition law as it stands will rarely require rivals to share data**.38 Data are seldom an indispensable input in the sense of Bronner, given that **most data are widely available and non-rivalrous** – **consumers can share user data with several firms**, and collecting usage data does not prevent other companies from collecting usage data of their own. An as-efficient competitor should normally be able to replicate the infrastructure used to collect the data. If data can be recreated or found elsewhere, **a refusal to share will not lead to** “complete **foreclosure of downstream competition”, nor stifle a “new product” or innovation**. Even though these requirements have been established for 30 years, it is proposed that the thresholds be removed.39 Is that really needed, useful, or doable?

First, could requirements to share data actually conflict with GDPR and privacy rules? For example, sharing personally identifiable information would raise privacy concerns and impinge on users’ rights and freedoms absent informed consent. Article 102 TFEU cannot simply take precedence over the fundamental right to privacy in Article 8 of the EU charter of fundamental rights.40 This issue should not be left to competition agencies, but should be pursued by the legislator.

Second, mandating access to “nice to have” data rather than “indispensable” data reduces the incentives on firms to innovate and create their own better products and solutions. The same principles apply here as identified by AG Jacobs in Bronner for mandating a high threshold for a duty to deal.41

Third, the role of data as a barrier to entry is often overstated, appears based on anecdotes and seems to lack an empirical foundation. An asset can be a barrier to entry, if the fact that a first mover has created or acquired it makes it more difficult or more costly for a potential entrant (than it was for the first mover) to make or buy an equivalent. But data can often be created or acquired (they are a non-rivalrous good as explained above). And knowledge and experience gained from data can be obtained by acquiring firms, or enticing or inspiring employees to move to a new firm. Many start-ups are begun by, and grow with the help of, employees of the large online firms.

**Are huge amounts of data** really **needed for a start-up to be viable**? In a number of cases, **the EC evaluated whether data are a real barrier** to entry, concluding that depending on the type of data, **there are many alternative data sources** in the market that can serve demand.42 **Data are non-rivalrous, easy to collect and store, of limited life-span, with dispersed ownership, and returns that diminish as volume increases**. **A**rtificial **i**ntelligence, for instance, often uses large amounts of data. However, like other factors of production data tends to be subject to diminishing marginal returns: whether we look at machine translation, language modeling, image processing, or speech recognition, the first million observations are much more valuable in improving predictions than the second million, and so on.43 **Open source datasets are increasingly available**,44 and **cloud computing makes it easier than ever** before to run complex computations even for startups. **The real barriers to entry are not usually data, but skills, ingenuity, and judgment.**

**The plan wrecks innovation**

**Dolmans 19** – Partner, Cleary Gottlieb Steen & Hamilton

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Second, mandating access to “nice to have” data rather than “indispensable” data **reduces the incentives on firms to innovate** and **create their own better products and solutions**. The same **principles apply here as identified** by AG Jacobs in Bronner **for mandating a high threshold for a duty to deal.**41

Third, the role of data as a barrier to entry is often overstated, appears based on anecdotes and seems to lack an empirical foundation. An asset can be a barrier to entry, if the fact that a first mover has created or acquired it makes it more difficult or more costly for a potential entrant (than it was for the first mover) to make or buy an equivalent. But data can often be created or acquired (they are a non-rivalrous good as explained above). And knowledge and experience gained from data can be obtained by acquiring firms, or enticing or inspiring employees to move to a new firm. Many start-ups are begun by, and grow with the help of, employees of the large online firms.

Are huge amounts of data really needed for a start-up to be viable? In a number of cases, the EC evaluated whether data are a real barrier to entry, concluding that depending on the type of data, there are many alternative data sources in the market that can serve demand.42 Data are non-rivalrous, easy to collect and store, of limited life-span, with dispersed ownership, and returns that diminish as volume increases. Artificial intelligence, for instance, often uses large amounts of data. However, like other factors of production data tends to be subject to diminishing marginal returns: whether we look at machine translation, language modeling, image processing, or speech recognition, the first million observations are much more valuable in improving predictions than the second million, and so on.43 Open source datasets are increasingly available,44 and cloud computing makes it easier than ever before to run complex computations even for startups. The real barriers to entry are not usually data, but skills, ingenuity, and judgment.

Finally, **granting access to data is complicated**, and may **require** determining **technical modalities of continuous access to data streams and FRAND rates for the remuneration**. Are competition authorities willing and able to monitor compliance in individual cases? A “bottom-up” approach to facilitate user switching between services, in particular data mobility, may be better – more proportionate – than a “top-down” approach of mandating data sharing. First, data mobility (especially when combined with interoperability and data format standardization) helps users take advantage of multiple competing or complementary services in parallel. Second, the prospect of user switching should facilitate new entry and intensify competition among digital service providers for existing users – not just new users. Third, placing users in control could spur businesses to compensate users for accessing their data not just with free services, but rewards programs. Fourth, it could create a new market for intermediary services or portals that help users manage multiple platform settings in one place. Such an approach is also advisable, because we simply don’t have a proper model for the value of privacy yet: In essence, the well-known “privacy paradox” states that users claim to value privacy, but are actually not willing to pay for it.45

Indeed, Article 20 of the EU General Data Protection Regulation (in force since May 2018) gave users a right to port their personal data. The UK Report suggests that government-led **standardisation is likely to be “inflexible and ill-equipped to deal with** market **developments** or changes in technology”. Interestingly, the market is developing solutions: Google Takeout has been available for years, and the UK Report recognizes that “Some companies are already making substantial efforts in this regard, like the Data Transfer Project that includes Microsoft, Google, Facebook and Twitter”.46 Another example is “Uber Movement”, through which Uber has released anonymised, aggregated data to inform local authorities’ infrastructure and planning decisions. Startups are developing apps to facilitate and syndicate user consents for ads, providing users incentives to give appropriate permissions.47

This is not to say data access should never be considered. It’s just that given the points discussed above, the **law** as it stands after Microsoft **seems adequate**, combined with measures – as proposed in the UK Report – to support data portability, mobility, and interoperability. Let the consumers decide. And where lack of data access is a systemic barrier to entry, an industry-specific regulatory framework may be better.48 [Footnote 48] The UK Report recognizes that “Email standards emerged due to co-operation but phone number portability only came about when it was required by regulators. **Private efforts by digital platforms will** be similarly **hampered by misaligned incentives**. Open Banking provides an instructive example of how policy intervention can overcome technical and co-ordination challenges and misaligned incentives by creating an adequately funded body with the teeth to drive development and implementation by the nine largest financial institutions.” (p. 5). [End FN] The PSD2 directive in the financial sector or the UK’s open banking initiative are examples.49

**Unprecedented productivity growth, innovation, and new firm entry means the squo is sufficiently innovative**

**Petit 21** – Nicolas Petit European University Institute, Florence. David J. Teece, Institute for Business Innovation U.C. Berkeley and Berkeley Research Group Institute

Nicolas Petit and David Teece, “INNOVATING BIG TECH FIRMS AND COMPETITION POLICY: FAVORING DYNAMIC OVER STATIC COMPETITION,” July 2021, https://ssrn.com/abstract=3229180

The rise of Big Tech firms is having the welcome effect of causing a resurgence of interest in industrial organization. The emerging scholarship is mixed. On the one hand, there is a tendency to treat big tech firms as different because innovation in general (both technological and business model), and technical inputs in particular (big data, intelligent algorithms, and skilled engineers), clearly impact market structure and economic performance. On the other hand, industrial age explanations like monopoly power, anticompetitive leveraging, and predatory mergers are often used to supply theories for the durability and diversification of big tech firms. There is little or no mention of the role of entrepreneurship and management or of new operating models which deliver value in new and better ways.

We are skeptical about the power of these narratives to account for the totality of the competitive circumstances at hand. Our skepticism is aroused by the record of the big tech firms.2 **There are many indicators suggesting that dynamism**, not a base of monopoly power, **is what is at work**. **The digital economy shows unprecedented productivity growth, rapid innovation, and new firm entry**. In consumer digital goods and services in telecommunications and broadcasting, **output has risen, quality has increased and prices have declined** (Byrne and Corrado, 2020). **This state of affairs could not** **reasonably exist if** big tech firms were **dominant players** that **suppressed competition** by using scale, supposedly like the large iron, oil and steel trusts of the industrial age. Admittedly, it is theoretically possible that absent big tech firms, the development and growth of the digital sector would be even higher, and welfare benefits greater. However, proponents of the monopoly argument are yet to articulate the “but for” ideal world that they imply would otherwise exist.3 Our intuition thus, strays, from the monopoly explanation. Instead, we might be observing a group of diversified big tech firms coexisting and competing in oligopoly with each other vigorously, and with new and adjacent firms entering the fray from time to time. One of us referred to this broad-spectrum competition as the “moligopoly” hypothesis (Petit, 2020). A similar interpretation was given in 2021 by The Economist, which noted that **monopoly explanations were “getting harder to sustain”** as digital markets in the US are “**shifting towards oligopolies** in which **second and third firms compete vigorously** against the incumbent” (The Economist, 2021).

**No impact to slow growth.**

Dr. Christopher J. **Fettweis 17**, Associate Professor of Political Science at Tulane University, PhD in Government and Politics from the University of Maryland, “Unipolarity, Hegemony, and the New Peace”, Security Studies, Vol. 26, No. 3, p. 434-442 [language modified]

Others are more skeptical of institutions’ potential to shape behavior, and believe instead that stability is dependent upon the active application of the hegemon’s military power.51

The second version of the hegemonic-stability explanation is based upon a different view of human nature than is the liberal, one less sanguine about the potential for voluntary cooperation. Actors respond to concrete incentives, according to this outlook, and will ignore rules or law if transgressions are not punished. The would-be hegemon must enforce stability, therefore, not merely establish it. Policing metaphors are common in this literature, with the United States playing the role of sheriff or globocop charged with keeping the peace.52

[FOOTNOTE]

52 Richard N. **Haass**, The Reluctant Sheriff: The United States after the Cold War (New York: Council on Foreign Relations Press, 1997); Colin S. Gray, The Sheriff: America's Defense of the New World Order (Lexington: University Press of Kentucky, 2004).

View all notes

[END FOOTNOTE]

Take away the police, or damage their credibility, and instability would soon return. “The present world order,” according to Robert Kagan, “is as fragile as it is unique,” and would collapse without sustained US efforts.53 “In many instances,” add Lawrence Kaplan and William Kristol, “all that stands between civility and genocide, order and mayhem, is American power.”54 Though this argument is commonly associated with neoconservatism55—and will be referred to as the neoconservative explanation from here on in—it is also accepted by a number of scholars and observers generally considered outside of that ideological approach.56

The two versions are united on this point: it is not unipolarity in general that accounts for the New Peace, but American unipolarity in particular. US hegemony is essentially benevolent, according to both liberals and neoconservatives. The United States has constructed an order that takes the interests of other states into account, which decreases revisionist impulses. At the very least, it is nonthreatening, and does not generate the kind of balancing behavior that might be expected to bring it to an end.57 In the liberal version, the order constructed by the United States is beneficial to all its members, who have a stake in its maintenance. Adherents of the more muscular version, whether neoconservative or not, assume that the default position of smaller states in a unipolar system is to bandwagon with the center.58 No one seems to suggest that there is an irenic structural logic of unipolarity independent of US behavior. The question is therefore not so much about the connection between unipolarity and the New Peace as much as it is whether US behavior, in one form or another, has brought it about.

Hegemonic stability is in some ways more theoretically elegant than the other possible explanations for the New Peace. For one thing, it does not suffer from questions regarding its causal direction. While it may be reasonable to suggest that peace produced the expansion of democracy and/or economic development rather than the other way around, peace did not produce unipolarity. In fact, if the United States is indeed supplying the global public good of security, it might be able to take credit for a number of these positive trends. Not just peace but democracy, economic stability, and development all might be beneficial side effects of unipolarity. 59 “A world without U.S. primacy,” argued Samuel P. Huntington, “would be a world with more violence and disorder and less democracy and economic growth.”60

There is a great deal at stake here, for both scholarship and practice. If hegemony is responsible for the New Peace, then its peaceful trends are unlikely to last much beyond the unipolar moment. The other proposed explanations described above are essentially irreversible: nuclear weapons cannot be uninvented, and no defense against their use is ever going to be completely foolproof; the pace of globalization and economic interdependence shows no sign of slowing; democracy seems to be firmly embedded in the cultural fabric of many of the places it currently exists, and may well be in the process of spreading to the few places where it does not. The UN, while oft criticized, shows no signs of disappearing. And finally, history contains precious few examples of the return of institutions deemed by society to be outmoded, barbaric, and/or futile.61 In other words, liberal normative evolution is typically unidirectional. Few would argue, for instance, that either slavery or dueling is likely to reappear in this century; illiberal normative recidivism is exceptionally rare.62 If the neoconservatives are correct and US hard power is primarily responsible for the New Peace, however, then it cannot be expected to last long after US hegemonic decline, or adjustment in its grand strategy toward retrenchment. If liberal internationalists are right and the New Peace is largely a product of the world order that the United States has forged, then it may have a bit more staying power beyond unipolarity, but not necessarily much.

Determining the relationship between hegemony and the New Peace has importance that goes beyond the academy. Whether or not decline is on the immediate horizon, unipolarity is unlikely to last forever. If the New Peace is essentially an American creation, that post-unipolar future is likely to be quite a bit more violent than the present.

Evidence for and against Pax Americana

Since the world had never experienced system-wide unipolarity prior to the end of the Cold War, judgments about its relative stability and likely duration are necessarily speculative.63 Extrapolations can be made from regional unipolar systems, like the Roman Mediterranean, but definitive system-wide statements cannot be made from one case. Still, if US power were primarily responsible for the New Peace, one would expect that it would leave some clues about its effects. This section reviews three kinds of evidence regarding Pax Americana in order to determine whether an empirical relationship can be said to exist between various kinds of US activity and global stability.

Conflict and Hegemony by Region

Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The **U**nited **S**tates has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic- stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear.

Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist **across regions**.

If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is **imperfectly correlated** with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East **worse**. In recent years, substantial hard power investments (**Somalia**, **Afghanistan**, **Iraq**), moderate intervention (**Libya**), and reliance on diplomacy (**Syria**) have been equally **ineffective in stabilizing** states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has **failed** to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 19**90s**, the **U**nited **S**tates cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 **The world grew dramatically more peaceful**

**[CUT HERE.]**

**while the United States cut its forces, however**, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same **nonrelationship** exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between **warfare** and **fluctuations in US GDP**, **alliance commitments**, and **forward military presence**. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there **does not seem to be much correlation** between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.”71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat **extreme versions** of a

central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.”73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the **U**nited **S**tates can **retrench without fear of negative consequences**. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.”77 In **no case** did the various anticipated disorders materialize. As Table 2 demonstrates, **armed conflict levels fell** steadily, **irrespective** of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had **much effect** on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving **no trace** in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem.

As it stands, the **only evidence** we have regarding the relationship between US power and international stability suggests that the two are **unrelated**. The rest of the world appears **quite capable and willing** to operate **effectively** without the presence of a global police~~man~~. Those who think otherwise have **precious little empirical support** upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.

**Adv 2**

**Digital divergence inevitable**

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Morten Skroejer and Nicole Lawler, January 20 2022, “Can the US and EU rein in Big Tech with diverging approaches?” Atlantic Council, https://www.atlanticcouncil.org/blogs/new-atlanticist/can-the-us-and-eu-rein-in-big-tech-with-diverging-approaches/

While there is a fair amount of overlap in the antitrust approaches of the United States and the European Union, **there are also significant differences**. To understand these differences, it is helpful to distinguish between substantive (legal) and institutional issues—and to recognize the diverging ideas about the role of government in antitrust enforcement that underpin the entire enterprise.

As far as the substantive antitrust rules, **there is broad overlap**. For example, authorities on both sides of the Atlantic tend to fall in line with one another when evaluating proposed mergers. If something is deemed unacceptable commercial behavior in the United States, it is generally also considered out of bounds in Europe (and vice versa). But **when it comes to single-firm conduct**―particularly relevant in the context of Big Tech―there are notable differences. Historically, the EU Commission and some EU member states have been much more aggressive in finding “abuse of dominance” than the DOJ or the FTC in their pursuit of “**unlawful monopolizations**,” likely because the market-share thresholds required to establish dominance under EU law are significantly lower than under US law. And once a company is found to have a dominant position, the European Court of Justice has held that it has a “special responsibility” to preserve competition in that market. No similar obligation exits in the United States.

**The biggest difference**, however, is the way in which individual **cases are examined and adjudicated.** In the United States, federal antitrust enforcers at the DOJ and the FTC **lack the authority to decide cases independently**. If, after an investigation, the DOJ determines that there has been an antitrust violation, its only option is to bring a civil lawsuit against the offending party in federal district court. In addition to going to district court, the FTC also has the option of pursuing the matter before an administrative law judge; but in either case, the FTC, like the DOJ, merely acts as a prosecutor.

In the European Union, the entire process―from initial investigation through final adjudication, including the imposition of sometimes heavy fines―**is conducted by and within the EU Commission**. This setup has led some in the United States to raise concerns about due process. While the Commission’s powers are more far-reaching than those enjoyed by either the DOJ or the FTC, any concerns about a lack of due process are, according to EU law experts, misplaced. Besides reflecting the administrative-type enforcement systems found in most EU member states, it’s simply an example of how legal systems on continental Europe differ from that of the United States. Also, any party that gets an adverse decision from the Commission has an absolute right of appeal to EU courts.

The DMA would allow EU **competition enforcers to regulate** the behavior of **dominant digital platforms (**the aforementioned gatekeepers) ex ante, meaning it would allow them to set general **guidelines for what those companies can or cannot do** rather than rely on ex post competition enforcement (which is what the current rules allow). This would require companies that satisfy the gatekeeper definition to follow a list of guidelines or incur penalties for non-compliance.

The question of what can be done in the United States is more complicated than in the EU. In addition to US antitrust authorities being institutionally more limited than their EU counterparts in their enforcement actions, US antitrust law (and its enforcement) is **controlled by the**[**consumer welfare standard**](https://time.com/6116953/antitrust-reform-big-tech-congress-biden/)—which means it focuses almost exclusively on whether alleged anti-competitive behavior harms the interests of consumers. **The focus of EU competition law is much broader**, and therefore as a baseline proposition allows for greater flexibility in exploring novel approaches to new challenges. The bills currently pending in Congress would tread new ground, but **if consumer harm remains the sole legal standard, the focus of US antitrust law would remain the same.**

In sum, there is a strong desire to curb the market power of Big Tech on both sides of the Atlantic. Given the EU’s comparatively advanced legislative progress, together with the political imperative of getting something done, **it’s highly likely the DMA will be passed this year**―thereby strengthening the EU Commission’s ability to constrain the alleged anticompetitive behavior of the largest tech companies. But the fate of the various bills pending before the US Congress remains an open question. The year ahead will be revealing about whether shared transatlantic values on Big Tech lead to shared policy.

**OR if anything is sufficient, partnership inevitable.**

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[Andrew Small](https://www.gmfus.org/find-experts/andrew-small), [Bonnie S. Glaser](https://www.gmfus.org/find-experts/bonnie-s-glaser), and [Garima Mohan](https://www.gmfus.org/find-experts/garima-mohan), February 2 2022, “US-European Cooperation on China and the Indo-Pacific,” The German Marshall Fund of the United States, https://www.gmfus.org/news/us-european-cooperation-china-and-indo-pacific

The Biden administration took office with the intention of making **partnership with Europe a central element of its China strategy**. This paper assesses what has been achieved in the first year of these efforts, and what to expect in 2022. Despite some of points of contention, such as the disputes over the security pact between Australia, the United Kingdom, and the United States (AUKUS), European and US officials ended the year **in a more optimistic place on the transatlantic China** and Indo-Pacific **agendas than they were at the start**. Over the course of 2021, the two sides put in place new structures—from the EU-US Trade and Technology Council (TTC) to the Indo-Pacific high-level consultations—that have **helped to get the right issues on the table** and pushed their bureaucracies to deal with each other in ways that they had not before. Instead of a thin layer of periodic dialogues on China, there is an increasingly **thick web of interactions**, from working-level groups in different policy areas **to leader-level exchanges**. The EU and the United States also removed many of the **obstacles to their joining forces** more effectively on economic goals, particularly with the deal on steel and aluminum tariffs. Meanwhile, without raising excessively high expectations of a new coalition government that will not depart radically from its predecessor, **the change in Berlin should also provide a stronger basis for cooperation on China** than was present during the final phase of Chancellor Angela Merkel’s government.

**No impact to data localization**

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Shira Ovide, August 10 2020, “The Global Internet Is a Mirage,” The New York Times, https://www.nytimes.com/2020/08/10/technology/global-internet.html

The U.S. government’s proposed ban on Chinese apps like [TikTok and WeChat](https://www.nytimes.com/2020/08/06/technology/trump-wechat-tiktok-china.html) plays into technologists’ fears that the internet utopia is crumbling.

The worry is that instead of a world brought closer together by the internet, a tech fight between the United States and China threatens to further [splinter the digital world](https://www.nytimes.com/2018/10/15/opinion/internet-google-china-balkanization.html) along country borders.

I share those concerns. But let me explain why **a splintered internet isn’t so novel, or necessarily a horrible thing.**

First, the internet was never as global or interconnected as the ideal. What we mean when we talk about a unified global internet is a history in **which the internet was dominated by America,** with U.S. companies and U.S. values infusing the world. The exception was China, which operated a parallel internet world.

For years, foreign governments at times **pushed back at the American-tinged internet**. They sometimes had understandable reasons. Germany, for example, has strong norms of personal privacy and strict rules against denial of the Holocaust. That has [resulted in conflict](https://www.nytimes.com/2010/07/12/technology/12disconnect.html) with the American internet companies’ standards of [personal data collection](https://bits.blogs.nytimes.com/2013/04/23/germanys-complicated-relationship-with-google-street-view/) and [free expression](https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html).

Other times, governments have imposed restrictions on online activity to[silence opposition](https://www.nytimes.com/reuters/2020/08/03/technology/03reuters-thailand-facebook.html) from their [own citizens](https://netblocks.org/reports/internet-disruption-hits-belarus-on-election-day-YAE2jKB3). Whether or not we agree with such tactics, **the internet has never been a single global blob where borders didn’t matter.**

And do we want it to be? I’m an American, and I prefer our relatively freewheeling internet to what exists in Russia or Vietnam. But I also recognize that each country has its own tax codes, labor laws and auto safety regulations. When Ford makes car bumpers, it has to figure out how to alter designs to meet different safety rules in Italy and Nigeria.

There are technical reasons that it’s trickier to make country-to-country rules about a website than the strength of car bumpers. But the idea of internet policy changing when you go from Brazil to Argentina is not crazy.

That’s not to say that there’s nothing to worry about. I’m concerned that [banning apps](https://www.nytimes.com/2020/06/29/world/asia/tik-tok-banned-india-china.html), [writing laws](https://www.nytimes.com/2018/05/19/technology/facebook-deletion-center-germany.html) restricting what people can say online or [shutting down internet access entirely](https://www.nytimes.com/2019/12/17/world/asia/india-internet-modi-protests.html) costs people digital lifelines to the outside world, and that the internet is one more way for authoritarian regimes to exert dominance.

But it’s not productive to pine for a utopian internet that never really existed. When technologists lament the fracturing of the internet world, I wonder if **what they’re really mourning is the fracturing of the world, period.**

**US protectionism is high, inevitable, and thumps.**

---Biden will continue Trump’s protectionist policies (he just conducted an 8-month review of trade policy and concluded more tariffs are good) which triggers protectionist tariffs from China and every other nation

---its part of a sea change in US policy which sees the international as zero sum and guarantees the US will continue to engage in protectionist measures

---our evidence is structural and predictive – prefer it to neg evidence that is snapshot or about previous policies

**Zakaria 10-7** [Fareed Zakaria writes a foreign affairs column for The Post. He is also the host of CNN’s Fareed Zakaria GPS and a contributing editor for the Atlantic, “Opinion: Candidate Biden was right on trade. President Biden is wrong.”, October 7, 2021, https://www.washingtonpost.com/opinions/2021/10/07/biden-is-wrong-on-trade-with-china/] IanM

After an **eight-month review** of the **U**nited **S**tates’ **trade policies** toward China, the **Biden** administration has **concluded** that Donald **Trump** was **right** and Joe Biden was wrong. On the campaign trail, Biden relentlessly attacked Trump’s tariffs on Chinese goods, [calling them](https://www.cnbc.com/2020/09/08/bidens-hands-may-be-tied-on-trumps-china-tariffs-trade-experts-say-.html) “disastrous.” Now, he has adopted those same “disastrous” policies.

**But** candidate Biden was right: **Trump’s tariffs did not work**. China’s behavior did not change, high-wage jobs did not come back, and while the U.S. deficit with China decreased, this caused the overall U.S. [trade deficit](https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/) to go up. **Beijing responded in kind**, **slapping its own tariffs on American goods**. One **2020 study found** that “approximately **100 percent” of the costs** of the U.S. tariffs against Chinese goods were **paid for by American consumers** and **businesses**. A **2021 study** **found** that the **tariffs** **cost** the U.S. economy up to **245,000 jobs.**

**Trade policy** in Washington has **become** an **encrusted**[**bipartisan ideology**](https://www.theatlantic.com/international/archive/2021/10/perils-washingtons-china-consensus/620294/), **driven by** a set of **unquestioned assumptions**. But as Adam S. Posen, president of the Peterson Institute for International Economics, points out in a brilliant [Foreign Affairs essay](https://www.foreignaffairs.com/articles/united-states/2021-04-20/america-price-nostalgia), every one of these assumptions is wrong. We have embraced the dogma that over the past two decades, America opened up its economy to the world and that American workers suffered as a result. But the facts show the opposite. Posen writes, “[The United States] has increasingly insulated the economy from foreign competition, while the rest of the world has continued to open up and integrate.” He adds, “The country suffers from greater economic inequality and political extremism than most other high-income democracies — countries that have generally increased their global economic exposure.”

Much of **the impetus for protectionism in general and toward China** in particular has **come from claims** that **trade** with China was **responsible** for about **2 million** U.S. manufacturing **jobs lost** — the “China shock.” That sounds like a huge number until you put it into context. The number is for the period 2000 to 2015, so the average number of jobs lost each year was around 130,000.

How many jobs do American workers lose in a typical year through the normal churning of the U.S. economy? Sixty million. Of those, a third are voluntary and a third can be attributed to causes not related to foreign trade, such as an employer closing or relocating — leaving a third, 20 million, caused by external shocks. “In other words,” Posen writes, “for each manufacturing job lost to Chinese competition, there were roughly 150 jobs lost to similar-feeling shocks in other industries.”

Posen points out that only about 16 percent of non-college-educated workers are employed in the manufacturing sector. And much of the [decline](https://conexus.cberdata.org/files/MfgReality.pdf) in manufacturing jobs, if not most of it, can be attributed to changes in technology rather than trade. The United States’ manufacturing output [keeps rising](https://data.worldbank.org/indicator/NV.IND.MANF.CD?locations=US), even as the number of workers it takes to produce those products has [fallen](https://fred.stlouisfed.org/series/MANEMP) over time.

This is not just a U.S. trend. Posen’s institute produced a [chart](https://www.piie.com/research/piie-charts/despite-germanys-trade-surplus-manufacturing-employment-share-total-employment) tracking manufacturing employment in Ohio over the past three decades and compared it to Germany’s North Rhine-Westphalia (a similarly important manufacturing region). Unlike the United States, Germany has a [trade surplus](https://tradingeconomics.com/germany/balance-of-trade). It provides much [governmental assistance](https://www.dw.com/en/germany-to-pump-additional-3billion-in-ailing-automotive-industry/a-55641102) for manufacturing, which is seen as the heart of the German economy. Yet the job losses are even more pronounced in Germany. Even China has overall been [losing manufacturing jobs](https://www.piie.com/blogs/china-economic-watch/chinas-manufacturing-job-losses-are-not-what-they-seem) as its economy branches into software and services.

It is also worth noting that manufacturing jobs in the United States are mostly held by workers who are [male and White](https://www.foreignaffairs.com/articles/united-states/2021-04-20/america-price-nostalgia). A policy that obsessively focuses on them devalues the many good jobs in other sectors, which have more women and minorities in them. These groups, being poorer, are also disproportionately affected by the higher cost of tariffed goods. More protectionism means [more economic pain](https://www.washingtonpost.com/us-policy/2019/06/07/repeat-after-me-tariffs-are-bad-economy/?itid=lk_inline_manual_14) for the vast majority of middle-class workers.

Posen points out that the chief reason for many of the United States’ economic inequities and discontents is not open trade but stingy domestic spending. He argues that all workers would gain from a more secure safety net, one in which benefits such as health care are “portable,” meaning not tied to employment. That is where misguided market economics have distorted public policy. More and better benefits — of the kind President Biden is proposing — would help displaced workers, reduce inequality and improve job readiness.

**Writing** all **this** sometimes **feels pointless**. **Protectionism** has **become** one of those **zombie ideas** that **continue to move forward despite all the evidence showing them to be wrong.** **Most worryingly**, it is part of a **sea change** in the **U**nited **S**tates’ **basic outlook**. From an **optimistic** and confident **view** that we can **thrive in a world** in which **others also do well** — a view borne out by the data — **we are now retreating to a cold, curdled view of international life**, one that is **dark** and **zero-sum**, in which we search for villains to blame for our problems. It’s a world in which **we try to gain** some **narrow benefit** for ourselves **by cheating everyone else.** **In other words, it is the** Donald **Trump way.**

**OR it’s resilient.**

**Gros 21** – member of the board and a distinguished fellow at the Centre for European Policy Studies

Daniel Gros, "The Great Lockdown and Global Trade," Project Syndicate, 6-8-2021, https://www.project-syndicate.org/commentary/how-globalization-and-trade-survived-the-pandemic-by-daniel-gros-2021-06

BRUSSELS – **Trade is recovering robustly** alongside the upticks in growth in major economies. This good news deserves more attention. Less than 12 months ago, many observers were predicting an end to globalization. The pandemic disrupted supply chains, and governments, suddenly confronted with the resulting vulnerabilities and dependencies, encouraged “reshoring” production of critical goods.

Today, the **outlook is much brighter**. There is **little indication** of a sustained movement away from global supply chains. And many governments have realized that trade is **more of an opportunity** **than a threat** to national sovereignty. As a result, the World Trade expects the volume of **global trade to increase** by **8%** in 2021, more than offsetting last year’s 5.3% decline.

True, foreign direct investment (FDI) still lags, having plummeted 42% in 2020. Europe actually recorded a negative flow. But the pandemic’s differential impact on trade and investment is not surprising. Transporting goods around the world requires little physical human interaction. Giant cranes, often remotely operated, load and unload containers, and supertankers pump oil ashore.

In contrast, acquiring a firm or establishing a new production facility in another country requires travel to meet potential partners, and in many cases close contact with foreign governments to obtain permits. Pandemic-induced border closures and travel restrictions obviously made this much more difficult.

But FDI is notoriously volatile, often plunging one year and recovering the next, so it could still bounce back strongly in 2021. In fact, the OECD has already detected signs of a recovery.

Moreover, global supply chains have proved to be **less vulnerable** than many had feared. The notion of a “supply chain” conjures up an image of a fragile arrangement, with each enterprise depending on inputs from the adjacent link. And a chain is only as strong as its weakest link.

The global trading system’s vulnerability to choke points seemed to be driven home in March, when a single large freighter blocked the Suez Canal, after sandstorms restricted visibility and transformed the huge stack of containers on board into sails. But this incident, which was resolved relatively quickly, is not representative of how global trade works.

It is more accurate to talk of interrelated networks of suppliers than supply chains. Most enterprises have more than one supplier of key components, and multinational companies with operations in many countries source supplies from many other countries. The pandemic has **reinforced multi-sourcing**, rather than triggering a retrenchment from the division of labor.

Yes, governments almost everywhere have interfered with trade during the pandemic to address acute shortages of key products, such as personal protective equipment in 2020 and COVID-19 vaccines during the first few months of 2021. But both of these products, while vital in the context of the pandemic, play only a **marginal role** in the wider economy. The rich countries could vaccinate the entire world for less than a dollar a week from each citizen.

**The main danger** is that governments, fearing similar dependence on foreign suppliers for many other key products, **introduce protectionist measures**. Prompted by the EU’s concern that such dependence could leave the bloc vulnerable to political pressures from hostile governments, the European Commission has recently completed a fascinating study of strategic dependencies and capacities.

The Commission examined more than 5,000 products and found only 137 in the most sensitive sectors, accounting for about 6% of all EU imports by value, for which the EU is highly dependent on imports from outside the bloc. For 34 of these products, constituting only 0.6% of all imports, the EU could be more vulnerable, owing to the low potential for further import diversification or substitution through EU production.

In other words, for the overwhelming majority of products, large economies like the EU have a sufficiently diversified supply base to make them independent of any single supplier. And broad protectionist measures like tariffs or quotas would have little impact on the few goods for which only a single source may exist.

Moreover, most of the 137 sensitive products that the Commission identified are raw materials and related commodities that are easy to store. It would thus be relatively straightforward for the EU to build up strategic stockpiles of those goods.

In the end, governments **do not** appear to have **resorted to protectionism** in response to the COVID-19 crisis. Although precise data on new trade barriers erected last year are not yet available, the **strong expansion of trade** in 2021 implies that the use of such measures **must have been limited.**

In fact, some governments have been **eager** to create **more trade opportunities** to help foster the recovery. A group of 15 Asia-Pacific countries, accounting for 30% of the global economy, has signed the Regional Comprehensive Economic Partnership, a new free-trade agreement. Meanwhile, the EU has concluded two important pacts: a so-called Comprehensive Agreement on Investment with China and a free-trade deal with Mercosur bloc in Latin America. The ratification of both agreements is in doubt, but not because of concerns about the economy.

What emerges overall is that global supply chains have **weathered the pandemic intact**, and the deep recession has **not unleashed** a **wave of** **protectionism**. **That is good for global trade**, and probably for FDI, too, and suggests that predictions of globalization’s demise were premature.

**No empirical ev it leads to escalation.**

Mariya **Grinberg 21**, assistant professor at the Massachusetts Institute of Technology, “Wartime Commercial Policy and Trade between Enemies,” International Security, Vol. 46, Issue 1, Summer 2021, https://direct.mit.edu/isec/article/46/1/9/102856/Wartime-Commercial-Policy-and-Trade-between

**Conventional wisdom** suggests that trade is the **first casualty** of **war**.1 Because the **gains** from trade can be **converted** into **military capabilities**, trading with the enemy is akin to **selling** the opponent the **gun** they will use to **shoot you**. The **empirical record** of **wartime trade**, **however**, **suggests otherwise**. For example, World War I, a total war in which the majority of the states involved fought for their very survival, saw **extensive trade** between **enemy belligerents**. Britain **continued** to **trade** with its **enemies** until October 1, 1918—one month and eleven days before the Armistice. In fact, Britain started the war with restrictions on the export of only 20 percent of the goods that it ultimately prohibited from reaching the enemy. Even after a year of fighting, by the end of August 1915, around half of the products that would eventually be prohibited were still allowed to be legally traded with enemy states.

World War I is **hardly unique** in that trade occurred and varied during the war. Some enemies **continue to trade** throughout the war—for example, **India** and **Pakistan** in the **First Kashmir War** (1947–49) and **Yugoslavia** and **Croatia** in the War of Bosnian Independence (1992).2 Other states sever trade immediately at the start of the war—for example, England and Argentina in the Falkland Islands War (1982) and India and Pakistan in the Kargil War (1999).3 Yet, other states start off trading with the enemy, only to change course during the war, as occurred, for example, between Ethiopia and Somalia in the Second Ogaden War (1977–78).4 There is remarkable variation in wartime trading patterns between adversaries.

Why do states trade with their enemies in wartime? In this article, I argue that states make deliberate choices when setting their wartime commercial policies and that these policies are tailored to the type of war the state expects to ªght. Specifically, states seek to balance two goals—**maximizing revenue** from **continued trade** **during the war** and **minimizing** the opponent’s ability to **benefit militarily** from trade.

As a result, states have **two reasons** to **continue trading** with their enemies during war. First, states **continue** to trade in **products** that their opponents **take a long time** to **convert into military capabilities**, because the **security consequences** from this trade will **not accrue in time** to **help the opponent** win the war. Second, states **continue to trade** in products that are **essential** to the **domestic economy** but that can be **obtained** **only from the opponent**, because **sacrificing** this trade would **impair** the state’s **long-term security**. Furthermore, states revise their wartime commercial policies based on how well they perform on the battlefield. As the expected length of a war increases, the number of prohibited products will increase, because the opponent will have more time to benefit militarily from the gains of trade. Similarly, the closer the war is to becoming an existential threat, the greater the portion of wartime trade with the enemy that the state will sever.

The article makes two major theoretical contributions. First, it shows that temporality is key to understanding the security externalities of trade—that is, the military consequences of a state benefiting from trade. Existing scholarship focuses on the idea that trading with the enemy increases the adversary’s military capabilities,5 but it omits the temporal dimension, in which economic gains may be converted into military power. Although all gains from trade are ultimately convertible into military capabilities, the amount of time this process takes varies by product. A similar temporal distinction can be applied to all wartime policy tools to determine if, and to what extent, they carry security externalities.

Second, the article **challenges** a **central conclusion** of **economic interdependence theory**—that **significantly interdependent states** are **least likely** to **fight each other**. **According to that theory**, trade between states is **severed in war**, which **incentivizes states** to **avoid war** to **prevent** **losing** the benefits of trade.6 So long as trade is lost during war, trade deters conflict. As my research shows, however, under the right circumstances, states have **ample reason** to **trade with their enemies** **during war**. Additionally, the **more interdependent** two economies are, the **greater** their **incentives** for **wartime trade**. **Contrary** to the **predictions** of economic **interdependence theory**, trade is **unlikely** to serve as a **deterrent** to **war** between **highly interdependent states**. This finding is particularly salient given the heightened possibility of conºict between the United States and China. Although they share significant economic ties, these ties could not be used to prevent the escalation of a potential U.S.-China conflict.

**2NC**

**RICO CP**

**The language authorizing suits is a carbon copy, so it has the same effect as the plan**

1. Reference Section 4 of Clayton

**Sullivan**, President Emeritus and Professor of Law and Political Science at the University of Vermont, **and** **Harrison**, Emeritus Professor of Law at the University of Florida's Levin College of Law, ‘**14**

(E. Thomas and Jeffrey L., *Understanding Antitrust and Its Economic Implications*, Lexis)

**In *Holmes*** *v. Securities Investor Protection Corp*.,34 the Court perpetuated the holding in *Associated General* by interpreting **RICO’s provision for civil actions**, which **is actually a near carbon copy of § 4** to incorporate the concept of proximate cause. The Court denied standing to SPIC in its attempt to recover funds paid to discharge brokerage debts to customers which were lost through alleged fraudulent handling of stock held by the brokerages. The Court found SPIC’s injuries too indirect.

**That is true in substance---they use the exact same deterrence mechanism**

**Goldsmith**, Professor of Law, Brigham Young University, **and** **Rinne**, Member of the Utah Bar, currently in private practice, **‘89**

(Michael and Vicki, “Civil RICO, Foreign Defendants, and ‘ET,’” 73 Minnesota Law Review. 1957)

This Article considers potential barriers to civil RICO litigation 'against foreign defendants and provides a framework for analyzing the extraterritorial application of RICO. In large part, this framework draws on current practice under other United States statutes applied to foreign conduct.39

[begin fn39]

39. For example, United States antitrust laws have been applied **extraterritorially** for more than 40 years. See, ag., United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (stating that alleged foreign "agreements would clearly have been unlawful, had they been made within the United States; and it follows ... that both were unlawful, though made abroad, if they were intended to affect imports and did affect them"); see also J. ATWOOD & K. BREWSTER, supra note 5, §§ 2.01-.16 (discussing history of antitrust extraterritoriality). Federal securities laws also have a history of extraterritorial application. See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (en banc) (stating that even though challenged transactions were effected outside United States, "Congress intended the Exchange Act to have extraterritorial application"), cert. denied, 395 U.S. 906 (1969); see generally Thomas, Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy, 7 J. CORP. L. 189 (1982) (discussing foreign application of United States securities law).

**RICO's link to antitrust** and securities laws provides a sound basis for borrowing solutions to extraterritorial problems. Professor G. Robert Blakey, **judicial drafter of the statute**, has noted that RICO was **modeled on both of these statutory schemes**. Blakey, supra note 34, at 26. In addition, all three statutes **share parallel public and private, and criminal and civil, enforcement mechanisms**. Id Indeed, **RICO's history establishes the government's intent to use antitrust approaches** in dealing with organized crime. See generally Blakey, supra note 7, at 249-80 (noting that Department of Justice attempted to combat organized crime by using antitrust theories imaginatively). At one time, the Department of Justice attacked the criminal infiltration of various unions by using antitrust theories. See, e.g., Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 103 (1962) (affirming finding of Sherman Act violations by union); United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806, 807 (3d Cir. 1966) (affirming finding of Sherman Act violations by association of refuse firms), cert denied, 384 U.S. 961 (1966). Later, as Congress drafted RICO, Senator Hruska observed: "The bill is innovative in the sense that it vitalizes procedures **which have been tried and proved in the antitrust field** **and applies them** into the organized crime field **where they have been seldom used before**." Blakey, supra note 7, at 261 n.65 (citing 115 CONG. REC. 6993 (1969)). Senator McClellan noted that RICO "**draws heavily upon** the **remedies developed in the field of antitrust**... The many **references to antitrust cases** are **necessary** because the particular equitable remedies desired have been **brought to their greatest development in this field**, and in many instance they are the **primary precedents** for the remedies in this bill." Id. at 263 n.71 (citing 115 CONG. REc. 9567 (1969)). The Supreme Court **recently traced the similarities** between RICO and the antitrust laws. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759 (1987). In Malley-Duff, the Court held that all treble damage RICO actions would be governed by the four-year statute of limitations **found in the Clayton Act.** Id. at 2767. The Court **borrowed** from the Clayton Act because **RICO's civil provisions were expressly patterned on this antitrust statute** and because both statutes **remedy economic injury** by providing for the recovery of **treble damages, costs, and attorneys' fee**s. Id. at 2765. The Court stressed that "we believe that **[the Clayton Act] offers the closest analogy to civil RICO."** Id. at 2764. See also Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 241 (1987) (stating that "'clearest current in [RICO] history is reliance on the Clayton Act model!" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985))); see generally Nathan, Opinion, 6 RICO L. REP. 658 (Nov. 1987) (discussing Malley-Duff and McMahon as providing evidence that antitrust precedent applies to civil RICO analysis).

In addition to the antitrust and securities statutes, federal drug control laws also have been extended extraterritorially. For example, in 1970 Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801 (1982)), several provisions of which apply specifically to conduct outside the United States. Thus, 21 U.S.C. § 959 makes it unlawful to manufacture or distribute controlled substances intending or knowing that they will be imported unlawfully into the United States. 21 U.S.C. § 959 (1982). Section 959 states: "This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." Ida; see, e.g., United States v. Winter, 509 F.2d 975, 990-91 (5th Cir.) (affirming finding of jurisdiction over Jamaican nationals charged with conspiring to import controlled substance), cert denied, 423 U.S. 825 (1975); see generally N. ABRAMs, FEDERAL CRII NAL LAw AND ITS ENFORCEMENT 352-407 (1986) (discussing extraterritorial jurisdiction under § 959). Federal drug control laws and RICO alike are aimed at eradicating criminal activity; indeed, the Drug Enforcement Agency relies on RICO as a valuable tool in combating drug traffickers. See 8 CoNTEMP. DRUG PROBLEMS 291, 299 (1979) (citing COMPrROLLER GENERAL OF THE U.S., 1979 REPORT TO CONGRESS) ("DEA believes that traffickers' financial resources can be attacked through effective use of... the RICO statute .... ").

[end fn39]

To the degree that existing extraterritorial jurisprudence does not address these problems adequately, however, this Article proposes legislative solutions that go well beyond current law. Part I reviews the nature and structure of RICO. Part II sets out jurisdictional barriers to the extraterritorial application of RICO and offers solutions drawn from other laws that have been applied extraterritorially. Finally, Part Ill examines the extraterritorial provisions in recent RICO reform proposals and offers new solutions for consideration.

**[1]---Nuclear liability—perm results in two paths for treble damages recovery—or “double liability trebled”**

Michael J. **Metzger**, Valparaiso University Law School, 19**86**, Treble Damages, Deterrence, and Their Relation to Substantive Law: Ramifications Under the Insider Trading Sanctions Act of 1984, 20 Val. U. L. Rev. 575

Three major cases under the Burger Court have had substantial impact on **restricting the availability of the treble damage award**. First, the availability of large consumer class actions for alleging an antitrust violation was severely restricted in Eisen v. Carlisle & Jacquelin,"9 when the Court held federal rule 23 required individual notice be sent to all class members who may be ascertained through reasonable effort, and that plaintiffs must bear the cost of sending this notice.150 Second, in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,5' the Court held that for plaintiffs to recover treble damages for an antitrust violation the injury complained of must be more than just "**casually linked** to an illegal presence in the market;" plaintiffs must prove "antitrust injury."'' 2 This antitrust injury test-an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful"15 3-has been interpreted as a sort of standing doctrine imposing a broad limitation on the kinds of injury for which plaintiffs may recover treble damages under antitrust law."M Third, in Illinois Brick Co. v. Illinois,'55 the Court held that indirect purchasers could not recover treble damages on the theory that overcharges paid by a direct purchaser to an alleged antitrust violator were passed on to the indirect purchaser." **The underlying threat of this** theory **was the potential for "double liability trebled**."' 5 1 If **only offensive use** of the "pass on" theory were available, **defendants would be at risk to multiple liability**. 5 '

While the treble damage provisions under antitrust law **are in many ways similar to treble damages under RICO**, 59 courts have not only **refused to draw parallels** between the substantive provisions for the two Acts,"160

**[begin fn160]**

160. E.g., Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir. 1983) (Congress enacted RICO to attack organized crime, not restrain competition), cert. denied, 464 U.S. 1002 (1983); Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982) (rejecting application of antitrust's restrictive standing, and noting Congress **did not intend to limit RICO to the antitrust goal** of preventing interference with free trade).

**[end fn160]**

but judicial treatment of the RICO provisions have generally been less restrictive.'1 Defendants have continually attempted to limit recovery by alleging several defenses, 2 most notably a causation-standing requirement similar to one under antitrust law, 3 but most have failed under the courts' liberal construction of the RICO provisions which are based on a legislative history indicating broad and flexible application.' Even with the concern that certain construction may create "a runaway treble damage bonanza for the already excessively litigious,"'" courts have generally deferred to congressional intent and construed the provisions broadly.

**That breaks the system—settlements overwhelm aff solvency and kills enforcement generally**

**Rowe**, JD, former Chair of DC Bar Section on Antitrust Law, **‘77**

(Frederick M., Testimony, Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Ninety-fifth Congress)

In short, each alleged antitrust violation might breed **dozens** or **scores of antitrust suits,** including class actions. In each of these actions, the plaintiffs could be entitled to any damages they could demonstrate as to themselves. But clearly, there is a serious risk that defendants, **already subject to treble damages**, **would be exposed to “double liability trebled**”8 and perhaps quadrupled or worse.

Judicial resolution of multiple claims in one consolidated omnibus proceeding would provide **limited protection**. Even if all the parties could somehow be joined together in one action, the practical problems of management would be immense. A critical problem would be the multiplicity of conflicts among the various “claimants,” conflicts in litigation tactics and conflicts in proof, as each group attempts to show that the lion’s share of the damages was really absorbed by it. The inevitable result of these conflicts would be delay, complexity, and hopeless confusion for the judge or the jury attempting to sort out the “facts.”

Some people apparently believe that in cases of premeditated, hard-core, price-fixing conspiracies such ordeals may be justifiable, with the conspirators bearing the risk. But many, if not most, areas of the substantive antitrust law are not as clear as the rules against price-fixing, nor are the rules as clearly understood by the business and consuming public. The interrelation of regulation and competition policies, for example, can lead to many situations where the businessman is cursed if he does and cursed if he does not. Even antitrust enforcers give **contradictory signals**. The Department of Justice once sought to prohibit by consent order conduct which the Federal Trade Commission was simultaneously attempting to encourage by rulemaking.9 A businessman can be faced with an action under the Robinson-Patman Act for allegedly cutting his price too far, and then with a prosecution for price fixing for checking whether he was “meeting competition” in defense against the Robinson-Patman claim.10 It **is fundamentally unfair** in such situations to authorize **multiple damages claims.**

In sum, the bill threatens a proliferation of extremely complex lawsuits, when the court system is already seriously overloaded. Such a massive influx of litigation, especially complex litigation, **could seriously impair the courts’ ability to dispense justice at all**, **antitrust or otherwise.**

Such new impositions on the seriously overburdened judicial system are not only unwarranted, but **may boomerang on antitrust enforcement**. In institutional self-defense, courts faced with a new onslaught of private antitrust litigation by peripheral plaintiffs **may accelerate the trend of cutting back on substantive antitrust principles**, thereby **curtailing Government *and* private antitrust enforcement alike**.11

The prime beneficiaries of such proliferating or amorphous litigation would be the lawyers, *on all sides.* For example, in the *Antibiotics* litigation settlement, while consumers eventually received a distribution of $28 million, the plaintiffs attorneys received over $40 million. Attorney General Griffin Bell recently stated that he “would not countenance using the resources of the government or court when the recovery is going to be $2 for each person in the class, and the real recovery is simply for the lawyers.”28

Rules of law and procedure which permit such cases to persist, threatening indeterminate but potentially enormous liabilities, **clearly create unjust leverage for settlement**. For as the Supreme Court has noted, “even a complaint which by objective standard may have little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial long as he may prevent the suit from being resolved against him by dismissal or summary judgment.13 But the “immense and unmanageable” class action antitrust suits which have been devised in recent years have almost never gone to trial. Instead, such suits became “overwhelmingly costly and potent engine[s] for the compulsion of settlements, **whether just or unjust**.”14

**[2]---Alternative holdings---adding another ground for liability confuses *both* doctrines and prevents spillover**

**Leval**, judge of the United States Court of Appeals for the Second Circuit, **‘06**

(Pierre N., “Judging Under the Constitution: Dicta About Dicta,” 81 N.Y.U. L. REV. 1249)

I do not mean to imply that in all cases it is easy, or even possible, to reach a confident conclusion whether a statement should be considered dictum or holding. At times a proposition advanced by the court will support the court's decision to grant judgment to the plaintiff or defendant, but **indirectly** or **remotely**. There is no line demarcating a **clear boundary** between holding and dictum. What separates holding from dictum is better seen as a **zone**, within which no confident determination can be made whether the proposition should be considered holding or dictum. 23

[begin fn23

23 **As to utterances falling within this zone**, it is unclear **to what degree** a future court **should consider itself bound** by them. When the statement forms a part of the line of reasoning supporting the judgment, **but a remote or tangential part**, **subsequent rulings are less clearly bound to adhere** to it than to a statement that lies at the core of the court's reasoning. The same may be true when the court **relies on two or more lines of reasoning to support judgment**, so that the judgment would be the same **regardless of the second line of reasoning**. Courts often give **less careful attention to propositions uttered in support of unnecessary alternative holdings**. Conversely, the closer an assertion comes to the court's justification for its ruling, the less easily it may be avoided, even if it can, with arguable justification, be considered dictum.

[end fn23]

Nonetheless, to say that the distinction between holding and dictum is sometimes murky does not mean that it is always murky. In many instances there **can be no doubt** that the proposition in question **played no role** in the court's justification of its judgment. Court opinions today are crammed full of such superfluous declarations of law. The remarks in this lecture are directed primarily to these vast deposits of dictum in contemporary jurisprudence.

**That undermines aff and CP solvency—does not create a clear legal rule and lets future courts distinguish the perm’s precedent as inapplicable**

**Stinson**, Clinical Professor of Law, Sandra Day O’Connor College of Law at Arizona State University, **‘10**

(Judith M., “Why Dicta Becomes Holding and Why it Matters,” 76 Brook. L. Rev. 219)

Furthermore, courts exceed their judicial authority when they take advantage of the confusion surrounding the holding/dicta distinction. That confusion creates opportunities for courts and counsel to behave **disingenuously**;54 the preferred result can be reached by **adjusting the level of deference due a prior opinion**. When judges want to reach a particular result, even when it has not yet been held by a higher court or the same court, they can rely on dicta and, labeling it as holding, declare they are “bound” to follow the earlier case.55 Because it is substantially more difficult to overrule a case than to decide a case of first impression (and impossible for a lower court to do so),56 an unfair and insurmountable burden has been imposed by characterizing dicta as binding precedent.57 It is true that counsel can, and often do, spend countless hours debating whether a particular statement is in fact **holding or dicta**.58 But **the lack of clarity in defining holding in the first place makes the task far more difficult** and far more likely to yield **illogical** and potentially **unfair results**. Similarly, when confronted with binding authority that arguably answers the question, counsel and courts often **evade the effect of that law** by using the label “dicta”59 and **declaring the authority inapplicable to the case at hand**.60

**[3]---Parens patriae---civil RICO doesn’t allow state AGs sue under federal law**

**Ranlett**, JD, partner in Mayer Brown’s Supreme Court & Appellate and Consumer Litigation & Class Actions practices, **‘13**

(Kevin, “What’s Next for the Class Action Plaintiffs’ Bar? Getting Deputized by State Attorneys General,” January 22, https://www.classdefenseblog.com/2013/01/whats-next-for-the-class-action-plaintiffs-bar-getting-deputized-by-state-attorneys-general/)

State AGs may lack standing to sue parens patriae if they’re merely suing on behalf of individual citizens, rather than vindicating a “sovereign or quasi-sovereign interest” in the health or safety of their citizens. Pennsylvania v. New Jersey, 426 U.S. 660, 666 (1976).

Statutory remedial schemes may preempt parens patriae lawsuits. For example, because the federal antitrust laws limit standing to direct purchasers, suits by states arguably are barred. **And RICO and ERISA forbid parens patriae suits**. See, e.g., Illinois v. Life of Mid-Am. Ins. Co., 805 F2d 763, 766 (7th Cir. 1986) (RICO); Conn. v. Physicians Health Servs. of Conn., Inc., 287 F3d 110, 120-21 (2d Cir. 2002) (ERISA).

**That undermines aff solvency---states derail federal enforcement to favor political and economic interests**

**Posner**, Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School, **‘04**

(Richard A., “Federalism and the Enforcement of Antitrust Laws by State Attorneys General,” 2 Georgetown Journal of Law and Public Policy 5)

The coalescence of these factors suggests a strategy for a state attorney general **that is in fact observed**. The strategy consists in bringing **high-profile lawsuits** that attract publicity to the attorney general and that **promote the interests of politically influential state residents**, including corporations that have headquarters or extensive operations in the state, **at the expense of nonresidents**, including nonresident **competitors** of resident enterprises.5 The strategy is constrained, however, by the fact that the resources available for such litigation are likely to be very limited unless the litigation has a realistic prospect of generating a large monetary judgment or settlement for the state, or unless several states join in the litigation, as they frequently do,6 enabling a pooling of resources. The latter is often the more feasible method of economizing on litigation expenses even when damages are the relief sought. The reason is that judgments or settlements obtained in parens patriae litigation are generally **distributed to the state residents** on whose behalf the suit was brought, and, if there is money left over, to charities designated by the state attorney general,7 although the court may award attorney's fees to him.

It is easy to see why antitrust parens patriae suits might be **attractive to state attorneys general.** Firms headquartered or operating within the state are likely to face competition from nonresidents and they will be grateful if the state's attorney general **incurs the expense of suing those competitors**. A state attorney general may also have somewhat greater credibility with the courts than would a competitor plaintiff. And major antitrust violations are likely to have effects in multiple states, facilitating joint action and, therefore, resource pooling by state attorneys general. What is more, as shown by the Microsoft case, if the U.S. Department of Justice brings an antitrust suit, the state attorneys general may be able to **take a free ride** on the Department's investment in the litigation, **by bringing parallel suits** that are then **consolidated** with the Justice Department's suit.8

The antitrust strategy of state attorneys general that I have just sketched obviously has a potential to generate **socially perverse consequences**. The use of the antitrust laws to **harass competitors** is an old story but a **true one**, and given the political incentives of state attorneys general, **the risk is great** that in deciding whether to bring an antitrust suit against a competitor of a resident enterprise, a state attorney general will not be scrupulous in the exercise of his enforcement discretion and will bring and press the suit even if unconvinced of its merit. **This is a form of protectionism**. In addition, I worry that state attorneys general will try to channel the moneys recovered in their suits to charitable uses that advance their political agendas.

**[A]---Civil RICO is guided by and reinforces antitrust precedent—statutory similarity means that the counterplan’s predictable**

**Nathan**, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division of the United States Department of Justice, **‘83**

(Irvin B., “Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO,” 52 Antitrust L.J. 327)

Where a civil RICO claim has been filed, litigators invoking the statute and those defending against its use must consider the extent to which the substantive and procedural precedents developed under the antitrust laws are **binding** or at least **persuasive** to resolve contested issues. To date, courts, commentators and counsel have been inconsistent on this topic. Those favorable to RICO have seized on expansive antitrust doctrines to bolster a liberal interpretation of RICO, while at the same time claiming that restrictive antitrust doctrines are not applicable to civil RICO actions. On the other hand, some which are antagonistic to civil RICO have attempted to limit such actions by restricting them to cases which tend to vindicate interests served by the antitrust laws. Neither approach seems to accord with the plain language and legislative history of RICO's private civil remedies.

As noted, RICO's private treble damage remedy was patterned directly on Section 4 of the Clayton Act. The language of the RICO statute, permitting "any person injured in his business or property" to sue in a federal district court for treble damages and attorney's fees, was **taken word for word from the Clayton Act**. The legislative history reveals the deliberate intent by Congress to **utilize the same basic private civil "machinery"** to enhance the criminal enforcement of RICO as had been used for the prior 80 years **under the antitrust laws.**

As originally introduced in both the House and the Senate, the RICO bills contained only criminal sanctions and did not authorize any private right of action. 136 Thereafter, in the Senate, Senator Hruska introduced a separate bill providing for treble damage remedies for violation of the anti-racketeering. laws. 1 37 He urged that his bill be considered at the same time as the RICO bills. While the matters were considered simultaneously, the bill reported by the Senate Judiciary Committee in the 91st Congress, considered the precursor of RICO, did not contain any priv ate right of action. One court has found that the reason for the decision to omit any private right of action was the inability of the Senate Judiciary Committee to resolve the "complex legal issues such as standing to sue [and] proximate cause. '

In the House, the Department of Justice and the American Bar Association recommended an amendment "to include the additional civil remedy of authorizing private [treble] damage suits based on the concept of Section 4 of the Clayton Act."' 39 Two of the leading sponsors in the House were Congressman Poff, who endorsed the "adaptation of the machinery used in the antitrust field,"'' 40 and Congressman Railsback, who said that the RICO bill "[made] available antitrust case sanctions of a civil nature to remove organized crime from legitimate organizations."' 4 ' As amended by the House Judiciary Committee adding the private treble damage action, the RICO bill passed the House; and the amendment was thereafter passed in the Senate without debate.

This legislative history suggests that Congress, to the extent that it adverted to the issue, intended that the **language and precedents of the antitrust laws** generally would be the **principal source of guidance for interpreting unresolved issues under civil RICO**. It is hardly likely that Congress would have intended for the **identical language** in one statute to be interpreted differently from the same language used in a second statute, which had been **directly copied from the first**. To date, however, the courts have given divergent interpretations to the legislative history and have inconsistently applied antitrust precedents to civil RICO actions. In Cenco v. Seidman and Seidman,'42 a panel of the Seventh Circuit derided analogies to the Clayton Act as "forced" and of no use in interpreting civil RICO's civil provisions. In marked contrast, another court has stated that "in order to properly construe the [civil RICO] provisions at issue ... it is necessary to turn to the antitrust provisions and the cases construing them."' 43

**The counterplan’s limited application of RICO retains certainty**

**Nathan**, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division of the United States Department of Justice, **‘83**

(Irvin B., “Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO,” 52 Antitrust L.J. 327)

Based on the origins of the language used in civil RICO and its legislative history, I believe that **antitrust precedents** should guide the interpretation of civil RICO on most substantive and procedural issues, except to the limited extent that the issue relates to a legislative purpose which is not common to both RICO and the antitrust statutes. As noted, the application of antitrust precedents in civil RICO actions will not uniformly favor either the plaintiff or the defendant. Certain expansive concepts, such as jurisdictional requirements, will favor plaintiffs, while restrictive concepts, such as standing to sue and proximate cause, will presumably favor defendants. However, **a basic uniformity in approach** would seem fair to all concerned, eliminate the temptation to cast the same set of facts under one statute as opposed to the other, and would be consistent with RICO's legislative history. Further, **utilizing the precedents that have evolved over almost a century** under the antitrust laws would allow counsel and parties to **predict with more certainty the course of civil RICO litigation**. Finally, a consistent application of antitrust precedents would reduce the result-oriented approach which appears to have dominated much civil RICO litigation.

**[B]---Links just as much to the aff---RICO precedent develops analogously to antitrust**

**Gordon**, Ph.D. Edinburgh (Law); Ph.D. Kansas (English). Executive Professor, School of Law and Department of History, and Faculty Fellow, School of Innovation, Texas A&M University; Office Managing Partner (Dallas), Duane Morris, LLP, **‘21**

(Randy D., “RICO Had a Birthday! A Fifty-Year Retrospective of Questions Answered and Open,” 105 Marq. L. Rev. 131)

Although RICO's ambiguities and vagaries are well documented and have been decried for most of its history, Congress has shown scant inclination to do anything about the situation. Indeed, the most significant Congressional collar placed on RICO in the last twenty-five years-the preemption provision of the PSLRA-appeared as part of a more general attempt to tamp down securities litigation, not as an assault on civil RICO per se. With this history as a guide, we can safely predict that **clarifications of RICO will come from judges**-not legislators-which means that clarifications will emerge not at a stroke but at the speed of the common law, which is to say glacially and incrementally. But **that's not necessarily a bad thing**. A similar process has **unfolded under the antitrust laws**, which have exhibited **both resilience** and **flexibility** in the face of **massive technological and social change**. So, we-like A. A. Milne's river-must wait patiently under the realization that "We shall get there some day." 229

**No spillover**

**Goldsmith**, Professor of Law, Brigham Young University, **‘90**

(Michael, “Civil RICO Reform: The Gatekeeper Concept,” 43 Vanderbilt Law Review 735)

Professor Abrams suggests that private parties **arguably abuse civil RICO** when they bring cases which, though facially violative of the law, would have been rejected at the discretion of a public prosecutor. This assertion, however, is based on the two flawed premises just discussed.2 Moreover, even if the preceding premises were true, actual abuse must exist or talk of reform is misguided. Obviously, some abuse of every statute occurs.6 Remedies, however, already exist to combat such abuse. 4 Proof of unusual abuse is required to mandate reform of any statute on this basis alone. To this end, Professor Abrams notes various long-standing criticisms of civil RICO, and ultimately implies that RICO's private attorney general rationale is abused when civil plaintiffs bring cases that prosecutors would not file.", He also points to the expansion of fraud liability under RICO as contributing to the potential for misguided litigation.6 Professor Abrams's concerns, however, are unwarranted.

1. Long-Standing Criticisms As Evidence of Abuse

Professor Abrams notes many of the long-standing criticisms of civil RICO, 7 and observes that most of these criticisms "translate into the contention that the private attorney general purpose is not being properly implemented insofar as a great many cases are being filed that would not warrant criminal prosecution." 8

Although Professor Abrams does not take a formal position on these criticisms, his proposal implicitly accepts them as true-otherwise he would not propose reform. The criticisms, however, do not withstand analysis. For example, RICO critics state that federal courts have been overwhelmed with RICO claims.6 9 The number of civil RICO claims, however**, has leveled off** at approximately one thousand per year.70 Of the cases filed, approximately sixty percent contain other jurisdictional grounds.7 1 Thus, claims of a federal judicial overload attributable to RICO are **grossly misrepresented**.

Opponents also assert that "civil RICO claims are being used to displace 'well-established federal remedial provisions.' "72 **RICO supplements**, **rather than displaces**, other federal remedial provisions.73 Furthermore, although RICO may **overlap** with federal remedies such as antitrust and securities, **the overlap is not complete**. **Numerous** RICO based securities and antitrust claims, for example, have been rejected for failure to establish RICO's enterprise and pattern elements. 74 Moreover, statutory overlap is **neither uncommon** 5 **nor inappropriate**.76 Consequently, this concern is **fundamentally misplaced**.

Critics further contend that civil RICO claims convert broad areas of state civil law into federal issues." Their argument is that the ease with which state common-law fraud claims can be converted into a RICO action violates principles of federalism. Courts, however, have regularly rejected common-law fraud claims filed under RICO, for failure to satisfy RICO's complex statutory requirements. 78 Moreover, in United States v. Turkette0 the Supreme Court dismissed an analogous argument based on federalism.80 After reviewing the legislative history, the Court stated that Congress enacted RICO knowing that the conduct being prosecuted under RICO also might be criminal under state law,8 ' because states retain jurisdiction over such matters. RICO not only fails to raise any legitimate federalism concerns, but is a perfect example of cooperative federalism. 2

Opponents of civil RICO also assert that RICO claims label ordinary business people as "racketeers."8' 3 At best, this argument is a **false issue**. The racketeering label can be eliminated **simply by changing the terminology** of the statute. In place of the prejudicial word "racketeering," Congress could insert the word "illicit" or another neutral term.84

Finally, critics contend **that "the threat or use of a RICO** claim has given plaintiffs improper leverage to **induce settlements**. 85 **No evidence actually supports this claim**. Treble relief is needed to **ensure the recovery of actual damages** and **otherwise equalize the plaintiff's chance of success**. If anything, the record demonstrates **that frivolous claims encourage defendants to stiffen their resistance** when racketeering charges have been brought.88

**Courts flush out non-meritorious cases early**

**Mahler**, JD, commercial litigation partner @ Farrell Fritz, **‘21**

(Peter A., “Civil RICO: A Blunt But Elusive Tool in Business Divorce Cases,” March 22, https://www.jdsupra.com/legalnews/civil-rico-a-blunt-but-elusive-tool-in-9986868/)

When I began practicing law in the 1980s, **civil RICO seemed to be all the rage**. The in terrorem effect of an award of treble damages and legal fees, plus the ease of alleging mail and/or wire fraud in connection with business operations and transactions, plus the relatively **undeveloped state of the case law** interpreting the statute’s nebulous terms, plus the ability to file the case in federal court as well as state court, **was too good to pass up**. **In the ensuing decades**, however, the federal courts, including the U.S. Supreme Court, perhaps in response to hyperactive civil RICO litigation, **issued a series of major rulings tightening statutory definitions** and **pleading standards** required to survive an early dismissal motion. As the NYT article observed, “[j]udges take a dim view of efforts to **turn what look like ordinary state law claims into federal cases by claiming a RICO violation**. For that reason, RICO cases often don’t survive the pleading stage.”

Civil RICO and Business Divorce Litigation

That observation is consistent not only with the apparent dearth of reported court decisions in business divorce litigation in New York and elsewhere, but also with the apparent dearth if not total absence of any reported decisions finding RICO liability in a business divorce setting. The following examples illustrate the hurdles to pleading a sustainable RICO claim in a business divorce setting:

In Daskal v Tyrnauer, 2012 NY Slip Op 52036(U) [Sup Ct Kings County 2012], the plaintiff brought direct and derivative claims against his co-owner in a realty holding LLC and others arising from a realty development project that ultimately led to the construction lender’s foreclosure on the LLC’s realty asset. The complaint’s gravamen was the plaintiff’s claim that his business partner defrauded him with the assistance of the lender’s loan officer in the diversion of the LLC’s assets. The complaint asserted civil RICO claims based on predicate acts of alleged mail fraud, wire fraud, bank fraud, and criminal bribery under state law. The defendants moved pre-answer to dismiss the RICO claims for failure to plead the existence of a racketeering “enterprise” and, specifically, failure to allege with the required particularity how the various associates of the alleged enterprise worked together as a unit to achieve the enterprise’s common purpose. The court agreed, finding that the complaint “is silent as to the internal workings or organization of the alleged enterprise, and fails to explain how such alleged organization was run or by whom it was run.” The court also based its dismissal of the RICO claims on the plaintiff’s failure to plead the existence of an enterprise “that is distinct from the alleged pattern of racketeering activity.” Rather, the court wrote, the plaintiff merely alleges that “the participants came together for the common purpose of defrauding him and the LLC’s by engaging in [the predicate acts].” Yet additional pleading defects, the court found, were the complaint’s failure to plead facts adequately showing enterprise continuity either of the open-ended or closed-ended variety, and the failure to allege that he or the LLC’s on whose behalf he sued suffered a non-speculative injury caused by the alleged racketeering activity.

In Weingarten v Kopelowitz, 2020 NY Slip Op 51260(U) [Sup Ct Kings County 2020], the plaintiff brought suit individually and derivatively on behalf of a Delaware LLC in which he held a one-third membership agreement after he was terminated as property manager of multi-unit rental properties in Tennessee owned indirectly by the LLC. The complaint included civil RICO claims alleging wire, mail, and bank fraud as predicate acts as part of a racketeering enterprise for the purpose of injuring plaintiff including loss of the LLC as an ongoing business, lost of investment, loss of personal credit, and reputational injury. The defendants moved to dismiss the RICO claims, arguing that the complaint failed to allege direct injury to himself or to the LLC resulting from the alleged predicate acts, and that any harm plaintiff suffered was derivative of any harm allegedly caused to the lending institutions to which the defendant member purportedly made misrepresentations. Applying the direct injury test for proximate causation established by U.S. Supreme Court decisional law, the court held that the plaintiff “does not even begin to approach the required showing” and that, at best, the plaintiff’s alleged injury resulted from his co-member’s “alleged retaliatory conduct against him personally after he told [the co-member] that he had learned of [the co-member’s] fraudulent activity.”

In Frank v D’Ambrosi, 4 F.3d 1378 [6th Cir. 1993], the plaintiff and defendant were 50/50 shareholders and co-directors in an Ohio steel processing company which was dissolved on consent in 1989 after the defendant, D’Ambrosi, sued for judicial dissolution. The plaintiff, Frank, subsequently filed a federal suit asserting RICO claims against D’Ambrosi and others claiming that they combined to form an association-in-fact enterprise through which they engaged in a pattern of racketeering activity including predicate acts of mail and securities fraud. The defendants moved to dismiss the complaint or, alternatively, for summary judgment which the District Court granted. On appeal to the Sixth Circuit, the court affirmed the dismissal of Frank’s RICO claims, finding that he lacked standing because the alleged wrongs and injuries were all directed at the corporation and that Frank “does not have standing to bring a RICO action for wrongs to [the corporation] in a direct suit as shareholder” or as an employee. The court also held that Frank did not adequately support his “absurd” allegation of mail fraud involving a letter sent by D’Ambrosi to Frank which “at most represents a fight for control of [the corporation].” The court likewise rejected Frank’s reliance on the corporation’s dissolution as a forced sale by him of securities, finding that “Frank owned then, and continues to own, 50% of [the corporation’s] stock, and 50% of its assets and liabilities — he cannot now seriously contend that the dissolution [pursuant to a consent decree] was a forced sale.”

The Takeaway. The RICO statute, enacted over 50 years ago, undoubtedly **has had a major impact** in the realm of criminal law enforcement, which was the main impetus for its enactment. Its popularity as a cudgel in civil litigation in the commercial realm has waxed and waned as the courts put their judicial gloss on the statute’s many requirements in an effort to put a damper on plaintiffs who, as one District Court wrote, in their zealous pursuit of RICO’s treble damages remedy and the stigma that may attach to RICO defendants, “have often been overzealous in pursuing RICO claims, flooding federal courts by dressing up run-of-the-mill fraud claims as RICO violations” **requiring courts “to flush out frivolous RICO allegations at an early stage of the litigation**.” As the above-discussed cases illustrate, the RICO statute and its case law present daunting and potentially insuperable challenges in suits between co-owners of closely held businesses who, in the end, may be better served by the causes of action and remedies available under state common and statutory law.

**It’s inevitable regardless**

**Goldsmith**, Professor of Law, Brigham Young University, **‘90**

(Michael, “Civil RICO Reform: The Gatekeeper Concept,” 43 Vanderbilt Law Review 735)

Underlying Professor Abrams's gatekeeper proposal is the belief that existing remedies against RICO abuse are inadequate. Some civil RICO abuse **undoubtedly occurs**. Abusive litigation, however, **is not a problem limited to civil RICO**, but is of **general concern in our legal system**. Moreover, such abuse does not necessarily evidence the **need for reform**,143 as existing remedies may **adequately address the problem**. Fortunately, existing remedies for abusive civil litigation generally **are adequate for RICO's needs as well**.'" Such remedies include ethical constraints;145 tort remedies;' 4 and Federal Rules of Civil Procedure 12(b)(6),'147 9(b), 148 and 11.149 Other remedies also are potentially available. 151

Professor Ronald Goldstock, in a recent statement before the Subcommittee on Crime of the House Judiciary Committee, summarized his review of 704 civil RICO cases decided between January 1, 1987, and June 1, 1989.151 His study **showed that sixty-five percent of the cases were dismissed before trial**.1 "2 Of these 457 cases, courts dismissed: twenty-one percent for failure to plead fraud with particular- ity;1 53 forty-nine percent for failure to state a claim upon which relief could be granted;154 and thirty percent on summary judgment.15 Thirty-seven additional cases were partially dismissed. These figures suggest that judges are dismissing improper RICO claims at the pretrial pleading stage. **Thus, our existing system appears adequate for controlling unwarranted claims**.

**Concerns are bunk, but you know that rampant fraud is occurring now**

**Brickman**, Emeritus Professor of Law, Benjamin N. Cardozo School of Law, **‘19**

(Lester, “Civil Rico: An Effective Deterrent to Fraudulent Asbestos Litigation?” 40 Cardozo L. Rev. 2301)

In addition to listing mechanisms that in her view are increasingly curtailing fraud and thus limiting the need for use of RICO, Engstrom provides a **list of the risks** that would accrue were **RICO to be invoked on a wider scale** than the handful of RICO cases that have been brought to address mass tort fraud, including: distortion of existing remedies,168 “**dampen[ing]** attorney **advocacy** and chill[ing] the initiation of valid, as well as invalid, claims,”169 **overdeterrence**,170 **additional costs**,171 **satellite litigation**,172 and eroding the finality of judgments.173 In support of the latter argument, she cites to a First Circuit case where the court affirmed the dismissal of a retaliatory RICO complaint and stated: “In essence, simply by alleging defendants’ litigation stance in the state court was ‘fraudulent,’ plaintiff is insisting upon a right to relitigate that entire case in federal court . . . [t]he RICO statute obviously was not meant to endorse any since occurrence.”174 Of course, the suit Engstrom has selected to support her claim that RICO will erode the “finality of judgments” would be quickly rejected by 100 out of 100 federal courts as a clear violation of the Rooker-Feldman doctrine.175

Engstrom is to be commended for breaking from the solid front of torts scholars’ refusal to acknowledge “the problem of fraud in the tort litigation environment,”176 which is “all too real.”177 She states that her intent in writing her Article is “to highlight the problem of fraud in the tort litigation environment—a problem that is often discussed and frequently lamented but rarely studied and poorly understood.”178 Distancing herself from Rosenbaum, she rejects the view that “retaliatory RICO actions are never justified,”179 instead recognizing that there are circumstances where “courts should permit retaliatory RICO actions . . . .”180 But balancing against that, she finds that “even if retaliatory RICO suits do successfully reduce litigation fraud, that benefit will come at a very high cost.”181

Unfortunately, she does not regard “the problem of fraud in tort litigation” to be sufficient to warrant a more aggressive response than has heretofore been the case. Though acknowledging that there “**has only been a smattering of [RICO] suits**,”182 **far short of the “trend”** that Rosenbaum perceives,183 she warns “that the unbridled use of retaliatory RICO carries substantial danger . . . .”184 **The evidence, however, that she offers that we are headed toward “unbridled use**” **is gossamer**. Furthermore, I have questioned the efficacy of the evidence she offers that the fraud-curtailing mechanisms she lists substantially reduces the need to have a recourse such as RICO. What is, or at least should be, unquestioned, is that fraud has permeated certain areas of the civil justice system, in particular, mass torts, and that there is a compelling need for more effective mechanisms, including RICO, to combat that fraud.

**T Expand the Scope**

**The threshold is simple---if plaintiffs can currently bring legitimate suits that are not dismissed before the trial, the conduct is within the scope of antitrust**

**Newman 19**—(Assistant Professor, University of Memphis Cecil C. Humphreys School of Law). John M. Newman. 2019. “Procompetitive Justifications in Antitrust Law”. Indiana Law Journal, Volume 94, Issue 2, Article 4. <https://www.law.nyu.edu/sites/default/files/upload_documents/John%20Newman.pdf>. Accessed 11/21/21.

The antitrust enterprise does immunize truly non-welfare-motivated conduct from liability. But this immunity is bestowed by labeling such conduct “noncommercial” at the very outset of a given case. Conduct that is deemed noncommercial falls outside the ambit of the Sherman Act, which by its terms applies only to “trade” or “commerce”.200 Thus, for example, the Eighth Circuit in Missouri v. NOW201 declined to apply antitrust law to a boycott organized by the National Organization for Women (“NOW”). NOW refused to hold conventions in states that had not ratified the proposed Equal Rights Amendment to the U.S. Constitution.202 Recognizing the boycott’s “social” and “political” purpose, the court deemed the **challenged restraint** entirely **beyond the scope** of the **Sherman Act**.203 This decision was reached **before the zero-stage** of analysis (deciding between the **rule of reason** and the **per se** rule), before **initiating a rule-of-reason analysis**, and **certainly before** proceeding to the **procompetitive-justification stage** of **rule-of-reason analysis**. On somewhat analogous facts (a politically motivated boycott), the U.S. **Supreme Court** has expressed similar sentiments.204

**That’s because “scope” refers to the range of activities to which the laws apply, not which ones they prohibit**

**HLR 8** – Harvard Law Review

Harvard Law Review, "A Most Private Remedy: Foreign Party Suits and The U.S. Antitrust Laws," 114 Harv. L. Rev. 2122, 2-26-2008, accessed via Nexis Uni

B. The International Scope of the Antitrust Laws

The sweeping rhetoric that has captured the goals of U.S. antitrust law can be viewed as filling the vacuum left by the spare language of the laws themselves. 28 The first and most basic antitrust statute, the Sherman Act, is remarkably general in its proscriptions, 29 leading some to characterize the Act as "little more than a legislative command that the judiciary develop a common law of antitrust." 30 Although later statutes have addressed particular business activities, 31 these enactments have not so much lent precision to the restrictions as they have highlighted the **far-reaching** and **intrusive scope of** American **antitrust law.**

The reach of the antitrust laws is reflected by the **broad range of possible activities to which the laws apply.** The **Sherman Act**, by its own terms, **covers** "**trade or commerce** among the several States, or with foreign nations." 32 The Act is perhaps one of the most striking economic measures promulgated under Congress's Commerce Clause power "to regulate Commerce with foreign Nations, and among the several States." 33 Although deliberately tracking this constitutional language, the Sherman Act notably shifts the positional primacy from foreign to domestic commerce. 34 One might argue that this transposition reflects the paramount importance Congress assigned to domestic commerce, as contrasted with the Framers' ostensible concern with foreign dealings. Whether intended or not, the reversal may highlight a fundamental tension or uncertainty in determining the scope of the antitrust laws' intended jurisdiction.

**Determination of scope comes prior to considering anticompetitive effects**

**Semeraro 1** – Associate Dean and Associate Professor of Law, Thomas Jefferson School of Law; former trial attorney and consulting attorney with the United States Department of Justice, Antitrust Division

Steven Semeraro, "The Antitrust-Telecom Connection," 40 San Diego L. Rev. 555, May 2001, accessed via Nexis Uni

This Article explores six ways that courts might account for a competition-enhancing regulatory statute when considering an antitrust challenge. These six degrees of connection range from creating a blanket exemption from antitrust attack to treating violations of the regulatory statute as per se antitrust violations. In choosing among these options, a court should engage in a **two-step analysis**. First, it should ask whether recognizing antitrust duties concurrently with regulatory duties would reduce the regulatory statute's effectiveness in fostering competition. If it would, then the court should find that the regulated **conduct falls outside the scope of antitrust**. If antitrust enforcement would not hinder the regulation's effectiveness, the **court should proceed to the second step** and ask how, if at all, the duties created by the regulation should **affect antitrust analysis.**

A court applying this test in a telecom-antitrust case should find, at the first step, that the 1996 Act would be enhanced if the court also imposed antitrust duties on ILECs. At the second step, the court should find that a plaintiff, who proves that an ILEC with market power has violated a nontrivial regulatory duty imposed by the 1996 Act, is entitled to a presumption that the violation substantially contributed to the maintenance of the ILEC's market power. The language and structure of the 1996 Act, however, indicate that defendants should **retain the right** to show that there are **procompetitive reasons** for violating a duty imposed by the 1996 Act, and plaintiffs should retain the burden of rebutting those justifications.

**Exemptions don’t analyze competitive effects**

**Gifford 88** – Professor of Law, University of Minnesota

Daniel J. Gifford, "Redefining the Antitrust Labor Exemption," 72 Minn. L. Rev. 1379, June 1988, accessed via Nexis Uni

The statutory and nonstatutory labor **exemptions** **constitute restrictions** on the **scope of the antitrust laws** particularly relevant to this Article. **Through these exemptions**, Congress and the courts have largely **eliminated competition** in the labor market (or the lack thereof) **from the scope** and hence the concern of **the antitrust laws**. Congress intended the antitrust laws to foster competition in product markets but to **ignore competition** in labor markets, **regardless of the effect** that a lack of competition in labor markets had upon manufacturing costs.

**We have offered a predictable line in the sand, which you should take---provides a finite limit on aff proliferation**

**Pensyl 6** – J.D. Candidate, University of Toledo College of Law, 2006. B.A. in Political Science, Denison University, 2003

Tyler Pensyl, "Note & Comment: Let Clarett Play: Why the Nonstatutory Labor Exemption Should Not Exempt the NFL’s Draft Eligibility Rule From The Antitrust Laws," 37 U. Tol. L. Rev. 523, 2006, accessed via Nexis Uni

In Radovich v. National Football League, the Supreme Court held that the NFL **is subject** to the Sherman Act. [18](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Radovich involved a challenge by a former NFL player who claimed that the NFL had monopolized professional football in the United States. [19](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) The NFL argued that since professional baseball had been held to be **outside the scope of the antitrust laws**; [20](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) consequently, stare decisis compelled professional football **to be exempt** from antitrust liability as well. [21](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) The Court disagreed. [22](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Specifically, the Court reasoned that the cases exempting baseball from antitrust liability could not be used as authority for exempting other sports from antitrust laws, as those opinions were limited to the business of organized professional baseball. [23](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Because no precedent immunized football from antitrust [[\*526]](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) laws, the Court found the sport could not be held outside the scope of the laws. [24](https://advance.lexis.com/document/?pdmfid=1516831&crid=f50084eb-ee3f-4abe-9759-2c3dcd4cc286&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4JWD-C5X0-00CV-N05D-00000-00&pdcontentcomponentid=12162&pdteaserkey=sr1&pditab=allpods&ecomp=wzvnk&earg=sr1&prid=26ef2809-f636-4557-895e-d24d3c0a4d51) Thus, Radovich makes clear that football is not immune from antitrust laws.

The consequence of this decision is that football must enact rules **with antitrust liability in mind**. Unlike baseball, every provision the NFL enacts **must pass antitrust scrutiny** **or** it will be **found invalid** under the Sherman Act.

**Lots of different exemptions with different mechanisms for each one proves aff ground**

**McGinnis 14** – J.D., May 2014, University of Michigan Law School

Anne McGinnis, "Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform ," 47 U. Mich. J. L. Reform 529, 2014, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1036&context=mjlr

B. Catalog of Exemptions

Together, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act bar anticompetitive behavior involving trade or commerce. Because modern courts construe trade or commerce **broadly**, almost any conduct that involves an exchange of money or bartering for a good or service is subject to antitrust law.37

[[Begin FN 37]]

37. See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 7–8. Note the limited exception for professional **baseball**. Id. at 3.

[[End FN 37]]

To prevent antitrust law’s broad application in areas where they have felt it unwarranted, the courts and Congress have read and written numerous exemptions into antitrust law over the past eighty years.38 For example, the Supreme Court created Noerr-Pennington immunity to protect political lobbying efforts from antitrust challenge,39 **Parker** immunity to immunize state regulatory action from scrutiny,40 and **Koegh** immunity to prohibit private treble damages suits where the plaintiff claims that a rate submitted to and approved by a regulator violated antitrust law.41

The majority of antitrust exemptions, however, were written into law by Congress. A leading Monograph by the American Bar Association Section of Antitrust Law organizes these statutory exemptions into three general categories.42 For the sake of simplicity, this Note will use that organizational system.

The first category consists of exemptions for an entire industry or type of activity in favor of state or national regulation. For example, the Shipping Act of 1916 exempted the ocean shipping industry from antitrust scrutiny,43 and the Transportation Act of 1920 immunized **railroad** mergers and other agreements.44 In 1945, Congress passed the McCarran-Ferguson Act, immunizing the “business of insurance” from federal antitrust scrutiny and leaving regulation to the states.45 Congress enacted the last broad statutory exemptions in the mid-1940s.46 As the era of deregulation took hold in the 1950s and 1960s, most of the exemptions in this category were repealed or substantially modified. Today, only five such exemptions remain.47

[[Begin FN 47]]

47. The five schemes currently in effect are: the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2006), which exempts the “business of **insurance**” if “regulated by state law”; the **Shipping** Act, 46 U.S.C. §§ 40101–42307 (2006), which exempts agreements between members of ocean shipping conferences to set and publish fixed rates for specific routes; the Capper-Volstead Act, 7 U.S.C. § 291 (2006), which works in conjunction with the Agricultural Marketing Agreement Act, 7 U.S.C. § 608b (2006) to exempt **agricultural cooperatives** and some agreements between farmers and agricultural processors about how to market, price, or restrict output for a particular crop; the Fishermen’s Collective Marketing Act, 15 U.S.C. §§ 521–522 (2006), which functions much like the Capper-Volstead Act to allow **fishing cooperatives** to collectively market fish; and the Norris-LaGuardia Act, which operates alongside sections 6 and 20 of the Clayton Act. Together, the Norris-LaGuardia Act and the Clayton Act provide an exemption for **labor union** activities. Clayton Act, 15 U.S.C. §§ 17–31 (repealed); Norris-LaGuardia Act, 29 U.S.C. §§ 101–113 (2006). The Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–113), replaced the Clayton Act § 20, expanding the once-modest limitation on injunctions in labor disputes. See United States v. Hutcheson, 312 U.S. 219 (1941); see also AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 38.

[[End FN 47]]

Each remaining exemption provides for oversight of an industry through regulation in theory, although in practice oversight is often limited.48

The second category consists of exemptions for specific transactions, practices, or events that are thought to be socially desirable or economically beneficial. As of 2006, nineteen exemptions fell into this category.49 Some authorize naked price fixing or market allocation,50 while others allow joint ventures or sales agreements that would otherwise be illegal.51

[[Begin FN 50]]

50. There are eight exemptions that fit into this subcategory. They include the **Natural Gas** Policy Act of 1978, 15 U.S.C. § 3364(e) (2006), as modified by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (authorizing natural gas pipeline companies to enter into market allocation agreements in the event of a gas shortage and exempting such agreements from antitrust scrutiny if approved by the Federal Energy Regulatory Commission); the Anti-**Hog** Cholera Serum Act, 7 U.S.C. § 852 (2006) (exempting a marketing agreement governing price and other sales conditions between Anti-Hog Cholera Serum Producers if approved by the Secretary of Agriculture); the **Defense Production** Act, 50 U.S.C. App. §§ 2061–2171 (2006) (exempting market allocation of military materials from antitrust scrutiny during a national emergency, if approved by the Secretary of Defense); 49 U.S.C. § 40129 (2006) (exempting certain agreements between competing **air carriers** to allocate landing rights at airports); Television Program Improvements Act of 1990, 47 U.S.C. § 303c(c) (2006) (authorizing persons in the **television** industry to agree on guidelines “to alleviate the negative impact of violence in telecast material” without antitrust scrutiny); 16 U.S.C. § 824k(e)(1) (2006) (exempting price fixing and other traditionally anticompetitive conduct in the electric power market from antitrust scrutiny by granting exclusive jurisdiction to the FERC); **Charitable Gift Annuity** Antitrust Relief Act, 15 U.S.C. §§ 37–37a (2006); ICC Termination Act of 1995, 49 U.S.C. § 13703 (2006) (exempting collective agreements between **motor carriers** that set rates for moves of household goods). See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 38–42.

[[End FN 50]]

[[Begin FN 51]]

51. Exemptions pertaining to joint ventures or sales agreements include: **Webb-Pomerene Act**, 15 U.S.C. §§ 61–66 (2006) (authorizing the creation and operation of joint ventures to sell products of American companies overseas, subject to supervision by the Federal Trade Commission); **Export Trading** Company Act, 15 U.S.C. §§ 4001–4003 (2006) (authorizing the creation and operation of joint ventures to sell products of American companies overseas, subject to supervision by Secretary of Commerce); **Sports Broadcasting** Act of 1961, 15 U.S.C. §§ 1291–1295 (2006) (authorizing collective sale of broadcasting rights to professional basketball, football, baseball, and hockey games); **Newspaper Preservation** Act, 15 U.S.C. §§ 1801–1804 (2006) (immunizing joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing); Agreement Relating to the International Telecommunications Satellite Organization “Intelsat,” Art. XV(c), Aug. 20, 1971, 23 U.S.T. 3814 and Headquarters Agreement Between the Government of the United States of America and the International Telecommunications Satellite Organization, ¶ 16, Nov. 22–24, 1976, 28 U.S.T. 2249 (exempting together, by treaty obligation, COMSAT, a common carrier of **satellite communications** for its conduct in serving INTELSAT, which is an international regulatory body); **Small Business Act**, 15 U.S.C. § 638(d) (immunizing research and development joint ventures between small businesses if approved by the administrator of the Small Business Association and the Attorney General); 49 U.S.C. § 41308 (2006) (exempting cooperative agreements about **international air travel** if approved by the Secretary of Transportation); 49 U.S.C. § 42111 (2006) (allowing mutual aid agreements between air carriers if there is a strike that affects international air travel); 15 U.S.C. § 37b (2006) (immunizing the **matching program** used to place medical school graduates with resident programs). See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 43–47.

[[End FN 51]]

Two immunize a specific merger or types of mergers.52 Some of the exemptions in this category replace antitrust liability with regulatory oversight,53 while others do not.54 Some of these exemptions, like the Anti-Hog Cholera Serum Act,55 appear to have little relevance today; however, this category of exemptions is the only one that continues to expand.56

One frequently cited example of an exemption that falls into this category is the Newspaper Preservation Act.57 The Act immunizes joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing. The Act was passed because legislators believed that it was important for society to have a large number of local newspapers with different editorial viewpoints, and many had begun to fail.58

The third category of statutory exemptions includes limited modifications of antitrust law for the benefit of some class of activity.59

[[Begin FN 59]]

59. The exemptions in the third category are: **Soft Drink** Interbrand Competition Act, 15 U.S.C. §§ 3501–3503 (2006) (requiring courts to consider whether trademarked soft drinks are “in substantial and effective competition with other products of the same general class” when evaluating horizontal market division agreements between soft drink bottlers and producers); **Bank Merger** Act, 12 U.S.C. § 1828(c) (2006) and Bank Holding Company Act, 12 U.S.C. § 1849(b) (2006) (requiring courts to consider the convenience and needs of the community when deciding whether to allow a particular bank merger that might otherwise be unlawful, exempting consummated mergers, staying mergers until any litigation is complete, and shortening the statute of limitations on challenges to proposed bank mergers); National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–4106 (2006) (eliminating treble damages for **qualified joint ventures** and modifying the rule of reason standard); Standards Development Organization Advancement Act of 2004, Pub. L. No. 108- 237, 118 Stat. 661 (amending 15 U.S.C. §§ 4301–4304) (eliminating treble damages and modifying the rule of reason standard for **Standards Development Organizations**); Health Care Quality Improvement Act, 42 U.S.C. §§ 11111–11152 (2006) (raising the burden of proof for antitrust challenges to peer review procedures for **medical practitioners**, and eliminating private rights of action for damages); Local Government Antitrust Act, 15 U.S.C. §§ 34–36 (2006) (eliminating treble damages liability for **local governments** who violate antitrust laws and limiting relief for private plaintiffs to an injunction). See AM. BAR ASS’N SECTION OF ANTITRUST LAW, supra note 12, at 49–52.

[[End FN 59]]

The exemptions in this category often modify the remedy that a plaintiff may seek or the substantive standard the plaintiff must meet in order to prove a breach of antitrust law.60 Sometimes, the substantive standard ordered by Congress effectively operates as complete immunity. For example, the Soft Drink Interbrand Competition Act required courts to examine horizontal market division agreements between soft drink bottlers and producers using a rule of reason-like analysis.61 But, because the Act also requires plaintiffs to show a lack of “substantial and effective competition” among bottlers, courts have determined that this additional requirement creates effective immunity for soft drink trademark holders and their bottlers.62

**Each could be amended in numerous ways**

**Gifford 88** – Professor of Law, University of Minnesota

Daniel J. Gifford, "Redefining the Antitrust Labor Exemption," 72 Minn. L. Rev. 1379, June 1988, accessed via Nexis Uni

Redefining The Antitrust Labor Exemption

A shift in bargaining toward profit-sharing objectives in those industries in which employers possessed substantial market power could be achieved through reformulation of the antitrust labor exemption. This Article proposes a redefinition of the antitrust labor exemption that will exclude, prima facie, the combination of union control of the industry-specific labor supply with employer power 153 in the product market. Under this **redefinition of** the labor **exemption**, courts would presume that agreements between oligopolistic or monopolistic employers and labor unions possessing power over the industry labor supply fell **within the scope of the antitrust laws**. As previously argued collective-bargaining agreements negotiated in hourly wage terms would produce unduly restrictive effects in these industries. Because collective bargaining agreements employing a profit-sharing method 154 would not produce the doubly restrictive effect on the product market of an hourly wage agreement, proof that the agreement employed the former measure, or otherwise avoided excessive restrictive effects on the product market, would rebut the presumption. Once the [\*1437] presumption was rebutted, the labor exemption would then apply. The antitrust laws, in short, should intervene in the bargaining context just enough to preclude agreements that restrict the product market more than is necessary to maximize the aggregate return to labor.

**Topic education flows neg---exemptions are an essential question in changing antitrust laws**

**Abbott 5** – Associate Director for Policy and Coordination, Bureau of Competition, Federal Trade Commission

Alden F. Abbott, "Prepared Statement of Alden F. Abbott Before the Antitrust Modernization Commission on Statutory Immunities and Exemptions," Federal Trade Commission, 12-1-2005, https://www.ftc.gov/sites/default/files/documents/public\_statements/ftc-staff-testimony-antitrust-modernization-commission-concerning-statutory-immunities-and/051202statutory.pdf

Congress over the years has adopted a wide range of measures that **partially or fully immunize certain sectors** of the American economy from **antitrust review**. The AMC has compiled an extensive list of these provisions, some of which involve industries and products and services that are very familiar to us, while other provisions deal with more obscure matters.3 Collectively, these sectors of the economy **cover a substantial volume of commerce**.

It is not my purpose today to argue about the original merits of Congress's decision to displace the antitrust laws in certain industries.4 Nor do I intend to comment on how well (or poorly) particular exemptions serve the public interest. Many of these exemptions involve industries that the FTC does not monitor on an ongoing basis (because the exempted activities are beyond our jurisdiction), and we would have to undertake considerable study before we could comment on them with any specificity. I do believe, however, that it is **important to consider** whether the **continued existence of these exemptions** in their current form **fosters the goal** of a strong, innovative, growing American economy – **or, rather, undermines it**. The AMC, charged with examining how the **antitrust laws can or should be modernized** to benefit the American economy, is an appropriate forum for a **study of that important question**. What I would like to do today is to offer some basic observations on why it is important to undertake such a review.

**1NR**

**RICO CP**

**For example, rogue states are using Bitcoin now.**

**Fanusie 18**

– Adjunct senior fellow at the Center for a New American Security. Former economic and counterterrorism analyst for the CIA.

Yaya Fanusie, “Seeking Sanctions Resistance Through Blockchain Technology,” *Forbes*, 11 October 2018, https://www.forbes.com/sites/yayafanusie/2018/10/11/seeking-sanctions-resistance-through-blockchain-technology/?sh=4c5089856392.

“**Digital currencies could provide a way for** both **Iran** and Russia **to avoid U.S. dollar transactions**, as well as a possible replacement of the SWIFT interbank payment system.”

--**A senior Iranian economic official** during a May 2018 meeting in Moscow.

Policy experts can argue about the appropriateness of various sanctions policies. Some voice concerns that the U.S. overuses sanctions tools while others convey that the U.S. must increase targeted sanctions to hinder the financiers that enable terrorists and corrupt regimes. But **there has never been the prospect that sanctioning could become a moot option against some states embracing new financial technologies. Until now**.

Today, **various regimes are trying to develop sanctions resistance through cryptocurrency technology**.

Governments that get sanctioned by the U.S. always seek ways to evade the economic restrictions that cut them out of the financial system. They usually find paths of least resistance, through frontmen and front companies allowing them to do business, secure capital, and move funds around the globe. This brings about a cat and mouse game where the U.S. Department of Treasury works to uncover deceptive schemes and fine parties that facilitate sanctions evasion. This cat and mouse game now includes easy-to-acquire blockchain software.

U.S. Adversaries Seeking an Alternative System

Since the end of World War II, the U .S. dollar has been the world’s dominant reserve currency, and the vast majority of cross-border trade is conducted in dollars. This gives the U.S. immense financial—and political—leverage. Losing access to dollar-clearing and correspondent relationships with banks in New York would be a death sentence for most foreign financial institutions. The U.S. used this leverage to urge European Union regulators to oust Iran from the international financial messaging system known as SWIFT as part of nuclear sanctions in 2012. The next year, Iran decided to begin negotiating a nuclear deal to get out from under sanctions.

Emerging powers like China have been calling for an alternative international reserve currency for years. And in the midst of growing trade disputes between China and the United States, some Asia regulatory experts earlier this year proposed that a digital currency system would be the ideal way to develop this alternative.

Sanctions Resistance Projects are Open Source

It is no surprise that **states like** **Russia, Venezuela, and Iran are looking to build blockchain technology to develop sanctions resistance for their financial sector. Officials** in each country **claim that state-based cryptocurrencies could eventually help blunt the effects of Washington’s financial coercion**. But what has not been discussed much is that the main technological ingredient for these efforts is open-source; software that is freely available on the internet, not owned by any one entity, and for practical purposes, can not be prevented from being acquired by these states.

For example, **Iran’s central bank announced in late August that it is planning a national cryptocurrency running on** a Hyperledger Fabric private blockchain. Hyperledger Fabric is an **open source software** platform for enterprise blockchain systems. It is a product of the Hyperledger Consortium, a group of companies led by the San Francisco-based Linux Foundation, a non-profit that supports open-source technology projects. Hundreds of firms around the world are engaged with Hyperledger blockchain projects.The Iranian effort is not affiliated with the consortium and there is little the Linux Foundation or any one else could do to stop the regime in Iran from using Hyperledger.

There is certainly nothing wrong with any nation setting up more efficient, blockchain-based payment systems. In fact, governments developing financial processes with the greater auditability that blockchains allow is a positive step for transparency. What is problematic is that Russia, **Iran** and Venezuela **state outright that they intend to use blockchain technology to get around sanctions**. They seek to undermine one of the few nonviolent tools that the international community has to respond to governments that grossly violate human rights, sponsor terrorism, or do other malign activities. Thus, one potential step forward for transparency is accompanied by a step backwards that in some ways enables authoritarianism.

Russia is subject to U.S. and EU sanctions against many of its major banks and has slowly been integrating blockchain technology pilots into its financial system. Earlier this year, Sberbank—the largest bank in Russia—completed a $12 million corporate bond transaction, settling purchases using Hyperledger Fabric software. Current sanctions prohibit U.S. firms from providing debt or equity financing to Sberbank, but not software.

Venezuela was the first country to attempt to launch a national cryptocurrency several months ago, claiming to create the oil-backed petro token based on a public blockchain platform called NEM. The claim was plausible, because anyone with limited computing skills and resources can develop a token like the petro in a few easy steps. The accessibility of this open technology brings an opportunity; a way to conduct financial transactions outside of the current financial system

With conventional banking, financial authorities pressure sanctions targets by freezing their assets and blocking their transactions. But these sanctions resistance projects rely on software that allows for financial transactions impervious to third party interdiction.

Open Source Software is a Net Positive

**Banning or sanctioning open source software would be an elusive and impractical goal**. Open source code intrinsically is easy for anyone to replicate and share anywhere in the world. It also would be ill-advised on another count: **Open source technology has tremendous societal benefits**. Open source software platforms have driven the key business innovations of the past twenty years; mobile phones, transportation systems, and medical technology have advanced greatly from non-proprietary code.

Open source software promotes collaboration among software developers, strengthens security by enabling crowdsourced fixes for bugs, and increases the pace of innovation as platforms iterate through wider use. U.S. policymakers should be careful not to respond to these efforts in a way that would indirectly jettison American developers from the open source software community. **This would undermine U.S. technological competitiveness in the long run.**

This does not mean that financial authorities are powerless against sanctions resistance strategies. For example, if Iran does launch a cryptocurrency, the same sanctions that target Iranian currency would apply to the digital rial.

National Cryptocurrencies not Enough to Counter Sanctions in Short Run

Today, cryptocurrencies derive their value through supply and demand on cryptocurrency exchanges. Treasury’s sanction restrictions against Iran means that cryptocurrency exchanges under U.S. jurisdiction (including some foreign exchanges with U.S. financial connections) would not be permitted to trade the new token. This sanctions pressure should have a deflationary effect on the price of the “crypto-rial.”

So, although the U.S. might not technically be able to block cryptocurrency transactions, Iran’s new token would not fundamentally alter U.S. sanctions leverage. It also would not likely provide a boon to the Iranian economy. Digitizing a floundering fiat currency is not enough to make it attractive for foreign investors or creditors.

Sanctions evasion using cryptocurrencies is not likely to be a major threat for the short term. **In the long run however, if a reliable blockchain-based system emerges that can support financial transactions** on par with the SWIFT system, **U.S. sanctions power could be diminished**. Still, a true “blockchain SWIFT” is something that probably would take decades to unfold.

**5] No means or motive for nuclear terror – their authors are hacks.**

**Weiss 15** Leonard, visiting scholar at the Center for International Security and Cooperation at Stanford University, USA, and a member of the National Advisory Board of the Center for Arms Control and Non-Proliferation, On fear and nuclear terrorism, Bulletin of the Atomic Scientists 2015, Vol. 71(2) 75–87

There is clearly some risk of nuclear terrorism via theft of weapons, but the risk is low, and a successful theft of a nuclear weapon would likely require a team of insiders working within an otherwise highly secure environment. There is also some risk that a nuclear-armed country might use a terrorist group to launch a nuclear attack on an adversary. This possibility is also of low probability, because the sponsor country would almost inevitably risk nuclear annihilation itself. Finally, a terrorist group might try to design and build its own weapon, possibly with the help of disaffected persons from a weapon state who might provide them with nuclear know-how and/or materials. Given all the steps needed to achieve a weapon that is workable with high probability without being discovered and without suffering an accident this scenario is also fraught with risk for the terrorists. As a result, terrorists are much more likely to try to achieve their aims using conventional weapons, which are cheaper, safer, and technically more reliable. Thus, while no one can discount completely the acquisition by a terrorist group of a nuclear explosive weapon, such an event appears to be of very low probability over the next decade at least, and can be made still lower using techniques or policies that do not require constitutionally problematic steps by the federal government or an optional war whose death rate could match or exceed what the terrorists are capable of. There is a tendency on the part of security policy advocates to hype security threats to obtain support for their desired policy outcomes. They are free to do so in a democratic society, and most come by their advocacy through genuine conviction that a real security threat is receiving insufficient attention. But there is now enough evidence of how such advocacy has been distorted for the purpose of overcoming political opposition to policies stemming from ideology that careful public exposure and examination of data on claimed threats should be part of any such debate. Until this happens, the most appropriate attitude toward claimed threats of nuclear terrorism, especially when accompanied by advocacy of policies intruding on individual freedom, should be one of skepticism. Interestingly, while all this attention to nuclear terrorism goes on, the United States and other nuclear nations have no problem promoting the use of nuclear power and national nuclear programs (only for friends, of course) that end up creating more nuclear materials that can be used for weapons. The use of civilian nuclear programs to disguise national weapon ambitions has been a hallmark of proliferation history ever since the Atoms for Peace program (Sokolski, 2001), suggesting that the real nuclear threat resides where it always has resided in national nuclear programs; but placing the threat where it properly belongs does not carry the public-relations frisson currently attached to the word Òterrorism.Ó

**EVEN IF they got a nuke, detection solves!**

**Seitz 16** (Sam, Director of Nuclear Security Studies @ the Global Intelligence Trust, “Why WMD Terrorism Isn’t as Scary as it Seems” https://politicstheorypractice.wordpress.com/2016/08/26/why-wmd-terrorism-isnt-as-scary-as-it-seems/)

Of all the potential WMD terror attacks, nuclear attacks seem to generate the most fear among the public. This is not surprising. After all, nuclear weapons represent the pinnacle of humans’ destructive potential, and Hollywood frequently utilizes nuclear weapons to drive the plot in movies ranging from Dr. Strangelove to The Avengers. Fortunately, though, there is very little risk of terrorists acquiring or detonating nuclear weapons, particularly in large, Western metropolises. The reason for this is simple; it is **exceedingly difficult** for terrorists to acquire and transport nuclear weapons without being **detected and stopped**. First, terrorists would have to break into **heavily guarded facilities**, likely in Russia or the United States, and steal weapons weighing multiple tons. Then, after securing the weapons, these terrorists would need to escape while being pursued by elite security forces. Assuming the terrorists are able to escape, they would then need **highly skilled technicians** to assemble the nuclear device, as nuclear weapons held in storage are almost always broken down into their constituent parts so as to prevent unauthorized use. The terrorists would have to do this while being sought after by the **most powerful and well-funded intelligence networks in the world,** and would then need to transport the nuclear device into a major city without being detected. According to **John Mueller, an expert on nuclear terrorism at Ohio State University**, the risk of a successful nuclear terrorist attack occurring is, therefore, less than **one in three billion** (1).

Certain analysts contend that while the risk of terrorists stealing nuclear weapons is low, it is possible that terrorists might simply construct their own nuclear devices instead. This scenario is even less likely than nuclear theft, though, as the production of nuclear weapons is an exceedingly complicated task. Terrorists would need highly specific blueprints detailing how to construct a nuclear device, access to highly enriched uranium or plutonium, and a secure, well-equipped site to construct the weapon. As Mueller points out, the odds of all of these conditions being met are quite low. Moreover, the need for so many complex and uncommon materials – **h**ighly **e**nriched **u**ranium, heavy industrial equipment, etc. – would **raise suspicion** among intelligence analysts, increasing the chance of detection. Even if intelligence agencies missed these clues one of the many middle-men used to acquire these materials might inform on the terrorist network, either for profit or because of moral qualms (1).

**Adv 2**

**Too many alt causes to digital integration**

**Portuese 21** – Director of Antitrust and Innovation Policy at the Information Technology and Innovation Foundation

Aurelien Portuese, "The EU must make (digital) peace, not war, with the United States," New Europe, 6-10-2021, https://www.neweurope.eu/article/the-eu-must-make-digital-peace-not-war-with-the-united-states/

In a time of growing influence of China and its large internet companies, you may think that we urgently need the EU’s proposed tech transatlantic partnership with the United States. You would be right. And yet, the EU is **fighting the wrong war**, ramping up its fight against **the US’ most innovative tech companies.** If the EU has **any hope** of a stronger transatlantic alliance now that, in the words of President Joe Biden, “America is back”, it will need to **deescalate the digital war.**

Andreas Schwab, the leading EU parliamentarian on the Digital Markets Act (DMA)–the EU’s new proposal to regulate digital competition–recently amended the DMA so that it **targets only U.S. tech** companies because he considers that “the DMA should be clearly targeted to those platforms that play an unquestionable role as gatekeepers due to their size and their impact on the internal market”.

With the proposed changes, European tech companies (such as Booking.com) **escape scrutiny**. The DMA will only apply to five American tech companies – namely Google, Amazon, Facebook, Apple, and Microsoft. This is a **drastic narrowing** of the twenty companies initially targeted when the European Commission released the DMA last December.

Schwab’s careful exemption of any European tech company from the DMA’s ambit goes together with a defiant tone on American “partners”: “let’s not start with number 7 [gatekeepers] to include a European tech giant just to please [President Joe] Biden”, he made clear.

On Twitter, when asked how he would justify such overt discriminatory, anti-American stance in light of well-traveled rules of international trade, Schwab bizarrely advertised a book sold on Amazon (sic!) written by US Senator Josh Hawley (R-MO), “The Tyranny of Big Tech”:

To refer to a book plagued with mistakes and false claims written by a populist senator to justify an overtly discriminatory treatment against American tech platforms is not only a weak argument, but it’s also no argument at all.

EU officials need to go back and read French journalist Jean Jacques Servan-Schreiber’s classic 1968 bestseller, The American Challenge, when he warned that “One by one, U.S. corporations capture those sectors of the economy most technologically advanced, most adaptable to change, and with the highest growth rates.” But Servan-Schreiber didn’t call for an attack on U.S. firms; he called for Europe to get its house in order. He wrote, “Nothing would be **more absurd** than to treat the American investor as ‘guilty’ and to respond by some **form of repression**.”

Servan-Schreiber was right then; he is right now. So many well-known positive solutions exist in Europe. For instance, we need a Digital Single Market with one regulation at the EU level instead of 27 regulations fragmenting the internal market. Does the DMA avoid regulatory fragmentation? Not at all. It worsens it by allowing national regulations to be adopted in each Member State atop the DMA. We need a strong capital market for European tech companies –a “European NASDAQ”. Does the DMA help create an urgently needed capital market for European tech companies? Not a single word in the DMA about how European tech entrepreneurs could compete by scaling up with capital injections. The European NASDAQ may probably emerge from outside Europe, in London or New York.

Rather than positive policies, the DMA channels **EU fear and insecurity** into **attacks on American companies**, thereby **undermining the prospect** of an **EU-US tech partnership**. As the **knives get sharpened**, Europeans may expect **no transatlantic partnership.**

**Plan can’t solve convergence – EU and Washington still at odds over full scope of antitrust regs AND internal domestic opposition in the US prevents regulatory harmonization**

**Nylen 2/3/2022** – antitrust reporter at POLITICO

Lean Nylen, Samuel Stolton, Mark Scott, “Biden’s push against EU tech rules sparks division in Washington” POLITICO, 2/3/2022

This anger comes on the heels coming of earlier opposition from the DOJ and its fellow antitrust agency the Federal Trade Commission, to efforts from the U.S government to lobby against the EU’s Big Tech regulations, after it emerged that a first document had been sent to Brussels, lobbying against the EU’s crackdown on the digital economy.

Washington concerned about scope of EU rules

The U.S government’s recent letter was **particularly scornful of Brussels’ attempts to narrow the scope of platforms covered** by the new rules, which would target American companies.

The European Commission’s proposal had originally pitched a broader scope, likely to subject around 11 of the world’s largest platforms to the rules — a position that was backed by EU nations. The European Parliament’s report, led by German EPP lawmaker Andreas Schwab, however, revised the criteria for designating the so-called gatekeeper platforms, likely to catch between five and seven companies.

**This**, in particular, **seems to have provoked the anger of the U.S. administration,** with the government’s letter saying that “the United States is concerned that substantially only U.S. companies will be in scope if the Parliament’s proposal to raise the threshold to 8 billion euros in annual turnover and a market capitalization of 80 billion euros is adopted in the final DMA.”

“The EP’s proposed scope would exclusively target U.S. companies, not just when the law is implemented, but for years to follow,” the paper continued.

The paper also accused the EU’s draft measures of opening up security vulnerabilities, and hit out at the European Parliament’s attempts to increase the maximum ceiling of fines against platforms that violate the rules, as well as calling for appropriate regulatory dialogue and backing the EU Commission’s role as sole enforcer of the rules.

U.S. officials have been doing the rounds in EU capitals since the Fall, trying to explain to national governments how Europe’s upcoming digital proposals are anti-American and may hamper the West’s pushback against China, according to three EU officials who were involved in those discussions. They spoke on the condition of anonymity to discuss internal meetings with their U.S. counterparts.

Two of the European officials said that **the U.S. talking points mirrored those often put forward by U.S. tech companies**. That included how the Digital Markets Act was too narrowly focused on Silicon Valley.

At an online briefing last month with MEPs, Commission officials and tech lobbyists, Peter Harrell — a member of the White House’s national security council who is spearheading much of Washington’s pushback against Brussels’ digital rules — doubled down on that line, accusing the EU of favoring Chinese firms with its DMA proposals and claiming that it would worsen the bloc’s cybersecurity protections, according to two separate people who participated in that discussion. They, too, spoke on the condition of anonymity because they were not authorized to speak publicly.

Not all negative

On the other side of the coin, the Biden-Harris letter got the support of those in the U.S. who oppose stringent crackdowns on Big Tech, further exposing Democrat divisions in particular.

Representative Suzan DelBene (D-Wash.), a former Microsoft executive whose district is home to many Microsoft and Amazon employees, praised the Biden administration for seeking changes to the EU regulation.

“Our shared concern is that this bill would unfairly target just American companies while providing a competitive advantage to Chinese, Russian, and other foreign companies,” said Delbene. “Instead, the U.S. and EU should work together through the newly formed U.S.-EU Trade and Technology Council, where both parties committed last year to cooperate on digital rules.”

Delbene chairs the House **New Democrats** Coalition, a caucus of 95 center-left lawmakers who last year **urged** congressional leaders **to delay moving forward with** the United States’ own **reform package aimed at the tech giants**. The **Blue Dogs**, another group of moderate Democrats, **have also raised concerns** about the bills, in particular to bills sponsored by Democrat Representative and Chair of the House Antitrust Subcommittee David Cicilline(D-R.I.).

Elsewhere, Senate Finance Chair Ron Wyden (D-Ore.) praised the Biden administration letter but urged it to do more to ensure U.S. technology companies aren’t put at a disadvantage compared to European counterparts.

“Policies intended to meaningfully address the excess market power of technology firms must apply equally to firms based in Europe, China, the United States, and other countries,” Wyden wrote in a joint letter Tuesday with Republican Sen. Mike Crapo of Idaho, the top Republican on the Finance panel. “We strongly support … efforts to encourage the EU to abandon the discriminatory aspects of these measures.”

The intervention in Europe comes as the U.S. Senate is considering its own antitrust reforms.

On Thursday, a key Senate panel will vote on a billthat would require Apple and Google to open up their mobile app stores. Last month, the same Senate panel advanced legislation by Sens. Amy Klobuchar (D-Minn.) and Chuck Grassley (R-Iowa) that would bar large tech platforms from discriminating against rivals.

Klobuchar and Grassley agreed to tweak the proposed legislation to address concerns that the bill could result in privacy and cybersecurity vulnerabilities — a line of argument also advanced by Apple, Amazon, Facebook and Google about both the U.S. proposals. Apple in particular has used the same criticism against the EU’s efforts.

Cicilline, who is working with Klobuchar and Grassley, rejected that characterization of the U.S. legislation Wednesday.

“Our legislation already includes strong protections for privacy and data security, so that’s not a concern for us,” he said. “It carefully distinguishes between practices by platforms that protect consumers and systems from fraud, malware, and cybersecurity threats from those that destroy competition.”

“Unlike current antitrust law, the bill includes a strong defense for protecting user privacy and data security, so in many ways it makes a great deal of progress on this issue.”

**Coop will stay strong – the catalyst for U.S. EU coop on China is their increased action**

**Mohan et. al. 2/2** – Andrew Small is a senior transatlantic fellow with GMF's [Asia](https://www.gmfus.org/asia-program) Program, which he established in 2006. Bonnie S. Glaser is director of the Asia Program at the German Marshall Fund of the United States. Dr. Garima Mohan is a fellow in the Asia program, where she leads the work on India and heads the India Trilateral Forum.

[Andrew Small](https://www.gmfus.org/find-experts/andrew-small), [Bonnie S. Glaser](https://www.gmfus.org/find-experts/bonnie-s-glaser), and [Garima Mohan](https://www.gmfus.org/find-experts/garima-mohan), February 2 2022, “US-European Cooperation on China and the Indo-Pacific,” The German Marshall Fund of the United States, https://www.gmfus.org/news/us-european-cooperation-china-and-indo-pacific

At the beginning of 2022, most officials in Europe and the United States **see the first year as a qualified success**. Alongside the stage-setting work undertaken through the structured exchanges detailed above, the China-related tracks have been supplemented by an assortment of other channels, including a range of processes at NATO, the **continuation of the EU-Japan-US trade trilateral** on dealing with non-market distortions (which in practice has always ranged more widely on strategic economic matters); a changed approach to basic practices, such as the Biden administration **providing briefings in Beijing and Washington to European allies** on major US-China exchanges; and improved sharing of information, analysis, and intelligence. This more **developed process** of transatlantic communication has helped **turn China into more systemized focus of the relationship**. It has also meant that whatever top-level political signaling about Europe and the United States “not ganging up” or being in alignment, the barriers to cooperation and coordination between them **have been breaking down in the many areas** where they essentially agree, ranging from coordination in multilateral organizations to dealing with Chinese disinformation. The backdrop of the China challenge has already substantially reconditioned the mutual approach to other subjects, including heightened coordination on investment screening and export controls, as well as the positive-sum agenda on offering alternatives to the BRI. The latter had progressed more tentatively during the Trump administration but the step-change represented by the EU’s Global Gateway initiative is a direct result not only of the need to compete with China more effectively but also of the need to figure out a way to cooperate more substantively on these issues among democratic partners. There are clear opportunities for progress this year. China’s behavior has continued to drive much of this agenda. Shifting European views on Chinese behavior domestically and in its own neighborhood would not have been enough to catalyze action among many European policymakers for whom there is still some discomfort in adjusting to the hardening Chinese approach. But **Beijing has gone out of its way to force decisions on them**, not just through its “wolf warrior” diplomacy or various facets of its behavior during the pandemic but also through the measures it has taken targeting EU member states and politicians. While Lithuania’s decision over the name of Taiwan’s new office in Vilnius is still contentious within the EU, the Chinese response—particularly the targeting of European companies with Lithuanian suppliers—has further **strengthened the case for the EU to move ahead with its planned “anti-coercion instrument**” and reinforced the understanding that any economic interactions with China are subject to far more unpredictable, politicized behavior than ever before. The CAI might well have hung over 2021 but here too China has ensured that any short-term political advantage accrued from the agreement was immediately undercut by its escalatory sanctions. As one US official noted in private, for all the value of constructing a positive-sum agenda in various areas, the catalyst for most US partners and allies to forge closer cooperation with Washington has typically been **the most egregious elements of China’s approach**. The end of 2021 also saw a rebalancing of the politics on China in the EU’s most important member state. The new government in Germany signaled several consequential differences from past policy in the coalition agreement reached between its three constituent parties, including explicit references to Taiwan, to the Indo-Pacific, and to transatlantic coordination on China. While there has been much reporting on the more critical stance of the Greens and the Free Democrats as well as on potential differences between them and a more cautious Social Democratic Party, including Chancellor Olaf Scholz, the absence—with Merkel’s departure—of a fierce defender of the old status quo in the China-Europe relationship has been just as big as shift. As Scholz noted in his inaugural speech as chancellor in the Bundestag, even a pragmatic adaptation to “the China we find in reality” requires a rebalancing of policy. If this does not go as far as some of the most critical voices might wish, an approach that is more in line with the sharper approach that the Federation of German Industries (BDI) has been calling for, and the wider shift in the consensus in Berlin, would still represent a significant evolution. There are clear opportunities for progress this year. **The throat-clearing meetings are out of the way** and there is a relatively **benign alignment of political forces on both sides of the Atlantic**. There is an opportunity to build on the work of the first year but also a degree of compulsion. The US midterm elections in November and presidential election in 2024 introduce elements of unpredictability, not so much over the US China agenda but on many other issues that will affect the broader scope for transatlantic partnership. Meanwhile many observers expect an even more belligerent China to emerge after Xi’s “third term” is secured. Failing to advance or lock in various long-term agreements and initiatives this year and to prepare for the scenarios that may follow is likely to prove costly

**China’s unifying effect means cooperation is inevitable as the U.S. and EU choose low hanging fruit to demonstrate good will**

**Collins 21** – Katie a UK-based news reporter and features writer. Officially, she is CNET's European correspondent, covering tech policy and Big Tech in the EU and UK.

Katie Collins, December 15 2021, “Friends reunited? How the US and EU spent the year reconnecting on tech,” CNET, https://www.cnet.com/tech/tech-industry/friends-reunited-how-the-us-and-eu-spent-the-year-reconnecting-on-tech/

Looking ahead

Just like the dysfunctional family gatherings many of us will attend this holiday season, **the US and the EU have brought baggage** and differing perspectives as they try to work on key issues. But ultimately, their historic loyalty to one another and desire to get along will likely see them through.

They do have shared interests -- **finding common ground on relations with China, for example**.

They both have concerns about the economic growth in the Chinese tech sector, the Chinese government's technological reach and its influence over digital rights. The US would be wise not to frame its entire tech agenda around China, Sherman said. It reinforces the idea that US tech policy is purely reactive, rather than proactive. But **having a** **common rival undoubtedly brings Europe and the US together.**

There's plenty of hope among onlookers that 2022 could yield more tangible results than 2021, which has largely involved lots of planning and agenda swapping. Even at the end of the year, things are changing fast. Just last week, Vestager was in Washington meeting with Commerce Secretary Gina Raimondo and Trade Representative Katherine Tai, which Gordon says should help "**jumpstart" a better effort in the US to get organized.**

"There is also a real **will to try to have some low-hanging-fruit, quick victories, and I think we'll see that hopefully earlier next year,** just to demonstrate goodwill on both sides," he said.

**Biden’s presidency has allowed for new harmonization of regs – Europe sees this as an opportunity for a new start so they’ll put aside minor differences**

**Collins 21** – Katie a UK-based news reporter and features writer. Officially, she is CNET's European correspondent, covering tech policy and Big Tech in the EU and UK.

Katie Collins, December 15 2021, “Friends reunited? How the US and EU spent the year reconnecting on tech,” CNET, https://www.cnet.com/tech/tech-industry/friends-reunited-how-the-us-and-eu-spent-the-year-reconnecting-on-tech/

With a new president, tougher federal regulation of big [tech](https://www.cnet.com/tech/) and a desire to draw allies closer in a challenge to China, 2021 was supposed to be **the year that the US hit reset on its frosty relationship with Europe.**

From the outside, US and European citizens alike have plenty to gain from better cooperation between their respective governments. Better trade agreements mean digital technologies will be more widely available, and more common ground on competition policy **has the potential to give consumers a better choice of digital services**. Then there's the promise of renewed data and [privacy](https://www.cnet.com/tags/privacy/) agreements, which will allow data to flow more efficiently across the Atlantic. That may benefit not only consumer services, but also medical research and providing better protections for internet users everywhere.

Eleven months later, not everything the economic superpowers hoped for has come to pass, but there have arguably **been some major breakthroughs** -- the formation of a new tech council, for one. The US has also been making efforts to claw back credibility following four years of failing to coordinate during the Trump era and delays in agreeing on effective domestic tech policy, which **Europe has responded to well.**

Bart Gordon, a former congressman and chair of the House Science and Tech Committee, now serves as a director of the Trans-Atlantic Business Council. He said **he's seen goodwill on both sides to find common ground throughout 2021.**

"**There's been a sea change**," he said. "In the previous administration, President Trump was looking for reasons to try to pick a fight, whereas in this administration, they're looking for reasons to try to work together."

New year, new US attitude to diplomacy

2021 certainly got off to an optimistic start. Following Joe Biden's election victory, there was a real excitement in Brussels and other European capitals, said Tyson Barker, head of technology and global affairs at the German Council on Foreign Relations. "**They wanted to take advantage of this opportunity to grab this administration as a like-minded partner in tech leadership," he said.**

Meanwhile, the US knew it had to make amends if it wanted to get its relationship with the EU back on track. Donald Trump, Biden's predecessor, had made no secret of his disdain of Europe's attempts to bring US tech companies to heel. "They were inheriting four years of real tension with the European Union," Justin Sherman, a fellow at the Atlantic Council, said about the Biden administration.

Europe is also worried that Trump may run for president again in 2024, added Gordon, meaning that the two powers need to make the most of the next three years in developing confidence in one another. "There is a burden on the United States to really reach out and try to build some of those bridges back," he said.

That's why it was unsurprising when the US extended an olive branch by immediately appointing a lead negotiator to work on reestablishing data flows between the US and EU. This followed a ruling by the EU's top court in 2020 that [invalidated Privacy Shield](https://www.cnet.com/tech/tech-industry/us-eu-privacy-shield-data-sharing-pact-invalidated-over-surveillance-fears/) -- the mechanism used to transfer data between the two regions -- due to surveillance fears.

Then in June, the EU and US formed the Trade and Technology Council, or TTC, which will attempt to find common ground on key tech policy issues. And in October, discussions led by the Organisation for Economic Co-operation and Development **finally resulted in a long-overdue international agreement that will see big tech companies pay fairer shares of tax in countries around the world.**

**The AFF is NOT a “digital economy agreement – those are ACTUAL trade agreements**

Says “regulatory agencies”

**Digital economy agreements** raise different challenges to traditional trade negotiations. Mainly, they require genuine buy-in from **regulatory agencies to** work with their trade colleagues and their foreign counterparts. **MOUs and soft commitments to cooperate in trade agreements are a dime a dozen.** The benefits of digital economy agreements depend on parties bringing the commitment to cooperate to life

**It’s structurally inevitable – but that won’t actually collapse internet cooperation**

**Bey 19** – Matthew Bey Stratfor Senior Global Analyst at RANE, Stratfor.

Matthew Bey, April 25 2019, “The Age of Splinternet: The Inevitable Fracturing of the Internet,” Stratfor, https://worldview.stratfor.com/article/age-splinternet-inevitable-fracturing-internet-data-privacy-tech

The concept of a "splinternet" or the "balkanization of the internet" -- in which rules and regulations would carve the global internet into a series of smaller internets -- has existed for years. But we're now barreling toward a point where concept will become reality.

HIGHLIGHTS

The days of a global internet with relative openness **are over as regulation and digital borders** rapidly increase in the coming years.

Nationalism and concerns about digital colonization and privacy are driving the "splinternet." **Those forces will not reverse**, but only accelerate.

The United States will still back a relatively open internet model, but it has clearly assessed that a global pact to govern cyberspace would tie its own hands in the competition with China.

A complex labyrinth of different regulations, rules and cybersecurity challenges will rule the internet of tomorrow, which will become increasingly difficult for corporations to navigate.

In 2001, Amazon founder Jeff Bezos — whose company had yet to turn a quarterly profit — said in an interview, "I very much believe the internet is indeed all it is cracked up to be." Now, 18 years later, the emphasis should be placed on how "cracked up" the internet could become. The concept of a "splinternet" or the "balkanization of the internet" — in which the global digital information network would be sectioned off into smaller internets by a growing series of rules and regulations — has existed for years. But we're now barreling toward a point where concept will become reality.

The Big Picture

The first three decades of the internet's development will be remembered as the period of a largely open internet, with few regulations beyond unique cases like China. But that narrative is ending. Countries and companies are erecting new digital walls on the internet every day. That concept has been given many names — splinternet, the balkanization of the internet and the fragmentation of the internet — but regardless of the nomenclature, the concept is here to stay. And accelerate.

[See Technology](https://worldview.stratfor.com/topic/science-and-technology)

The Wild West days of an open internet are gone for good, and the implications of an increasingly fragmented internet will be profound. It will result in a regulatory minefield that will present new challenges to the current dominance of large U.S. multinational internet companies, like Amazon, and consequently has the potential to leave the United States with less ability to exert "soft power" through its corporate giants.

The Open Internet Rests in Peace

The internet developed in tandem with the United States' rise as the world's sole superpower; once the Cold War ended, it became a key hallmark of U.S. dominance. The internet began as something called ARPANET, a creation of the U.S. Defense Department, before going public in the 1990s. But although the internet became global, the United States still maintained its role as its primary manager through the Internet Corporation for Assigned Names and Numbers' (ICANN) contract with the U.S. government. ICANN plays a key role in managing the domain name system (DNS), a set of databases in root servers that make the internet functional.

The U.S. policy that information and data are human rights that should flow freely among countries, companies and individuals, combined with the country's internet managerial role, has helped facilitate the current U.S. dominance in the global internet sector. The largest U.S. internet companies — Amazon, Google, Facebook, Netflix and others — have been able to extend their dominance over most of the world relatively unencumbered by drastically different regulations or viable local competitors. The dominance of U.S. corporations has meant that U.S. companies also primarily control the 21st century's equivalent of oil (aka the most prized resource of the time): data. And they can spin it to their advantage. The omnipresence of U.S. companies in some countries has become akin to digital colonialism, exemplified by Facebook's control over mobile experiences in dozens of countries through its Free Basics program and Google's control over advertising. Moreover, as the Edward Snowden revelations in 2013 showed, U.S. intelligence services and law enforcement branches have more freedom than other countries to access data — legally or illegally — since it lives on U.S.-based servers.

Those dual realities — U.S. corporate dominance of the internet and its incomparable access to data — have fueled a backlash against the open internet model. At the same time, companies and countries have developed new tools that make it less expensive for authoritarian **states to limit and stifle the free movement of information internally**, as well as more easily use bots on social media to try to spin a narrative in their favor. Backlash against the open internet comes from multiple directions, and **it's not going away**.

A Divided Internet as an Authoritarian Tool

U.S. rivals are increasingly taking steps to compartmentalize the internet, creating global and domestic spheres. Most well-known is China, which for years has controlled the movement of information between global cyberspace and domestic cyberspace through [its Great Firewall](https://worldview.stratfor.com/article/tech-giants-growing-behind-chinas-great-firewall), which controls domestic access to the web, for instance restricting access to specific foreign sites. But **Russia and Iran are taking notes from China** and going one step further: creating domestic internets that can be cut off from the global internet if necessary while remaining internally intact and functional. Iran's National Information Network is now fully operational, and the country has been trying to force its netizens to set up websites and Iranian-made competitors to Western apps on Iran's domestic internet rather than the World Wide Web. [Russia has done the same](https://worldview.stratfor.com/article/russia-plants-its-flag-digital-realm-cybersecurity-internet), although it's unclear whether a purported test to cut off all access to the global internet it had planned to carry out at some point before April 1 was actually conducted.

The U.S. corporate dominance of the internet and its incomparable access to data have fueled a backlash against the open internet model.

Russia, Iran and China setting up their own networks out of concern over meddling from Western countries may only be the tip of the iceberg of authoritarian governments developing robust internal networks to control information. As the price of internet control tools declines, they will be increasingly accessible to smaller and less developed countries. Obvious candidates for setting up domestic internets or employing robust internet filtering systems include Egypt, Saudi Arabia, Turkey and Brazil. (The latter has floated the possibility of increasing internet regulations in the past.) Russia has even proposed a smaller internet exclusive to BRICS countries (Brazil, Russia, India, China and South Africa) as a means of breaking free from U.S. digital hegemony.

Nationalism and the Push for More Data Privacy

It's not just authoritarian countries that are taking notice of [U.S. internet hegemony](https://worldview.stratfor.com/article/coming-tech-war-china). At the opposite end of the spectrum, data privacy, data nationalism and economic nationalism **are driving internet regulations and controls**. This is perhaps most true in Europe. Despite being as wealthy as the United States, Europe has struggled to create internet companies that can compete with U.S. counterparts. There is no European equivalent to Facebook, Google or Amazon. And individual European nations are too small for country-focused companies to compete with the financial firepower that U.S. competitors can wield in investments. Perhaps unsurprisingly, as nationalism has increased across Europe, so has a desire to lessen the United States' internet dominance. Examples so far include antitrust and monopoly investigations against Google, as well as **increased regulations requiring data localization** and calls for higher taxes.

Data privacy has been a crucial component of European reactions to U.S. internet control, particularly the European Union's deeply impactful May 2018 introduction of [General Data Protection Regulation (GDPR)](https://worldview.stratfor.com/article/what-gdpr-means-companies-europe-and-beyond). The regulatory scheme forced new compliance rules on data privacy, including how data can be used, where it is stored and how people can give consent on data issues. GDPR was driven in part by Snowden's revelations that the National Security Agency and the so-called "Five Eyes" intelligence-sharing alliance were accessing data globally. It introduced an enormous set of regulations, which require companies to uniquely navigate each European country's jurisdiction. And while this does not exactly equate to a wholly separate, physically divided internet like the Russian and Iranian proposals, it has a similar effect of increasing regulations and decreasing the global all-access quality of the internet.

Even in the United States, movements to increase internet fragmentation are emerging. **Proponents aim to reduce the hegemony of large companies** and their unparalleled control of data, and they also want to [increase personal data protections](https://worldview.stratfor.com/article/data-privacy-and-ai-ethics-stepped-fore-2018), perhaps by introducing GDPR-like mechanisms in certain states.

And companies are also increasingly interested in slicing up the internet in different ways, as ecosystems start to emerge around certain platforms. Apple's business model has drawn in and locked down users to the Apple and iOS ecosystem. Amazon and Google have done the same with their offerings, as have China's Alibaba and Tencent, increasingly. As concrete, country-led internet fragmentation occurs, these company-specific ecosystem approaches could come to dominate certain sets of affiliated countries or regions, further fomenting new digital boundaries.

Divided Opinions About Dividing the Internet

The last two years have highlighted the extremely divided international viewpoints about how the internet should be governed. On five different occasions, the United Nations has tasked a group of government experts with establishing rules and norms for global digital governance. After the fifth group failed to do so in July 2017, **no sixth group has been created**. In November 2018, French President Emmanuel Macron announced the Paris Call for Trust and Security in Cyberspace, a new initiative to establish international norms that was signed by more than 50 nations, 90 nonprofit groups and universities and 130 private corporations including Facebook and Google.

But the United States, China and Russia did not sign the Paris Call initiative, and those three countries also blocked each of the U.N. efforts. After all, the great power competition heating up among the United States, China and Russia extends to cyberspace. The United States has been able to exert enormous amounts of soft power through the internet, and China's rise is now becoming a more important geopolitical threat to the United States in all ways, including digitally. Washington has recently focused heavily on ensuring that international agreements about cyberspace do not introduce the added challenge of making it harder for the United States to compete with its Chinese adversary.

The great power competition heating up among the United States, China and Russia extends to cyberspace.

Countries' domestic laws and national regulations **reign supreme due to the physical requirements of the current internet**, so the United States, China, [Russia](https://worldview.stratfor.com/article/russia-plants-its-flag-digital-realm-cybersecurity-internet) and others truly can **go their own way in cyberspace**. That means that global internet governance issues are likely to remain stalled while regional or affinity groups, or extremely nationalistic countries, introduce their own localized regulations, firewalls and, in some cases, domestic internets with a limited connection to the outside world.

A Complex Future Is Already Here

China provides a good case study of how this domestic internet control can affect the dominance of U.S. companies when taken to the extreme. China's Great Firewall and extremely tech-nationalist rules have essentially made it impossible for U.S. companies to operate in the country. The government explicitly bans some companies, while others are subject to so much censorship and surveillance that they simply choose not to pursue the Chinese market. This situation has allowed Chinese companies to dominate inside China, evolving and [catering to the domestic market](https://worldview.stratfor.com/article/chinese-internet-companies-sharpen-their-competition-home-better-compete-abroad). Even when U.S. companies have tried to compete, they've failed. In the future, this type of domestic dominance may likely emerge in other countries with extreme nationalist internet policies, such as Iran.

Globally this means that businesses — purely internet-based and otherwise — should be prepared to navigate an increasingly complicated minefield of different internet regulations. In the 21st century, almost every sector of the world economy is deeply dependent on quick, seamless connectivity to the internet and data flow, and increasing regulations will slow and disrupt operations in many ways, no matter how large or small a business may be. Indeed, in many niches of the tech sphere, national competitors to formerly dominant international behemoths will emerge. But small companies will also be put at a large disadvantage when trying to expand beyond one or two countries because of the overhead costs of having to comply with different rules and regulations that can vary vastly.

U.S. tech companies will struggle to maintain their global influence in a world of internet fragmentation where national sovereignty reigns supreme.

Ironically, the major U.S. and Chinese companies can most easily afford to comply if they choose to. Yet, this will only reinforce concerns of digital colonialism and privacy — eventually likely provoking an even stronger backlash against large U.S. companies. In the West, this opposition will focus on data privacy and how to treat data, particularly as artificial intelligence and the Internet of Things create [even more personal data from our lives](https://worldview.stratfor.com/article/ai-makes-personal-privacy-matter-national-strategy).

Looking Forward

U.S. tech companies will struggle to maintain their global influence in a world of internet fragmentation where national sovereignty reigns supreme. For China, on the other hand, that scenario is preferable. Its [nurtured giants Tencent and Alibaba](https://worldview.stratfor.com/article/alibaba-and-tencent-disrupting-china-dozens-industries-time), for example, are beginning to export the ecosystems that they've built in China to some of China's neighbors, eating into markets that have traditionally been dominated by U.S. companies. This may drive some backlash against Chinese digital colonization, but since China is new to that particular game, it will still be making progress in its power competition with the United States even if it faces limits and opposition.

The end result is that the next 25 years of internet regulation and changing guidelines about how information flows across boundaries will be far more complicated than the previous 25. **The extreme version of the splinternet**, in which every country creates its own internet with limited connections to the global internet**, is unlikely to come to pass.** The requirements of a modern economy simply won't allow that eventuality. Instead, companies will be required to jump through increasingly more hoops, and domestic demands for local ownership or data regulation will grow steadily. Corporate America will still demand an open internet for all — even making massive investments in satellite technology to try to do so — **but it will not be able to prevent the inevitable**.

**The age of the splinternet is at hand.**

**It’s impossible to reverse the balkanization of the internet – every government imposes some restrictions that makes a fracture inevitable**

**Elgan 19** – Mike Elgan is a technology-obsessed journalist, author, blogger, podcaster and digital nomad.

Mike Elgan, July 27 2019, “How I learned to stop worrying and love the splinternet,” Computer World, https://www.computerworld.com/article/3411947/how-i-learned-to-stop-worrying-and-love-the-splinternet.html

Have you heard the one about the “splinternet”? It’s the idea that the internet could someday be split into different national or regional mini-internets. It’s usually talked about as something that could happen someday, or that is beginning to happen. I’ve got news for you: It’s already happened. **The splinternet is here**. It’s time to stop pretending that the ever-increasing “**cyber-balkanization” of the internet will ever be reversed**. Who and what is splintering the internet? In 1996, John Perry Barlow penned “A Declaration of the Independence of Cyberspace.” This naive and now-cringeworthy screed said, in part, “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.” He continued: “We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity The response by Governments of the Industrial World: “Challenge accepted.” Barlow’s free-speech utopia never happened, and never will. Since Barlow’s declaration, the division of the global internet into separate, incompatible and **walled-off mini-internets has increased**, and it will continue to do so. Here are the actors and forces that have already splintered the internet into many internets. China The famous “Great Firewall of China” is a collection of laws, policies and technologies that block foreign information and censor what users of the Chinese internet can see. It’s optimized for state surveillance (as opposed to America’s internet, which is optimized for corporate surveillance). The Chinese internet is completely different in form, function and content from the U.S. internet. The Chinese internet is unrecognizable to you and me. Chinese censorship of words and pictures is nearly total. China’s censors delete objectionable content automatically and in real time. Post the words “**Winnie the Pooh**” on Weibo and they are deleted before anyone can see them. (Critics mock Chinese President Xi by saying he looks like Winnie the Pooh.) The person who posted the censored content isn’t informed of the censorship and believes the post was successful. But the poster’s followers never see it. China’s internet is an internet without Facebook, Twitter, Instagram, Pinterest, Tumblr, Snapchat, Flickr or Tinder. It has no YouTube. In fact, the list of blocked websites on the Chinese internet is basically all the websites and internet services you and I use every day. Oracle said this week that the Chinese internet is designed more like an intranet. China can disconnect from the other internets at will and still operate its own internet. Not only has China used vast technological sophistication to **create a separate Chinese internet**, but now it’s exporting those technologies to Africa as well. Russia In the last two years, Russian authorities have essentially **outlawed online anonymity and private communications**. They’ve blocked encrypted message services like Telegram. VPNs, internet filtering sites and even sites giving how-to instructions on how to access blocked websites are banned on the Russian internet. And the Russian internet is aggressively censored. Google now censors searches on behalf of the Russian government. Even my personal blog is blocked in Russia, a fact I learned while researching this column. All non-Russian news sites have to be registered as foreign agents in Russia. And the Russian state’s vast and aggressive disinformation programs strive to pollute the outside-Russia internet with disinformation, while simultaneously polluting the inside-Russia internet with propaganda that benefits the ruling class. (I detailed in this space the opposing messages about 5G technology promulgated by the Russian state inside and outside Russia.) Russia has even created its own, government-controlled alternative domain name system (DNS). The European Union EU regulations **prioritize privacy over freedom of expression**. The General Data Protection Regulation (GDPR) is the latest splintering factor. I spend a lot of time in Europe, and the experience of using the internet is very different there. The overwhelming majority of U.S. news websites are blocked in Europe, **citing GDPR rules**. The web in the EU spams you mercilessly with cookie warnings that nobody reads. Europe’s “right to be forgotten” laws require search engines like Google to become increasingly inaccurate and non-representative of what’s actually on the internet. And the EU’s new Copyright Directive will solidify and further separate the European internet form the other internets. Despotic governments Eritrea, Ethiopia, Saudi Arabia, Iran, Syria, Tunisia, Vietnam and Myanmar also have **censorship regimes** so extreme that they constitute separate, national internets. In fact, Freedom House’s rankings on internet freedom can be used as a proxy for the degree to which each national internet deviates from the U.S. internet. Facebook A huge number of people use Facebook primarily or exclusively when they are on the internet. Facebook censors according to local laws and dictates, and so Facebook is very different in each country. Google Google is one of the leading advocates and practitioners of algorithmic personalization and local customization. As a result, Google sites like YouTube are completely different in different countries. Trending and recommended videos are selected according to local or national languages, personalities and preferences, so that each country where YouTube is allowed in has its own local version of YouTube. Why the splinternet is not the end of the world (wide web) It’s an unpopular opinion, but the U.S. and British technologists who created the internet and the web, respectively — as well as the hippies who articulated the early “information wants to be free” ethos — were cultural imperialists and free-speech fundamentalists. The idea that freedom of expression is the highest value is a very American idea, which the internet utopians of the ’90s hoped they could impose on the world. **They couldn’t**. It turns out that religious countries don’t want blasphemy and pornography **flooding in from the rest of the world**. Governments don’t want insurgents **using the internet to overthrow democracies**. Democracies don’t want fake news causing riots. China doesn’t want people promoting multiparty democracy. **Russia doesn’t want Western news** about Russian oligarchs. And **Americans don’t want Russia meddling** in their elections (nor does Russia want America meddling with its meddling). Here’s another unpopular perspective: Nations that have gone the furthest to isolate their national internets from the international internet are in a far better position to survive all-out **cyberwar** than the countries (like the U.S.) that are naively pushing for a single global internet. It’s time to stop pretending that the web is worldwide. **It’s never has been. It’s not now. And it never will be**. **The global internet is a delusion**; the splinternet is reality. It’s merely the result of national governments extending their rule to cyberspace, **which has always been inevitable**. I’m sorry, John Perry Barlow, but the Governments of the Industrial World are not going to leave us alone.

**That’s because the internet was never unified – governments and actors will always be able to cut off access**

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[Milton Mueller](https://www.internetgovernance.org/author/milton-mueller/), [Brenden Kuerbis](https://www.internetgovernance.org/author/brenden-kuerbis/) and [Vagisha Srivastava](https://www.internetgovernance.org/author/vsrivastava/), March 8 2022, “The Narrative: Have we reached splinternet yet?,” Internet Governance Project, https://www.internetgovernance.org/2022/03/08/the-narrative-have-we-reached-splinternet-yet/

The Russian invasion of Ukraine has put global **interconnection to the test as never before.** Every media outlet is now talking about “[Splinternet](https://www.cnet.com/news/russian-internet-takes-a-hit-as-cogent-disconnects-backbone-network/).” The ruptures extend beyond the internet and web to include many forms of cooperation and trade, especially in financial systems. This Narrative briefly comments on some of the more notable developments and tries to weave it into a coherent picture.

While the underlying infrastructure of technical compatibility is holding up well, we see the free flow of news, opinion and online **services dramatically affected by the incident**. The West is cutting itself off from **Russian users and markets**, while Russian authorities cut off their own population from exposure to foreign news and opinion sources. This may be the most divisive and long-lasting aspect of the conflict.

Unifragged

The dichotomy between a “fragmented” or “unified” Internet has never made sense. As argued in the book [Will the Internet Fragment?](https://www.wiley.com/en-us/Will+the+Internet+Fragment%3F%3A+Sovereignty%2C+Globalization+and+Cyberspace-p-9781509501229) the Internet is neither fragmented nor unified, it is **unifragged**, which means that millions of networks and services speak the same language but **can freely block external users or other systems as they please**. The overall level of **connectivity is never uniform** but is actively managed by tens of thousands of different entities. The big difference now is that the invasion of Ukraine has catalyzed collective action in this distributed system, fostering a coordinated response reflecting geopolitical divisions. **These decisions manifest in different governance structures.**

**Trade doesn’t solve war – latest studies.**

**van de Haar 20** [Edwin van de Haar, formerly a visiting fellow and lecturer in political theory at John Tomasi’s Political Theory Project at Brown University, a lecturer in international relations and political economy at the Institute of Political Science at Leiden University, and a lecturer in international relations at the European Studies Program at Ateneo de Manila University, “Free trade does not foster peace,” 2020, *Economic Affairs*, Vol. 40, Issue 2, pp. 281-286, https://doi.org/10.1111/ecaf.12405, EA]

Trade is **unable to foster peace**, because it is **unable to overcome** many **causes of war**. Think about **cultural** and **religious** **differences, geopolitical causes** such as the fight for **natural resources**, including increasingly **rare** raw **materials**, or more **traditional wars between great powers** or their proxies over a border dispute. States may also act against their economic interest for **some** perceived **higher goal** (Coker, 2014). The causes of war are often **multifaceted** and **complex**. Wars happen because people have reasons to fight, in the form of goals and grievances, and possess enough resources and resolve (Ohlson, 2009). Trade relations are **just one factor** in the mix of causes of war, which include such **coincidental** **factors** as chance, luck, or reckless behaviour by individuals who happen to influence public policy. International commerce is **simply not a “perfectly effective antiwar device”** (Suganami, 1996, pp. 153–210). The best one can say is that the protection of trade relations is sometimes one of the factors in the decision not to wage war. Nothing less, nothing more.

To sum up, many of Adam Smith's arguments still stand, and are confirmed or complemented by modern research. There is **no** solid **ground** for the expectation that trade **promotes**, **fosters**, or **leads** **to** **peace**. Generally, international economic interests are **not** the **crucial factors** in decisions over war and peace. **Too many other factors** come into play. To believe that trade fosters peace was folly even hundreds of years ago. To still think so is to believe in fairy tales, to be ~~blinded~~ by the correlates computed by limited yet available datasets, or both.

**No trade impact**

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

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

**Adv 1**

1. **Small sets are sufficient, and users use multiple platforms which distribute data**

**SIIA 18** – Principal trade association of the software and digital content industries.

Software & Information Industry Association, “Comments of the Software & Information Association on the Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century,” 20 August 2018, pp. 7-8, https://www.ftc.gov/system/files/documents/public\_comments/2018/08/ftc-2018-0051-d-0022-152095.pdf.

Data is not a barrier to entry in the Internet ecosystem.

There is no question that **data** is a vital asset in the 21st Century digital economy, but it **has also proven to be plentiful**. Unlike the natural resources that drove previous industrial revolutions, **data is not a finite commodity that one entity can** obtain and **prevent others from obtaining. Data available from one online source**, for instance, **is usually available from other sources. People who use one social network, also use others.** They are likely to have accounts with more than one of Facebook, Pinterest, Snapchat, YouTube, LinkedIn, and Twitter, all of which collect the user data they need deliver a compelling service to consumers. **The Pew Institute recently found that the typical American uses three of these major social media platforms**.19 **People don’t keep economically valuable data a secret from these other platforms** and **there is nothing one platform can do to stop them from engaging with others elsewhere**.

Moreover, as MIT business professors Brynjofsson and McAfee note, **small data sets are often good enough to provide the insights needed to power a business**.20 In particular, they note that “you may not need all that much data to start making productive use of machine learning” and “sufficient data is often surprisingly easy to obtain.”21

In the data economy, the question isn’t whether data is valuable but whether there’s enough good data available for competitors to use. When competition authorities have faced this context-dependent factual question in recent years in specific merger cases, time after time they determined that **competitors would have post-merger access to enough data**.22

1. **Data is not the make or break for firms, tech outweighs**

**Kennedy 19** – Senior fellow at the Information Technology and Innovation Foundation. Former chief economist for the U.S. Department of Commerce.

Joe Kennedy, “Data and Privacy Are Not Antitrust Concerns,” *Information Technology and Innovation Foundation*, 15 October 2019, https://itif.org/publications/2019/10/15/data-and-privacy-are-not-antitrust-concerns.

It is true that, in some cases, data, like other inputs to production, can be used in anticompetitive ways. But as ITIF has written, many aspects about data reduce this threat. First, **the mere possession of data is seldom the main source of competitive advantage. What distinguishes companies is often the development of algorithms that add market value** to the products they sell. Google’s search, for example, benefits from lots of data. But **its biggest asset is the software that uses this data to deliver the most relevant search results. While more data can lead to better results, after a certain point, there are diminishing returns**. Doubling the amount of data may lead to only marginal improvements in the quality of an algorithm’s output.

1. **Data is only useful for a short time – prevents incumbent advantage by stockpiling data**

**Kennedy 19** – Senior fellow at the Information Technology and Innovation Foundation. Former chief economist for the U.S. Department of Commerce.

Joe Kennedy, “Data and Privacy Are Not Antitrust Concerns,” *Information Technology and Innovation Foundation*, 15 October 2019, https://itif.org/publications/2019/10/15/data-and-privacy-are-not-antitrust-concerns.

Another constraint is that **lots of data is useful for only a short time**. Thus, **any advantage it confers is temporary. Knowledge that a consumer has been searching for hiking boots is only valuable until she buys a pair**. Economists Anja Lambrecht and Catherine E. Tucker looked at the implications of data for market power and concluded that: “**The** unstable **history of digital business offers little evidence that the mere possession of big data is a sufficient protection for an incumbent against a superior product offering**.”

1. **Data is cheap and widely available**

**Kennedy 19** – Senior fellow at the Information Technology and Innovation Foundation. Former chief economist for the U.S. Department of Commerce.

Joe Kennedy, “Data and Privacy Are Not Antitrust Concerns,” *Information Technology and Innovation Foundation*, 15 October 2019, https://itif.org/publications/2019/10/15/data-and-privacy-are-not-antitrust-concerns.

**A great deal of data is widely available at little cost. Data**, especially personal data, which is the focus of this week’s hearing, **is often not exclusive to a specific company**. Indeed, nothing stops users from sharing their personal information with more than one company. **Data is also nonrivalrous**. Unlike most resources, its use by one party does not diminish its value to anyone else. **Many parties can use the same information**, and **once data is generated the cost of duplicating it is almost zero**.

**‘Slow growth’ is inevitable AND is proof of a strong economy.**

Dietrich **Vollrath 20**, Professor of economics at the University of Houston, "Slow economic growth is a sign of success," USAPP, 02/22/2020, https://blogs.lse.ac.uk/usappblog/2020/02/22/slow-economic-growth-is-a-sign-of-success/.

We’re accustomed to looking at the growth rate of GDP to evaluate the **health of our economy**. Which is why the recent slowdown in growth **appears** so troubling. In the US, GDP growth for 2019 was **2.3%**, meaning it has been nineteen years since growth hit 4%, and nearly as long since it touched **3%**. For the UK the story is similar, as it has been fifteen years since growth hit 3%. In the Eurozone as a whole, growth last came close to 4% in 2000. These slowdowns across developed economies **predates** the financial crisis, and leads to **natural questions**: what went wrong with the economy, and how do we fix it?

But the slowdown we’re observing isn’t something **we can fix** – or that we would want to fix – because the slowdown was never a **consequence of things that went wrong**. Instead, as I show my new book, the slowdown is a **consequence** of things that went right.

From a simple accounting perspective, there are **two main factors** behind slower growth: the **fall in fertility** during the 20th century, and the **shift** of our expenditures **away from goods and towards services**. And both of those explanations can be traced back to economic success.

The fall in fertility had a **significant** impact on economic growth for decades, particularly **in the US**. The baby boom generated a one-time wave of human capital that hit the economy during the middle of the 20th century. As those new workers hit the workforce, the proportion of **workers to population** rose **substantially**, as evidenced by the fall in the youth dependency ratio between 1960 and 1980 (see Figure 1). Combined with the relatively high educational attainment of the baby boomers compared to prior generations, this provided a substantial boost to the growth rate, increasing it around 1.25 percentage points in 1990 compared to immediately after World War II.

Chart, line chart

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As that wave of **human capital** receded, so did the growth rate. Starting in the early 2000s, the old age dependency ratio started to rise (see Figure 1) the inevitable consequence of the **drop** in youth dependency back in the 1960s and 1970s. As workers **aged out of the workforce** – and continue to do so – this **dragged down** the growth rate of the aggregate economy. That 1.25 percentage point boost during the 20th century disappeared in the 21st, explaining most of the slowdown in the US.

But why should we see these demographic shifts as a success? The drop in **fertility** after the baby boom which explains the shifts was driven by **several successes**. **Expanded access to college education** pushed back the age at which people were willing to marry. The opening up of many **professions** to women, along with **growth in overall wages**, meant that it made sense for many women to delay marriage. Finally, advances in contraceptive technology meant it was **possible** for women to take advantage of the new **educational and professional** opportunities that arose. The growth slowdown today is a **consequence** of family decisions made decades ago in response to **rising** living standards and the **expansion** of women’s rights.

The second source of the slowdown, the **shift from goods towards services**, was also driven by success. In the past one hundred years we became **incredibly efficient** at producing goods like clothes, food, furniture, and computers. The consequence was a **steady reduction in the price** of those goods relative to services. We could have used that reduction to buy even more goods than we did, but instead we took advantage of the savings to purchase more services like education, healthcare, and travel. Therefore the composition of our expenditures shifted away from goods and towards services (see Figure 2). We still consume more goods than before; it is just that they got so cheap that their share of our **total expenditure** fell relative to services.

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This had a consequence for overall economic growth, however. Productivity growth in services is lower than for goods. That wasn’t a failure of services in the last few years. It appears to be an inherent quality noted by economist William Baumol in the 1960s. If a restaurant — a service — tried to operate with half their normal staff, you’d complain about the slow service and lack of attention. In comparison, if a manufacturer produced a laptop – a good – with half as much labour, you’d never know. This makes productivity growth harder for services than for goods. As we shifted expenditures towards services, aggregate productivity growth was thus bound to fall. Between the middle of the 20th century and today, that probably shaved another 0.2 to 0.25 percentage points off of the growth rate. But note that this only happened because of the productivity growth we experienced in the first place, a success.

Relative to the successes in the demographic shifts and spending shifts, the usual suspects are not capable of explaining the growth slowdown. Tax rates fell right as the slowdown started, and evidence from across states and industries shows that, if anything, more regulation was associated with faster growth, not slower. Trade with China exploded in the last twenty years, but evidence suggests that this had little effect on growth for the economy as a whole, even though individual regions and industries saw booms or busts. Economy-wide measures of the mark-up of price over cost rose, but it turns out that this didn’t lower growth. The shift of activity to high mark-up industries kept economic growth rates from falling even further than they did, as it meant we produced more valuable products.

If you’re still **uncertain** that the growth slowdown is a **consequence of success**, ask yourself what you’d give up to bring growth back to 4%. We could destroy half of **all our goods**: cars, couches, TVs, laptops, houses, trampolines, and so on. That would lead to a **massive** shift of spending towards goods as we scrambled to replace everything, and we’d see a jump in productivity growth. Alternatively, we could roll back contraceptive rights and women’s participation in the workforce in the hopes of starting a new baby boom. Wait twenty years and we’d have another surge of human capital into the economy. Would either of those be worth it just to see growth hit 4% again, perhaps not until 2040? Assuming the answer is “no”, that tells us the growth slowdown happened because of things that went **right**, things we would not sacrifice.

**Slow growth is okay.**

**Posen 16** Adam S. Posen, Government and Economics PhD from Harvard, economic advisor to the Congressional Budget Office, faculty of the World Economic Forum, consultant for the International Monetary Fund and the United States government. [Why We Need A Reality Check, Reality Check for the Global Economy, Peterson Institute for International Economics Briefing 16-3]//BPS

**Greater confidence** in the world economy’s **resilience** and near-term prospects is **justified**. Market fears about the ability of policy to stabilize growth and promote inflation, if understandable, are **exaggerated** or in some cases **unfounded**. All the more reason then not to allow ourselves to be distracted by a financial market tail wagging the macroeconomic dog. At a fundamental level, most of the major economies, starting with China and the United States, are growing **more sustainably now** than a decade ago, at their slower rates. That growth is **not built** on rising private or public leverage, with the notable exception of China—and even in China some restructuring is under way with ample savings to cushion the process. Even where the situation is not so rosy, many in the markets seem to be confusing strains and suboptimal situations with acute instability, not just for Italian banks and for Brazilian budgets but also for Latin America more generally or for trends in global trade. A **more normal muddling** through with **poor but stable** conditions is a **far better bet**. And where some in the **markets moving prices fear** that normal economic laws have been reversed—that monetary policy is ineffective or that low oil prices are on net harmful—they are **likely to be proven** clearly wrong, as they were previously on inflation and commodity prices. Having some clarity to distinguish between the more solid **underlying economic outlook** and the **shadows thrown by financial puppetry** is **critical** to making the right policy decisions to avoid an **unnecessary recession**.

A combination of **public policies** and **decentralized private-sector responses** to the crisis have **increased our economic resilience**, **diminished** the **systemic spillovers** between economies, and even created some **room for additional stimulus** if needed. Large parts of the **global financial system** are better **capitalized**, **monitored**, and frankly **more risk averse** than they were a decade ago, with less leverage. The riskier parts of today’s global economy are less directly linked to the center’s growth and fi nancing than when the troubles were within the United States and most of Europe in 2008. Trade imbalances of many key economies are smaller, though growing, and thus accumulations of foreign debt vulnerabilities are also smaller than a decade ago. Most central banks are now so committed to stabilization that they are attacked for being too loose or supportive of markets, making them at least unlikely to repeat some policy errors from 2007–10 of delaying loosening or even excessive tightening. Finally, corporate and household balance sheets are far more solid in the US and some other major economies than they were a decade ago (though not universally), and even in China the perceptions of balance sheet weakness exceed the reality in scope and scale.