# 1NC

## T Per Se

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Prohibit means forbid by authority

Merriam-Webster No Date <https://www.merriam-webster.com/dictionary/prohibition> and <https://www.merriam-webster.com/dictionary/prohibiting>

Definition of prohibition 1: the act of prohibiting by authority

Definition of prohibit transitive verb 1: to forbid by authority : ENJOIN

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Prefer it:

#### 1) GROUND---key to link uniqueness and a unidirectional topic. Fringe standards dodge topic links, AND they can pick a broader but more permissive standard, making the topic bidirectional.

#### 2) LIMITS---too many possible standards, each requiring distinct answers, makes the topic unmanagbly large.

## States

#### The 50 states and all relevant sub-national actors should

#### substantially increase prohibitions on anticompetitive business practices by the private sector that prevent litigants from effectively vindicating their statutory causes of action in antitrust suits.

#### coordinate antitrust enforcement through the National Association of Attorneys General’s Multistate Antitrust Task Force

#### Preemption is wrong for arbritration – zero change the cp is overturned

Clopton 18. Zachary D. Clopton. Assistant Professor of Law, Cornell Law School. “Procedural Retrenchment and the State” https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2750&context=facpub

F. State-Enforcement Assessment This Section has outlined the ways in which public enforcement can respond to the Supreme Court's decisions on class actions, arbitration, standing, international law, and personal jurisdiction. Public enforcement substitutes are free from many of the constraints on state courts acting alone. 5 **Public or private attorney general suits can eschew doctrines that push courts to deny class certification or compel arbitration**." 6 Many of these suits also avoid the pull of federal court jurisdiction.4 7 In this way, public enforcement may be particularly meaningful when private claims are subject to removal or compelled arbitration. Federal action may limit state public enforcement, but the requisite federal action is not easy to come by. **First, federal law could preempt state-enforcement efforts.** However, this would require Congress to overcome the presumption against preemption of state law448 and disempower state actors from enforcing the preemptive federal law.44 9 Federal-enforcement actions also could preclude state enforcement by resolving claims or issues.450 Here, the federal statute would have to permit such federal actions, the federal enforcer would have to initiate and resolve the claim, and a court would have to stamp the judgment.451 **In other words, multiple branches of the federal government would need to make concerted efforts for either preemption or preclusion to attach.452**

## Stocks

#### Goldilocks now for stock growth—confidence in corporate earnings are key

Jackson 11/1/21 (Anna-Louise Jackson, Benjamin Curry, Forbes Contributors “November Stock Market Outlook”, https://www.forbes.com/advisor/investing/november-2021-stock-market-outlook/)

So much for those predictions of a market correction in October. The S&P 500 finished the month at an all-time high and surged 6.9%, for its biggest monthly gain of 2021. This benchmark for the U.S. stock market is up more than 22% for the year while the Dow Jones Industrial Average, Nasdaq Composite and Russell 2000 are all up at least 16%.

Although investors are feeling more optimistic about stocks again, that doesn’t mean their reasons for caution have gone away. If anything, earnings season confirmed that the pace of growth has slowed more than economists had expected. Several Big Tech companies reported disappointing earnings results, supply chain issues persist and inflation is now at a 13-year high.

Third quarter earnings season is still underway, and earnings reports have generally been strong. More than half of the members of the S&P 500 have reported results, with 82% of them beating analyst estimates. Some of the seemingly bad news—like sluggish economic growth—could actually benefit stocks, particularly if the Federal Reserve is less aggressive with raising interest rates in 2022, notes Ernesto Ramos, chief investment officer of BMO Global Asset Management. And yet, the inflation picture could put pressure on central bankers to raise rates faster, he adds.

“There’s a whole class of contradicting or opposing forces in the market,” Ramos says, adding that time will tell “who ends up winning the contest.”

November kicks off with a key meeting for the Federal Reserve, and ends with the all-important holiday shopping season in full swing. Here’s what to watch out for in markets.

Will the Fed Begin Tapering?

Federal Reserve policymakers are scheduled to convene for their second-to-last meeting of the year on Nov. 2 and 3, and investors broadly expect that the Fed will announce plans to begin tapering bond purchases. Since mid-2020, the Fed has been purchasing $120 billion of Treasury and mortgage-backed securities each month to help support the economy amid the Covid-19 pandemic.

“Obviously, they’ve signaled and signaled and signaled and signaled that they’re going to do tapering, and this time they really mean it,” says Barry James, CEO and portfolio manager of James Investment Research. While he believes the Fed is “highly likely” to begin tapering in November, that news shouldn’t come as a surprise or cause much volatility. Back in 2013, a similar such announcement rocked markets and caused U.S. Treasury yields to surge higher in what came to be called the taper tantrum.

If the Fed begins tapering its quantitative easing (QE) program as planned, it could stop buying bonds altogether by mid-2022, Ramos notes. Even though the pace of economic growth has slowed, this type of supplementary support from the Fed is no longer necessary and has contributed to higher inflation, he adds. “If for no reason than to temper inflation, the Fed needs to remove QE,” he says.

Earnings Season as a Read on Economic Growth

The U.S. economy grew at a pace of just 2% in the third quarter, a big slowdown from the prior four quarters and less than economists were forecasting. The second estimate for third quarter gross domestic product (GDP) is scheduled for release on Nov. 24, but investors will continue monitoring corporate earnings for other clues about the pace of economic growth.

“We’re very keen on earnings releases and the guidance the companies give, and so far those have come in pretty strong,” Ramos says. James agrees that earnings season has by and large been “very strong” but adds that some commentary from company executives reinforces what that most recent GDP report showed—that the economy is growing at a much slower pace than it was earlier in the year.

And the market will get the much-watched monthly jobs report for October on Nov. 5, which could signal whether the economy is picking up some steam in the fourth quarter. “Hopefully this slowdown is transitory and growth comes back a little higher,” Ramos says. “The deceleration has been pretty dramatic.”

Even so, James points to two positive trends, particularly as the all-important holiday season approaches: The latest surge in both the number of cases and deaths related to the Covid-19 pandemic appears to be lessening, and consumers and businesses have a lot of money in accumulated savings. “The framework for the economy is in pretty good shape.”

Consumer confidence is holding steady with the pandemic average, and 53% of respondents believe the economy will recover quickly once pandemic-related restrictions are lifted, according to the Oct. 22 Ipsos-Forbes Advisor U.S. Consumer Confidence Tracker.

Meanwhile, investors actually welcomed the latest GDP report that showed a slowdown in economic growth. “It removes some pressure from the Fed to raise interest rates,” Ramos says. Traders currently see a nearly 66% probability of at least one rate hike by mid-June 2022, up from a likelihood of about 21% one month ago. The prospect of lower interest rates for longer is good for stocks, Ramos adds.

#### Aff is a death knell for the market

Hennig 16 (Steffen, Steffen is a founding partner of Fideres with over 18 years’ experience in structured products and complex derivatives across all major asset classes. Steffen is responsible for the quantitative analysis of consulting mandates and has handled various complex benchmark manipulation cases, including LIBOR and ISDAfix, and cases relating to the mis-selling of structured product and derivatives. Prior to founding Fideres, he held a senior position at The Royal Bank of Scotland were he moved to after working for 5 years at Deutsche Bank. Steffen holds a master-level degree in Mathematics from the University of Erlangen, the Certificate of Advanced Studies in Mathematics (Part III) from the University of Cambridge and an MSc in Financial Engineering and Quantitative Analysis from the ICMA Centre at the University of Reading. “Class Action Lawsuits And Stock Prices”, https://fideres.com/publications/class-action-lawsuits-and-stock-prices)

Stanford Law School maintains an open database of securities-related class action filings, a collection of some four thousand cases, from 1995 up through the present.Fideres has expanded on a 2010 paper by Rob Bauer and Robin Braun which used this data to evaluate the effect of class action filings on share price over time. Their main finding was that in the months surrounding a class action lawsuit, stock price drops steeply prior to the filing date. Bauer and Braun found that average post-filing price performance varies widely, depending on the type of allegation brought forward and the time horizon examined. Our own analysis of the Stanford class action data has replicated these findings with a sample size of 1640 class actions, close to triple the sample size of Bauer and Braun. We have refuted another of their findings, that a small price recovery of 2%-3% follows the filing date. This dataset has also allowed us to explore some intriguing new directions. For example, we have developed a model using machine learning that predicts a company’s short term price trajectory after a class action filing from an automatic analysis of the filing text. A fuller explanation of this model is beyond the scope of this blog post. However, a comparison of average price performances, before and after the filing date of the class action, has yielded interesting results in its own right. Stock prices decline an average of 13% in the month prior to filing The chart below tracks the overall price trend around a class action filing. The filing date of the lawsuit is centred at ‘0’ for each case, with the relative share price of the defendant firm tracked for thirty days before and after. The average price movement is plotted below. Fideres’ findings corroborate the work of Bauer and Braun: share price declines predictably leading up to the filing date, as the negative news about an impending class action case hits the market. This is visible in the clearly declining average price represented on the left-hand side of the graph. The end of the average drop seems to coincide with the filing date. This phenomenon is due to the fact that the majority of cases are filed very shortly after the end date of the class period, not because the filing stops the decline in price. Post filing performance is widely dispersed The flat post-filing stock price trend visible in the above chart disguises a wide variety of outcomes. The plot below illustrates this point. The roughly symmetric dispersion of price paths should not be confused with price stability. Relationship between equity market performance and number of filings Anecdotal evidence suggests an inverse relationship between the performance of the equity market and the volume of 10b-5 class action filings. More stocks are falling in value during periods of recession than during periods of growth. There may be a greater short term temptation for managers to resort to fraudulent activities to disguise poor performance, as well as greater incentive for investors to seek out evidence of such practices and file cases against them. As a result, we might expect to see a larger number of filings during bear markets. Fideres’ analysis finds little support for this theory in the price data. The magnitude of an annual drop in the S&P500 corresponded very weakly with a rise in the number of class action lawsuits between 1996 and today. In periods of significant market downturn, for example 2008 and 2001, there is a marked increase in the number of filings. However, the magnitude of the increase is not proportional to the size of the downturn.

#### Bull market driven by exuberance is tenuous—the plan causes a crash and recession

Roberts 11/7/21 (Lance, Seeking Alpha, “Did The Fed Just Set The Stock Market Up For A Crash?”, https://seekingalpha.com/article/4466775-did-the-fed-just-set-the-stock-market-up-for-a-crash)

Market Back To Extreme Overbought As noted last week, the more significant concern remains the underlying technical condition of the market. While the rally has been impressive, rising to all-time highs, the market is now back to more extreme overbought levels. Furthermore, our "money flow buy signal" is near a peak and slightly triggered a "sell signal." However, with the MACD still positive, the signal suggests a consolidation rather than correction. However, a confirming MACD often aligns with short-term corrections at a minimum. Therefore, we will watch that signal closely. Also, this entire rally from the recent lows has been on very weak volume, which suggests a lack of commitment. Currently, the bulls control the market as we are in the middle of a "buying stampede." Historically, buying stampedes last on average between 7 and 12 days. Logically, buying stampedes always get followed by selling stampedes of similar lengths. However, there are times these stampedes can last much longer than expected. We are currently in one of those longer-term periods. As shown below, the S&P 500 has only been down in 2 of the last 18 days. How unusual is that? In the previous 20 years of the S&P 500, the number of times the market accomplished such a feat was precisely ZERO. Of course, that stampede gets driven by exuberance. Irrational Exuberance In our daily market commentary, we quoted a piece of analysis from Chartr.com. To wit: "Every week it feels like we get a new headline about financial markets doing something unusual. Just this week we've had:" A "squid game" crypto token falling 99.99% in a few minutes. Tesla adding hundreds of billions of dollars in value over a deal with Hertz that hasn't even been signed. US stock markets hitting fresh all-time highs. "All of which begs the question: are we in a bubble?" So where are we now? The latest CAPE ratio for the S&P 500 Index is 38x. That's pretty close to the all-time record, which was 44x back in 2000. For those with a short memory, that was just before the dotcom bubble burst and stock markets (particularly tech) crashed hard." As we have noted previously, valuations, by themselves, are a terrible timing metric. However, they tell us a great deal about expected future returns and current market psychology. When it comes to "irrational exuberance," there are other indicators better at revealing speculation in the markets that have preceded a stock market crash. The CNN Fear/Greed index is now at extreme greed territory. Furthermore, the demand for protection against a stock market crash (put options) fell to new lows. Historically, such periods of "speculative" activity led to a minimum of short-term stock market corrections, but a crash is not beyond the realm of possibilities. As noted above, with the market extremely overbought, speculative activity surging, and conviction weak, taking some actions to rebalance and manage risk is warranted. However, for now, investors have "no fear" as they believe the Fed will continue to remain accommodative. The Fed's Third Mandate Takes Priority My co-portfolio manager, Michael Lebowitz, made an important observation on Thursday. "Jerome Powell made it clear the Fed is in no hurry to raise interest rates. 'We don't think it's time yet to raise interest rates. There is still ground to cover to reach maximum employment, both in terms of employment and in terms of participation.' The Fed's reason is the employment picture is not back to pre-pandemic levels. In our mind, there is plenty of evidence such as the outsize quits rate, rising wages, and the record number of job openings that scream the labor market is very healthy. Does Mr. Powell disagree with our assessment, or is there more to the Fed's policy stance? We believe he answered the question at Wednesday's press conference. Per Jerome Powell: 'The Fed's policy actions have been guided by our mandate to promote maximum employment and stable prices for the American people along with our responsibilities to promote the stability of the financial system.'" The last sentence is the most important. According to the Federal Reserve's Congressional authorization, the Fed has only TWO mandates: price stability (inflation) and full employment. The third mandate is a self-imposed mandate from Ben Bernanke, who was the Fed Chairman in 2010: "This approach eased financial conditions in the past and, so far, looks to be effective again. Stock prices rose, and long-term interest rates fell when investors began to anticipate the most recent action. Easier financial conditions will promote economic growth. For example, lower mortgage rates will make housing more affordable and allow more homeowners to refinance. Lower corporate bond rates will encourage investment. And higher stock prices will boost consumer wealth and help increase confidence, which can also spur spending." Fed Opts To Keep Markets Elevated Jerome Powell ignored surging inflationary pressures and a robust job market in favor of supporting asset prices. With valuations surging, speculative activity rising, and investors heavily leveraged, the Fed faces a difficult choice. There is already a decoupling of markets from consumer confidence. A stock market crash would further devastate confidence pushing the economy into recession. That is the risk the Fed cannot afford.

#### Nuke war

Jomo Kwame Sundaram & Vladimir Popov 19. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

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

Crisis responses limited

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

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

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

From bust to bubble

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

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

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

## T Prohibition

#### Anticompetitive business practices are actions conducted by businesses

Ivy Wigmore No Date. Content Editor on WhatIs.com, the IT encyclopedia engine behind TechTarget’s large network of technology media websites. “DEFINITION anti-competitive practice.” https://whatis.techtarget.com/definition/anti-competitive-practice

An anti-competitive practice is an action conducted by one or more businesses to make it difficult or impossible for other companies to enter or succeed in their market. The market distortion resulting from anti-competitive practices can result in higher prices, poorer service and a stifling of innovation, among other effects. As such, anti-competitive practices are illegal in most countries and are prohibited under antitrust law in the United States.

#### Prohibitions are any proscribed conduct in antitrust.

Margaret V. Sachs 01. Robert Cotten Alston Professor of Law, University of Georgia School of Law. A.B. 1973, Harvard University; J.D. 1977, Harvard Law School. “Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of The Securities Exchange Act Of 1934”. https://www.illinoislawreview.org/wp-content/uploads/2001/06/Sachs.pdf

Many federal regulatory statutes are hybrid statutes—their prohibitions1 are enforceable in criminal actions as well as in private or govern- mental civil actions (or both).2 Leading examples include the Sherman Antitrust Act,3 the Clean Water Act,4 the Truth in Lending Act,5 the False Claims Act,6 the Racketeer Influenced Corrupt Organizations Act,7 the Federal Food, Drug and Cosmetic Act,8 and the Securities Exchange Act of 1934.9 Hybrid statutes present an important question that has divided courts but received virtually no attention from legal scholars—can the same prohibition mean different things in different enforcement contexts?10

---FOOTNOTE 1 STARTS---

1. For purposes of this article, the term “prohibition” refers to the part of the statute that identifies proscribed conduct. The plaintiff must prove that the defendant engaged in this conduct in order to establish a prima facie case.

---FOOTNOTE 1 ENDS---

#### Violation---Limiting barriers to antitrust suits doesn’t change if conduct is prohibited.

#### Vote neg on predictable limits and ground---infinite adjudication standards without differences in outcome moot topic disads and create unpredictable process advantages.

## Court Ptx

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

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

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

Well, yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CP

#### The United States federal government should

#### Maintain the current scope of its antitrust laws

#### Adopt and uphold a delegation-policing doctrine to arbitration agreements

#### Cp changes arbitration but does not restrict class actionss

Shapiro 2018. Matthew A. Shapiro. Associate in Law, Columbia Law School. “Delegating Procedure” <https://www.jstor.org/stable/pdf/26419422.pdf?refreqid=excelsior%3Af3ef93d4dc2c84731654e6252a67adb9>

Both sets of concerns have a lot of merit, but they have been fully aired in the literature, as have the resulting proposals to dramatically curtail arbitration.342 Notwithstanding the extensive scholarly criticism, the Supreme Court has steadfastly adhered to its decades-old jurisprudence upholding the enforceability of adhesive arbitration clauses against individual consumers and employees.343 What proponents of the delegation critique have missed is that civil procedure contains the seeds of another kind of response to arbitration’s delegation problem, one with its own, distinct logic. **Even if courts continue to enforce arbitration clauses** that many scholars consider problematic, **we should empower courts to repudiate the abuses of delegated state power** **that occur during arbitration after the fact**. **A delegation-policing** approach holds promise notwithstanding the significant differences between arbitration and ordinary civil litigation. The power asymmetries between the parties do indeed tend to be more pronounced in arbitration than in civil litigation, and arbitration involves the wholesale delegation of the state’s dispute-resolution powers to privately chosen arbitrators, in contrast to the piecemeal delegations in civil litigation. In light of all this, many scholars worry that sophisticated parties can use arbitration to effectively suppress legal claims, making arbitral proceedings so one-sided that no victim of wrongdoing would bother to invoke them to seek redress.344 But adopting delegation-policing doctrines might still go at least some way toward addressing this concern. **If courts reviewed arbitral awards and proceedings more rigorously before enforcing the awards**—if arbitration’s delegations were better policed— **the prospect of such review might have a feedback effect of rendering those processes less one-sided** in many cases. It might then become more worthwhile for would-be plaintiffs to actually go through with an arbitration **when their claims were subject to a valid arbitration clause**. **Greater policing ex post**, in short, **might help to make arbitration fairer ex ante.** To be clear, such ex post delegation-policing strategies may be insufficient to resolve some of the biggest controversies surrounding arbitration. It may be impossible, for example, to address the problems posed by class-arbitration bans without prohibiting them ex ante. Nonetheless, we can combat a significant amount of abuse by having courts police arbitration ex post, through analogues of civil procedure’s delegationpolicing doctrines.

## Growth

#### Broad-based growth is strong

Reuters 11/5/21 (“Strong U.S. payrolls brighten economic outlook; millions still missing from workforce”, https://www.reuters.com/business/us-job-growth-picks-up-october-unemployment-rate-falls-46-2021-11-05/)

WASHINGTON, Nov 5 (Reuters) - U.S. employment increased more than expected in October as the headwind from the surge in COVID-19 infections over the summer subsided, offering more evidence that economic activity was regaining momentum early in the fourth quarter. But the brightening outlook was somewhat clouded by millions of unemployed Americans who remained at home even as companies are boosting wages, generous government-funded jobless benefits have ended and schools have reopened for in-person learning. The labor force is down 3 million from its pre-pandemic level. "The dog days of summer are long gone and the U.S. economy is gearing up for an acceleration in growth and activity in the fourth quarter," said Brian Bethune, a professor of practice at Boston College. "Demand for labor is strong, but there is an issue with matching people with the jobs that are available." The Labor Department's closely watched employment report's survey of establishments on Friday showed nonfarm payrolls increased by 531,000 jobs last month. Data for September was revised higher to show 312,000 jobs created instead of the previously reported 194,000. Economists polled by Reuters had forecast payrolls rising by 450,000 jobs. Employment is 4.2 million jobs below its peak in February 2020. Job growth has averaged 582,000 per month this year. President Joe Biden hailed the acceleration after two months of moderate gains, saying the nation needed to "keep driving vaccinations up and COVID down," for "our economy to fully recover." Biden said vaccines had "made the economy the envy of the world." Leisure and hospitality businesses led the broad-based increase in hiring last month, with 164,000 jobs created. Payrolls also rose in professional and business services, transportation and warehousing, healthcare, wholesale trade, financial activities as well as mining sectors. Manufacturing added 60,000 jobs, with 28,000 of the positions at motor vehicle manufacturers, an encouraging sign for an industry that has been hobbled by a global semiconductor shortage. Construction payrolls increased by 44,000 jobs. But state and local government education shed 65,000 jobs. The government said pandemic-related staffing fluctuations in education have distorted normal seasonal patterns, making the changes in employment in the sector challenging to interpret. Shortages of bus drivers and other support staff have been well documented. Overall government payrolls fell by 73,000 jobs. The job gains joined rising consumer confidence and services sector activity in painting a more favorable picture of the economy, after the Delta variant of the coronavirus and economy-wide shortages of goods restricted growth in the third quarter to its slowest pace in more than a year. The Federal Reserve on Wednesday announced it would this month start scaling back the amount of money it is pumping into the economy through monthly bond purchases. read more Stocks on Wall Street rallied on the report, lifting the main indexes to record highs. The dollar rose against a basket of currencies. U.S. Treasury yields fell. UNEMPLOYMENT RATE FALLS "The solid gain in employment is consistent with a strong quarter for output growth," said Michael Feroli, an economist at JPMorgan in New York.

#### Plan causes premature rate hikes – collapses global recovery and leads to conflict

Andreas Becker 21. Based in the Dusseldorf office for PwC, he is a Senior Executive Advisor at Strategy& Germany. With more than 30 years of industry experience, Andreas is a member of our Financial Services practice in Europe and focuses on strategy and transformation projects in the areas of corporate and wholesale banking. “'Emerging economies stymied by rising interest rates and COVID'” <https://www.dw.com/en/emerging-economies-stymied-by-rising-interest-rates-and-covid/a-59037119>

The more a country is intertwined with the global economy — whether through industry, trade or tourism — the greater the potential damage from the COVID-19 pandemic. Germany and other rich countries have tried to mitigate this damage with the help of huge aid and economic stimulus packages. **But emerging economies worldwide** **are** mostly **not in a position to mobilize the same amount** of **resources**. "They lack the resources," said Klaus-Jürgen Gern, an expert on business cycles and growth at the Kiel Institute for the World Economy (IfW). "Measured against overall economic output, their government revenues are usually lower. They also cannot borrow on the international capital markets to the same extent as the industrialized countries." Fear is on the rise As the COVID-19 pandemic spread in spring 2020, many feared a major economic catastrophe. But it has so far failed to materialize. At that time, investors withdrew their capital from emerging markets at record speed, threatening to bleed the countries dry financially. But after the initial shock, the situation returned to normal. Global financial institutions like the International Monetary Fund (IMF) and the World Bank have provided a lot of money and played an important role in stabilizing the markets. "In this way, they allayed investors' fears that sovereign bankruptcies could occur as a result of the crisis," Gern told DW. Watch video01:23 OECD projects world economy could bounce back by 2023 **In the meantime, however, fear is once again on the rise**. As inflation increases in the United States, the Federal Reserve could raise its interest rates in the foreseeable future. "**For emerging markets, there is then a risk of a sharp rise in the cost of capital and a flight of capital**," Clemens Fuest, head of the Munich-based Ifo Institute, told DW. Interest rate concerns This has already been witnessed several times in the years following the 2007-08 financial crisis, for example in 2012-13 or 2015-16. **When capital is withdrawn from emerging markets, it causes their currencies to crash and there is a lack of money for investment.** Overall, however, these risks are lower today than in the past, partly because emerging markets now have more experience in dealing with the problem, said Fuest. Nevertheless, IfW researcher Gern points out that **emerging economies have "dramatically increased" their debt over the past decade**. "Before the 2007-08 financial crisis, emerging markets' public debt averaged about 30% of economic output. Now it's closer to 65%," he said. **So, as interest rates rise, an ever increasing share of government revenues must be used to pay back the debt.** Some emerging market economies are already facing severe problems. The Argentine peso, for example, has lost around a third of its value against the US dollar since the start of the pandemic, and inflation is running at around 50%. A big minus The economies of major emerging markets such as India, Mexico and South Africa also contracted by around 7-8% in 2020. Unlike in the past, most of these countries were unable to decouple themselves from the global trend and failed to act as growth engines. According to IMF estimates, the economic slump in emerging economies excluding China was even greater than in the industrialized countries. Watch video08:25 What damage did COVID-19 do to the economy? The crisis has also shown that the once celebrated group of BRICS countries (Brazil, Russia, India, China and South Africa) hardly has anything in common anymore. Of the group, only the Chinese economy was able to grow last year. In Russia, the economy was down 3%, while in Brazil a 4% decline was compounded by high infection and death rates due to COVID and a populist president, Jair Bolsonaro, who is putting the country's democratic institutions under pressure. BRICS' star fades Next year, the IMF estimates the Brazilian economy will grow by less than 2%. It is a devastating figure for a country once seen to be on the threshold of becoming an industrialized nation. A lack of political stability and often a lack of legal certainty are the reasons why the BRICS' star has faded, Michael Hüther, head of the Institute of the German Economy (IW), told the Handelsblatt newspaper. The days "when all you had to do was shout BRIC and investors jumped" are over, he said. The forecast is similar for South Africa whose problems have been compounded by political unrest and severe lockdowns. "South Africa is deeply integrated into global value chains and thus its economy is vulnerable in the same way European economies are," said Christoph Kannengiesser, head of the German African Business Association. Nevertheless, for German companies operating in the country, there is no reason to withdraw, the expert stressed. "German industry, which is heavily invested there, is committed to South Africa as a business location and is basically optimistic," Kannengiesser told DW. Watch video02:42 African economies crash as delta variant runs rampant Recovery depends on vaccines How quickly these economies can recover depends on the authorities' ability to control the COVID health crisis. But because of a lack of vaccines, inoculation rates in Africa have so far been extremely low, while at the same time the US and the EU are mulling over booster vaccines for their populations. Kannengiesser believes there's no point in discussing whether this is fair. Rather, he said, the aim must be to make the African continent less dependent on aid from others. "Africa must be put in a position where it can produce the vaccines it needs by itself. This is not a question of patents, but of production capacities." However, boosting production capacity cannot happen overnight. In the meantime, Germany should consider donating surplus vaccines not only through the international COVAX initiative, but also bilaterally, the expert underlined, adding that COVAX has faced great difficulties in quickly supplying vaccines to countries that need them urgently.

#### Evidence is anecdotal at best

Asker & Nocke 21 (John Asker Department of Economics University of California, Los Angeles Volker Nocke Department of Economics University of Mannheim Germany COLLUSION, MERGERS, AND RELATED ANTITRUST ISSUES, Working Paper )

Economists’ understanding of the propensity of cartels to deter entry rests largely on anecdotes, theoretical possibility results (as in Wiseman), and a small number of empirical studies. If entry is commonly deterred by cartels, then the harms from collusion may persist for longer than would otherwise be expected, and it also would change how we view the plausible economic costs likely to arise from collusion. In particular, costs from the misallocation of production to higher-cost producers may be accentuated, to the extent that more efficient producers are deterred, or to the extent that less efficient entrants are able to survive under the umbrella of cartel pricing (see Carrera and Titov, 2019, and Asker et al., 2019). The relationship between collusion and entry remains one of the more significant gaps in economists’ understanding of cartel activity.

#### Plan is worse for them—

#### 1) Liability is too high--

Nuechterlein 21 (Jonathan E. Nuechterlein is co-leader of Sidley’s Telecom and Internet Competition practice focusing on telecommunications law, antitrust and appellate litigation, and is the former General Counsel of the Federal Trade Commission, Timothy J. Muris is former chairman of the FTC and former director of the Bureau of Consumer Protection and director of the Bureau of Competition, 3-2021, “Private Antitrust Remedies: An Argument Against Further Stacking the Deck”, U.S. Chamber Institute for Legal Reform, https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf)

There is no basis for suggestions that private antitrust remedies are not strong enough and need to be turbocharged by new pro-plaintiff legislation.23 The regime for U.S. private antitrust remedies is already aggressively pro-plaintiff when compared to remedies available in comparable non-antitrust cases.

Pursuing Deterrence, Not Overdeterrence

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

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain:

One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

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

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

That, however, is precisely what the Report advocates. It reflects the ascendant populist strain in American antitrust rhetoric, which claims that “Chicago School” conservatives in the 1970s and 1980s “ushered in a new ideology” that hobbled effective antitrust enforcement.28 The Report implies that today’s procedural guardrails against antitrust litigation abuse arise from the same political movement, and it advocates overruling half a century of judicial precedent. Among other legislative proposals, the Report calls for (1) “[e]liminating court-created standards for ‘antitrust injury’ and ‘antitrust standing’” recognized in Brunswick and similar cases;29 (2) “[l]owering the heightened pleading requirement introduced in Bell Atlantic Corp. v. Twombly”;30 and (3) “eliminating forced arbitration clauses.”31 Each of those proposals is misconceived.

#### 2) Arbitration is more effective and results in merit-based suits succeeding. The aff collapses it.

Nuechterlein 21 (Jonathan E. Nuechterlein is co-leader of Sidley’s Telecom and Internet Competition practice focusing on telecommunications law, antitrust and appellate litigation, and is the former General Counsel of the Federal Trade Commission, Timothy J. Muris is former chairman of the FTC and former director of the Bureau of Consumer Protection and director of the Bureau of Competition, 3-2021, “Private Antitrust Remedies: An Argument Against Further Stacking the Deck”, U.S. Chamber Institute for Legal Reform, https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf)

The Value of Private Arbitration

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

FIRST

Nearly one hundred years after passage of the Federal Arbitration Act of 1925,43 private arbitration has proven itself as a fair, less expensive, and speedier alternative to the court system for adjudicating business disputes of all kinds, including antitrust claims. Indeed, recent research suggests that consumers tend to fare better, and receive compensation far sooner,

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when they proceed via arbitration rather than in court.44 In all events, the process is hardly “tilted in … favor” of antitrust defendants.45

SECOND

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

THIRD

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

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

Conclusion

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

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

## Healthcare

#### Consolidation driven by increased regulation not monpoly

Cannon 5/5/21 (Michael, Michael F. Cannon is the Cato Institute’s director of health policy studies. “What’s Driving Provider Consolidation?”, https://www.cato.org/blog/whats-driving-provider-consolidation)

Provider consolidation is a concern because greater consolidation means more market power and higher prices. I see three main drivers behind provider consolidation.

The first is government regulation generally. Regulation has high fixed costs but low marginal costs. The larger a firm is, the more it can spread those fixed costs and minimize their impact on price per unit. One of the unintended consequences of government regulation is imposes relatively greater costs on smaller producers, especially new entrants, and that it rewards scale. So the more you regulate an industry, the more consolidation you’ll get.

The second is government encouragement of excessive insurance. Various government policies encourage more comprehensive health insurance than consumers would choose on their own. That leaves consumers paying for more medical care via health insurance than they otherwise would. To the extent consumers pay via insurance, they don’t really care about prices. Insurers care about prices somewhat, but they face significant constraints when trying to negotiate lower prices or force providers to compete on price. Insurers’ main tool in this regard is to exclude a provider, drug, or device from coverage in order to wrangle greater price concessions. But insurers and providers both know that enrollees aren’t even purchasing their insurance with their own money, and therefore won’t see the savings from those strategies. Both insurers and providers therefore know that enrollees will rebel against any insurer that excludes the drug, doctor, or hospital enrollees prefer. In such an environment, providers know that if they consolidate, they can demand higher prices from insurers, who essentially have nowhere to go. So over‐​insurance rewards consolidation too.

The third is government pricing errors. Medicare often pays more for the same service when the patient receives it in a hospital than they do when the patient receives it in a physician’s office. As a result, hospitals buy up physician practices to capture those higher payments, which they then split with physicians. As Cato adjuncts Charles Silver and David Hyman write in Overcharged, “How do hospitals profit by turning some (but not all) independent physicians into employees? When you look at the physicians who become hospital employees, two things stand out. First, many of these doctors provide services that generate payments known as ‘site‐​of‐​service differentials’ that make it advantageous for hospitals to hire them. Second, many of these physicians refer patients to hospitals for profitable treatments. Some do both.” (The latter hearkens back to government encouragement of excessive insurance.) Often, the patient receives the service in a doctor’s office but because that physician group “affiliates” with a hospital, patients and/​or taxpayers end up paying more.

#### Even high consolidation is sustainable. Leverage is falling since acquisitions already. Underlying fundamentals are strong and the major vulnerability is *event risk* which the plan creates.

Neuburger et al. 17 (June, Megan Neuburger, Britton Costa Robert Kirby, Caitlin Blalock Benjamin Immordino. All are CFAs working for Fitch Ratings, one of the three largest credit rating agencies in the US. “The Checkup: High-Yield Healthcare Handbook”, available to Fitch Ratings subscribers)

Debt/Earnings = 4.6:1.

Welcome to the Checkup: This is the fifth annual edition of The Checkup. The report includes analysis of the business profiles and capital structures of 18 of the largest issuers of high-yield debt in the U.S. healthcare industry. The companies included in this report have a cumulative $155 billion of debt outstanding, including high-yield bonds and bank loans, up from $148 billion as of last year’s publication. Healthcare Providers Dominate List: The group of companies profiled in The Checkup is diverse, representing the healthcare provider, specialty pharmaceutical, medical device and diagnostics subsectors. Ratings and Credit Opinions on these companies are concentrated in the ‘B’ and ‘BB’ categories and 22% of the sample currently has a Negative Rating Outlook, which is higher than in past years. Healthcare providers are the most heavily represented in this group, comprising 11 of the 18 companies profiled. Median FCF Generation Drops: The group has a median LTM FCF (CFO minus capex and dividends) margin of 4.1%, down from 4.8% a year ago. Many of the pharmaceutical and medical device manufacturers produced FCF margins stronger than the median while most of the healthcare providers produced FCF close to or below the median; four of the 18 companies posted negative FCF in 2016, with two of those being close to break-even. M&A Drives Higher Leverage: Median leverage (total debt to EBITDA) was higher at the end of 2016 versus the prior year, rising to 5.7x from 4.9x. Much of this is temporary since it is due to the timing of acquisitions; Fitch Ratings forecasts normalized median leverage of 4.6x at the end of 2017. Median interest coverage remains solid but deteriorated to 4.4x from 5.1x a year ago. Financing terms remain favorable, but higher interest expense on unhedged floating-rate debt exposure could be a headwind to interest coverage in 2017–2018. 2018 Maturities Largely Addressed: Community Health Systems, Inc. (CHS), Valeant Pharmaceuticals International, Inc. (VRX) and Select Medical Holdings Corporation faced large maturities in 2018. Despite concerns about the operating outlook and divestiture plans of VRX and CHS, all three were able to refinance this debt early in 2017. Heavy Hospital Company Maturities: The six acute care hospital companies in the group represent 71% of bonds and loans maturing for all 18 companies in 2017–2019. The median percentage of total debt in the capital structure maturing through 2019 is 20% for the six hospital companies, versus 7% for the group of 18 companies. Amongst the hospitals, only Quorum Healthcare Corp. and LifePoint Health, Inc. have light near-term maturity schedules, with almost no debt coming due in the next two years. Solid Fundamental Outlook: Fitch sees the U.S. leveraged healthcare sector facing low risk of deteriorating fundamentals but high levels of event risk driven by political and regulatory uncertainty. Fundamentals are solid relative to some other corporate sectors, with strong organic demand growth driven by demographics and innovation, and Fitch is forecasting low or mid-single-digit organic EBITDA growth for most of these companies in 2017–2018, but headline risk will be a persistent backdrop.

#### Burnout and variation check

York 14 (Ian, head of the Influenza Molecular Virology and Vaccines team in the Immunology and Pathogenesis Branch of the Influenza Division at the CDC, PhD in Molecular Virology and Immunology from McMaster University, M.Sc. in Veterinary Microbiology and Immunology from the University of Guelph, former Assistant Prof of Microbiology & Molecular Genetics at Michigan State, “Why Don't Diseases Completely Wipe Out Species?” 6/4/2014, http://www.quora.com/Why-dont-diseases-completely-wipe-out-species)

But mostly diseases don't drive species extinct. There are several reasons for that. For one, the most dangerous diseases are those that spread from one individual to another. If the disease is highly lethal, then the population drops, and it becomes less likely that individuals will contact each other during the infectious phase. Highly contagious diseases tend to burn themselves out that way. Probably the main reason is variation. Within the host and the pathogen population there will be a wide range of variants. Some hosts may be naturally resistant. Some pathogens will be less virulent. And either alone or in combination, you end up with infected individuals who survive. We see this in HIV, for example. There is a small fraction of humans who are naturally resistant or altogether immune to HIV, either because of their CCR5 allele or their MHC Class I type. And there are a handful of people who were infected with defective versions of HIV that didn't progress to disease. We can see indications of this sort of thing happening in the past, because our genomes contain many instances of pathogen resistance genes that have spread through the whole population. Those all started off as rare mutations that conferred a strong selection advantage to the carriers, meaning that the specific infectious diseases were serious threats to the species.

#### No AI impact

Yann Lecun 17, Director of AI Research at Facebook and Professor at NYU, 2-9-2017, "Could Artificial Intelligence Ever Become A Threat To Humanity?," Forbes, https://www.forbes.com/sites/quora/2017/02/09/could-artificial-intelligence-ever-become-a-threat-to-humanity/#5b626a112142

I don’t think at AI will become an existential threat to humanity. I’m not saying that it’s impossible, but we would have to be very stupid to let that happen. Others have claimed that we would have to be very smart to prevent that from happening, but I don’t think it’s true. If we are smart enough to build machine with super-human intelligence, chances are we will not be stupid enough to give them infinite power to destroy humanity. Also, there is a complete fallacy due to the fact that our only exposure to intelligence is through other humans. There are absolutely no reason that intelligent machines will even want to dominate the world and/or threaten humanity. The will to dominate is a very human one (and only for certain humans). Even in humans, intelligence is not correlated with a desire for powe

r. In fact, current events tell us that the thirst for power can be excessive (and somewhat successful) in people with limited intelligence. As a manager in an industry research lab, I’m the boss of many people who are way smarter than I am (I see it as a major objective of my job to hire people who are smarter than me). A lot of the bad things humans do to each other are very specific to human nature. Behavior like becoming violent when we feel threatened, being jealous, wanting exclusive access to resources, preferring our next of kin to strangers, etc were built into us by evolution for the survival of the species. Intelligent machines will not have these basic behavior unless we explicitly build these behaviors into them. Why would we? Also, if someone deliberately builds a dangerous and generally-intelligent AI, other will be able to build a second, narrower AI whose only purpose will be to destroy the first one. If both AIs have access to the same amount of computing resources, the second one will win, just like a tiger a shark or a virus can kill a human of superior intelligence.

# 2NC

## CP

#### It’s distinct and doesn’t link to net benefit

Shapiro 2018. Matthew A. Shapiro. Associate in Law, Columbia Law School. “Delegating Procedure” <https://www.jstor.org/stable/pdf/26419422.pdf?refreqid=excelsior%3Af3ef93d4dc2c84731654e6252a67adb9>

Section IV.B begins to take up that task. This Article’s approach focuses less on the enforceability of arbitration clauses and more on the reviewability of arbitral proceedings and awards. **Whereas holding broad classes of arbitration clauses unenforceable effectively restricts private parties’ access to arbitration’s delegations** **before any abuse has occurred**, **reviewing arbitral proceedings and awards allows courts to police those delegations for abuse after the fact**—the primary strategy civil procedure employs with respect to the delegations in ordinary civil litigation. There may indeed be compelling reasons to severely restrict access to arbitration’s delegations ex ante. But short of that, the lesson of civil procedure’s delegations is that many of the concerns about delegated state power in arbitration can be addressed by policing arbitration’s delegations for abuse ex post.

#### Their criticisms of arbitration assume the status quo

Shapiro 2018. Matthew A. Shapiro. Associate in Law, Columbia Law School. “Delegating Procedure” <https://www.jstor.org/stable/pdf/26419422.pdf?refreqid=excelsior%3Af3ef93d4dc2c84731654e6252a67adb9>

While it is important to recognize the differences among these various **criticisms of arbitration**, each ultimately **presumes the kind of delegation identified in Part I.** Each problem, that is, **arises only because arbitration allows private parties to tap** the **coercive** **power** of the state **without any meaningful judicial oversight**. Thus, private parties perform the inherently “public function” of dispute resolution only insofar as their decisions are binding—more or less automatically backed by the coercive power of the state.311 Private parties can use procedure to evade substantive legal obligations **only insofar as courts will** more or less **automatically enforce their procedural choices**. Privately made rules constitute “law” only insofar as they’re coercively enforced without any real judicial review.312 Arbitration forgoes the public goods of precedent and transparency only insofar as private parties can authoritatively resolve their disputes **unsupervised**. And private parties can shield dispute resolution from public scrutiny **only insofar as their authoritative decisions are insulated from judicial review**, which would be subject to public scrutiny. **None of these problems would be so acute if a party to an arbitration agreement could**, notwithstanding the agreement, **either litigate her dispute in court or at least obtain meaningful judicial review of any arbitral award**;313 each problem stems from the fact that the state coercively enforces arbitration without adequate scrutiny. This is the sense in which arbitration can be understood to delegate state power.314

#### CP resolves those problems

Shapiro 2018. Matthew A. Shapiro. Associate in Law, Columbia Law School. “Delegating Procedure” <https://www.jstor.org/stable/pdf/26419422.pdf?refreqid=excelsior%3Af3ef93d4dc2c84731654e6252a67adb9>

The analytical framework developed in the previous Parts can shed light on several procedural debates, both within ordinary civil litigation and beyond it. Within ordinary civil litigation, this Article’s delegation framework simultaneously highlights some of the benefits and drawbacks of current procedural practice. For example, although judges enjoy substantial discretion to police discovery abuse, there is a widespread impression that they rarely exercise it, with the result that discovery often ends up devolving into a “free-for-all.”299 **The delegation framework suggests that judges can respond to such problems** (insofar as they’re real problems)300 **by more aggressively policing discovery for abuse ex post**, in contrast to the recent amendments to the discovery rules, which focus on limiting the scope of discovery ex ante.301

#### Stops meritless appeals

Shapiro 2018. Matthew A. Shapiro. Associate in Law, Columbia Law School. “Delegating Procedure” <https://www.jstor.org/stable/pdf/26419422.pdf?refreqid=excelsior%3Af3ef93d4dc2c84731654e6252a67adb9>

This proposal prompts an obvious objection: Permitting interlocutory judicial review of arbitrators’ procedural decisions would invite a flood of piecemeal appeals, which would undermine the benefits of arbitration and burden the courts. **This problem could be substantially ameliorated**, however, **by making interlocutory review discretionary with the court rather than as of right**,348 **and limiting such review to just a few key procedural decisions,** **such as the decisions whether to permit discovery and the presentation of evidence**. And courts could further discourage abuse of the interlocutory-review mechanism by imposing sanctions for review petitions that did not even plausibly allege an abuse of delegated power.

#### Of course there’s some tradeoff but the cp strikes the balance

Shapiro 2018. Matthew A. Shapiro. Associate in Law, Columbia Law School. “Delegating Procedure” <https://www.jstor.org/stable/pdf/26419422.pdf?refreqid=excelsior%3Af3ef93d4dc2c84731654e6252a67adb9>

Supporters of arbitration, on the other hand, will likely worry that the delegation-policing strategies would threaten to vitiate many of arbitration’s purported benefits, such as finality, informality, and speed.367 Some scholars have suggested that these benefits are exaggerated, as arbitration has increasingly come to resemble litigation.368 But whatever the merits of that debate, **the delegation-policing approach advocated here would likely undermine arbitration primarily in one-off disputes between unequal parties**—precisely the kinds of disputes in which arbitration is most likely to involve abuse. For the weaker party in such disputes would have little reason not to invoke the delegation-policing doctrines. In disputes between sophisticated parties, by contrast, the parties would be more likely to have an ongoing relationship **and thus would be more loath to invoke the delegation-policing doctrines**, lest they undermine the efficiency advantages of arbitration for their future disputes.369 It is also worth reemphasizing that, in any kind of dispute, the standard for showing an abuse of delegated power would be a strict one, such that the majority of arbitral decisions would in practice be final. In the end, though, we inevitably face a tradeoff between benefits to private parties and costs to public values whenever we delegate state power. **A delegationpolicing approach better accounts for both the benefits and the costs of arbitration’s delegations than does the current regime.**

## states

#### Nobody one cares

Mila Versteeg 13, Associate Professor at the University of Virginia School of Law. Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?, 29 May 2013, www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations

Unsurprisingly, attempting to gauge one constitution’s “influence” on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly dissimilar, by definition, one cannot be following the other. That is, neither is exerting influence on the other (at least not in a positive way).¶ This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.¶ Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.¶ For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.¶ A similar trend has occurred for presidentialism, another American innovation. Since the end of World War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.¶ Finally, though judicial review

is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.¶ Reasons for the Decline¶ It appears that several factors are driving the U.S. Constitution’s increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.¶ Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a “right to bear arms.” Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women’s rights, the right to social security, the right to food, and the right to health care.¶ These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.

#### Rule of law doomed—too many ways for the AFF to solve.

Jon Robins 18, 1-31-2018, "'A crisis for human rights': new index reveals global fall in basic justice," Guardian, https://www.theguardian.com/inequality/2018/jan/31/human-rights-new-rule-of-law-index-reveals-global-fall-basic-justice

Fundamental human rights are reported to have diminished in almost two-thirds of the 113 countries surveyed for the 2018 Rule of Law Index, amid concerns over a worldwide surge in authoritarian nationalism and a retreat from international legal obligations. “All signs point to a crisis not just for human rights, but for the human rights movement,” said Professor Samuel Moyn of Yale University. “Within many nations, these fundamental rights are falling prey to the backlash against a globalising economy in which the rich are winning. But human rights movements have not historically set out to name or shame inequality.” The 2018 index, published by the World Justice Project (WJP), gathers data from more than 110,000 households and 3,000 experts to compare their experiences of legal systems worldwide, by calculating weighted scores across eight separate categories. While Venezuela retains its unwanted position at the bottom of the index – just behind Cambodia and Afghanistan – the Philippines is this year’s biggest faller, dropping 18 places to 88th in the table, on top of a slump of nine places in the 2016 survey. President Rodrigo Duterte’s administration has put a “palpable strain upon established countervailing institutions of society”, according to Jose Luis Martin Gascon, chairman of the Philippine Commission on Human Rights. He said there had been a “chilling effect” on the country’s opposition in the wake of attacks against personalities who have criticised Duterte’s policies. Non-discrimination, freedom of expression and religion, the right to privacy and workers’ rights were all taken into account in calculating observance of people’s fundamental rights across the world. Respondents’ belief in the protections afforded by such rights has dropped in 71 of the 113 countries surveyed for the latest index. “The WJP’s findings provide worrying confirmation that we live in very dangerous times for the rule of law and human rights,” said Murray Hunt, director of the Bingham Centre for the Rule of Law. “The worldwide resurgence of populism, authoritarian nationalism and the general retreat from international legal obligations are trends which, if not checked, pose an existential threat to the rule of law. Preventing violations of the rule of law and human rights is always better than curing them after the event,” Hunt said.

## Growth

#### Private antitrust causes over-deterrence—best and most recent evidence

Nuechterlein 21 (Jonathan E. Nuechterlein is co-leader of Sidley’s Telecom and Internet Competition practice focusing on telecommunications law, antitrust and appellate litigation, and is the former General Counsel of the Federal Trade Commission, Timothy J. Muris is former chairman of the FTC and former director of the Bureau of Consumer Protection and director of the Bureau of Competition, 3-2021, “Private Antitrust Remedies: An Argument Against Further Stacking the Deck”, U.S. Chamber Institute for Legal Reform, https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf)

Pursuing Deterrence, Not Overdeterrence

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

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain:

One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

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

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

#### Cartels solve themselves quickly

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

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

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

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

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

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

#### The “recent study” is a from 2012, and uses a miniscule dataset of 75 cases. Data for cartels is inherently limited which makes their stuff irrelevant, BUT it makes our link better! The aff requires a search for optimal remedies!

Sokol 12 (Daniel, U Florida College of Law, “Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement” https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1307&context=facultypub)

The Chicago School approach, based on an optimal deterrence framework, is cast in terms of expected profits. However, a cartel member is an organization, and the people involved are employees, all of whom respond to different incentives because of agency costs of whether or not to advance firm profitability short or long term. Based on this understanding, this article develops a richer model of cartel operations within the firm and cartel enforcement by antitrust agencies, and moves beyond the traditional Chicago School approach to examine both firm and individual incentives as well as the interplay between them. The contribution of this article is to show the limitations to the optimal deterrence-inspired cartel enforcement policy currently used by the Department of Justice Antitrust Division. Because the number of cartels remains unknown, it is difficult to determine if enforcers have achieved optimal deterrence.8 The uncertainty as to whether enforcers have reached optimal deterrence is a significant empirical challenge to cartel scholarship and policy. As Joseph Harrington explains: The data obstacle to addressing these questions is that we only observe discovered cartels, so we do not know the frequency of cartels in the economy. Until we find a way in which to surmount that obstacle, the ultimate impact of leniency programs on cartel formation and the lifetime of cartels will remain an open question.9 As a result of the empirical limits to better inform theoretical approaches to cartel enforcement, many of the original Chicago School assumptions on cartels remain unchanged. This is perhaps surprising given the significant empirical inroads made in the finance, organizational theory, ethics, and accounting literatures on compliance, white-collar crime, and the understanding of the incentives within the firm that can be applied to cartel enforcement and compliance.

#### Mandatory trebling makes it too putative!

Nuechterlein 21 (Jonathan E. Nuechterlein is co-leader of Sidley’s Telecom and Internet Competition practice focusing on telecommunications law, antitrust and appellate litigation, and is the former General Counsel of the Federal Trade Commission, Timothy J. Muris is former chairman of the FTC and former director of the Bureau of Consumer Protection and director of the Bureau of Competition, 3-2021, “Private Antitrust Remedies: An Argument Against Further Stacking the Deck”, U.S. Chamber Institute for Legal Reform, https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf)

But private antitrust remedies in the United States extend far beyond the relief available in ordinary civil litigation. For example, if plaintiffs succeed in proving negligence or breach of contract, they generally collect compensatory damages equal to their harm. In unusual circumstances, tort plaintiffs can collect punitive damages as well, but only if they can successfully argue that the defendant behaved egregiously. Attorneys’ fees in ordinary civil litigation are also subject to the “American Rule”—with rare exceptions, each side is expected to pay its own lawyers no matter who wins.

The U.S. system of antitrust remedies departs from that baseline litigation regime in two significant respects, both of which greatly advantage plaintiffs.

Automatic Punitive Damages

With narrow exceptions, any plaintiff that prevails on any theory of liability under federal antitrust law is automatically entitled to “threefold the damages by him sustained.”10 In other words, two-thirds of every private antitrust award takes the form of punitive damages, over and above what is needed to make the plaintiff whole. Of course, sometimes punitive damages are appropriate for their deterrent value—for example, where a given category of conduct (1) often escapes detection or (2) never has redeeming social value. And sometimes antitrust cases involve such conduct: for example, naked price-fixing cartels often elude detection and have no redeeming social value. Such cartels exemplify conduct that is “per se” unlawful and, indeed, is subject to criminal as well as civil penalties.

The problem is that prevailing antitrust plaintiffs always recover treble damages, even when the defendant’s conduct was open rather than covert, and even when it was not clearly unlawful when it was undertaken. As antitrust law has evolved since the Sherman Act of 1890, it has come to address a broad range of competitive conduct that is not categorically anticompetitive and is thus properly subject to the full “rule of reason” rather than any “per se” prohibition.11 Such cases require a judge or jury to scrutinize the context and economic effects of the defendant’s conduct and consider not only the extent of any competitive harm, but also any countervailing benefits. This appropriately nuanced approach applies today to an extraordinary array of conduct, including joint ventures,12 trade association activities,13 vertical restraints,14 and virtually any claim of monopolization under Section 2 of the Sherman Act, such as exclusive dealing.15

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

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

[Lande study for reference]

#### For reference card references Lande Study

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

C. There is No Evidence of Overdeterrence by The Combination of Private and Public Enforcement

Some critics assert that “treble damages, along with other remedies, can overdeter conduct that may not be anticompetitive….”41 Yet, despite the request by the Antitrust Modernization for evidence on this issue,42 “[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission . . . .”43

A recent study, moreover, demonstrates the opposite. This study demonstrates that the combined level of current United States cartel sanctions – the total of private and public remedies - is only 9% to 21% as large as it should be to protect potential victims of cartelization optimally.44 [Footnote] See John M. Connor & Robert H. Lande, Cartels As Rational Business Strategy: Crime Pays,” 34 Cardozo Law Review 427 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1917657, at 431-35. [footnote ends ]Consequently, the average level of United States anti- cartel sanctions should be increased: there certainly is no overdeterrence.

#### Lande study uses 75 cases they know of

Connor & Lande 12 John M. Connor & Robert H. Lande, Cartels As Rational Business Strategy: Crime Pays,” 34 Cardozo Law Review 427 (2012)

We have undertaken the same analysis for all seventy-five cartels for which we have been able to ascertain the necessary data. 235 The overall results show that, on average, the value of the imposed U.S. sanctions has been much less than they should have been for society to obtain optimal deterrence against cartelization. If mean average figures are used, the total value of the imposed sanctions were only 15.8% to 20.8% of their optimal level. If median figures are used, the imposed sanctions averaged only 9.2% to 12.1 % of optimality.236

#### Aff fails—private antitrust cannot change cartel behavior even with treble damages, just imposes constraints. Increasing deterrence -> increased cost imposition

Juška 17 ŽYgimantas Juška, 8-16-2017, Leiden University, Leiden, the Netherlands, The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement, SAGE Journals, https://journals.sagepub.com/doi/full/10.1177/0003603X17719764; accessed 10-13-2021

Conclusion

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

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

The legal issues and conclusions debated in this chapter should be of particular relevance not only for the United States, but also for the European Union. The underdevelopment of private antitrust enforcement has led the EU to facilitate damages actions by adopting the Directive on antitrust damages actions.227 Critically, only the Recommendation—a non-binding document—was proposed to facilitate collective actions. However, a binding measure is expected in the near future. The achievement of objectives in the EU private antitrust enforcement is very complicated, since the Directive enshrined the principle of full compensation, and deterrence can only be seen as a side effect. But the US example has shown that the effectiveness in compensating victims cannot be achieved if there is no strong deterrence. Simply, private attorneys would not be incentivized to bring class actions.

## HC adv

#### Costs are higher because people are using more---the overall PRICE is still stabilizing

Lagasse 10-11 (Jeff Lagasse, Associate Editor, Healthcare spending for working Americans reaches all-time highBetween 2015 and 2019, spending increased by 21.8%, or $1,074 per person, with prices rising and utilization declining, https://www.healthcarefinancenews.com/news/healthcare-spending-working-americans-reaches-all-time-high)

THE LARGER TREND

Healthcare utilization is on the rebound as the COVID-19 pandemic begins to recede, and personal healthcare spending is on the rise. But the price of care, by contrast, is showing signs of stabilizing after months of growth.

According to data published in June from Altarum, Health Care Price Index (HCPI) growth was mostly steady for the month of May, with prices 2% higher than they were a year ago. That's similar to the 1.9% increase in April, and both are below the average posted during the depths of the pandemic, indicating healthcare prices are beginning to moderate.

#### Empirics and isolated populations prove

Beckstead 14 (Nick, Research Fellow at the Future of Humanity Institute, citing Peter Doherty, recipient of the 1996 Nobel Prize for Medicine, PhD in Immunology from the University of Edinburgh, Michael F. Tamer Chair of Biomedical Research at St. Jude Children’s Research Hospital, “How much could refuges help us recover from a global catastrophe?” in Futures, published online 18 Nov 2014, Science Direct)

That leaves pandemics and cobalt bombs, which will get a longer discussion. While there is little published work on human extinction risk from pandemics, it seems that it would be extremely challenging for any pandemic—whether natural or manmade—to leave the people in a specially constructed refuge as the sole survivors. In his introductory book on pandemics (Doherty, 2013, p. 197) argues: “No pandemic is likely to wipe out the human species. Even without the protection provided by modern science, we survived smallpox, TB, and the plagues of recorded history. Way back when human numbers were very small, infections may have been responsible for some of the genetic bottlenecks inferred from evolutionary analysis, but there is no formal proof of this.” Though some authors have vividly described worst-case scenarios for engineered pandemics (e.g. Rees, 2003 and Posner, 2004; and Myhrvold, 2013), it would take a special effort to infect people in highly isolated locations, especially the 100+ “largely uncontacted” peoples who prefer to be left alone. This is not to say it would be impossible. A madman intent on annihilating all human life could use cropduster-style delivery systems, flying over isolated peoples and infecting them. Or perhaps a pandemic could be engineered to be delivered through animal or environmental vectors that would reach all of these people.

#### Wrong-AI boosts existing tech, CIC will integrate slowly and AI can’t threaten 2nd strike.

Vincent Boulanin 18, Senior Researcher at SIPRI, 12-7-2018, "AI & Global Governance: AI and Nuclear Weapons," No Publication, https://cpr.unu.edu/ai-global-governance-ai-and-nuclear-weapons-promise-and-perils-of-ai-for-nuclear-stability.html

Early on, nuclear-armed states not only identified the appeal of AI for nuclear deterrence, they also saw its limitations. Given the dramatic consequences that a system failure would have, they were reluctant to hand over higher-order assessments and launch decisions to AI systems. A human had to remain ‘in the loop’. The Soviet Union is the only country that pursued the development of a fully-automated command and control systems for nuclear weapons. However, this system, known as the Dead Hand, was meant to be activated only in the exceptional case of a decapitating attack on the Soviet nuclear command and control. AI and nuclear warfare toolbox What might change with the current AI renaissance, which is seeing breakthroughs in the areas of machine learning and autonomous systems? Recent advances in AI could be leveraged in all aspects of the nuclear enterprise. Machine learning could boost the detection capabilities of extant early warning systems and improve the possibility for human analysts to do a cross-analysis of intelligence, surveillance, and reconnaissance (ISR) data. Machine learning could be used to enhance the protection of the command and control architecture against cyberattacks and improve the way resources, including human forces, are managed. Machine learning advances could boost the capabilities of non-nuclear means of deterrence: be it conventional (air defence systems), electronic (jamming) or cyber. Autonomous systems could be used to conduct remote sensing operations in areas that were previously hardly accessible for manned and remotely-controlled systems, such as in the deep sea. Autonomous unmanned systems such as aerial drones or unmanned underwater vehicles could also be seen by nuclear weapon states as an alternative to intercontinental ballistic missiles (ICBMs) as well as manned bomber and submarines for nuclear weapon delivery. These would be recoverable (unlike missiles and torpedoes) and could be deployed in ultra-long loitering periods – days, months or even years. At least one nuclear-armed state is already considering that possibility: In 2015, Russia revealed that it was pursuing the development of a nuclear-armed unmanned submarine, called Status-6. Game-changing technologies? Will the adoption of such systems fundamentally transform the field of nuclear strategy? The answer is no, at least not in the near-term, for three reasons. First, these technologies reinforce rather than fundamentally alter the existing application of AI in nuclear force-related systems. Second, the field of nuclear weapon technology is renowned for its conservativeness – it has been historically slow at integrating ne

w technologies. The US military, for instance, allegedly still uses 8-inch floppy disks to coordinate nuclear force operations. In that regard, machine learning and autonomous systems have some critical technical limitations that would make a rapid adoption unlikely in the near future. Machine learning systems operate like black boxes, which makes them potentially unpredictable, while the reliability of advanced autonomous systems is also technically hard to establish. Nuclear-armed states would have to crack difficult testing issues associated with the design of these systems to be confident that they can be used in a predictable and reliable manner and be certified for use. Third, the technology is not at the stage where it would allow nuclear-armed states to credibly threaten the survivability of each other’s nuclear second-strike capability. Some experts have argued that a large-scale deployment of autonomous unmanned systems for remote sensing could make the continuous at-sea deterrence obsolete. In light of the current stage and development trajectory of AI technology and other key enabling technologies (such as sensor and power technology), this is bound to remain a very theoretical scenario for the foreseeable future.

# 1NR

## da

**No impact on stocks**

**Graham ’9-16** [Jed; September 16; Author and analyst; Investor’s Business Daily, “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court,” <https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/>]

Investors **don't** seem to **see** a major threat. Google parent [Alphabet](https://www.investors.com/news/technology/google-stock-buy-now/) ([GOOGL](https://research.investors.com/quote.aspx?symbol=GOOGL)), Apple and Facebook stock have hit **all-time highs** this month. After **Khan's ascension** as FTC chair, Amazon stock **ran to a record**, before its second-quarter revenue miss briefly halted its momentum.

Recent **antitrust rulings** help explain the apparent **lack of concern**.

The Supreme Court's June opinion rejecting NCAA limits on educational benefits for student-athletes reads like a celebration of noninterventionist antitrust law, William Kovacic, who chaired the FTC under President George W. Bush, told IBD.

"Markets are often **more effective** than the **heavy hand** of judicial power when it comes to **enhancing consumer welfare**," Justice Neil Gorsuch wrote. Courts examining business dealings should take care not to "set sail on a sea of doubt," he added, elevating William Howard Taft's warning of the danger of a "shifting, vague and indeterminate" antitrust standard.

The words seemed to carry a **not-too-subtle message** for the Biden team, Kovacic says. "**Until** the Congress **changes the law**, we will **continue to endorse** the approach we have taken for the **last 40 years**," he said.

Can Parties Unite On Antitrust Law?

The House Judiciary Committee narrowly passed a package of antitrust measures in June called the Ending Platform Monopolies Act. Amazon has warned of massive disruption from restrictions preventing the biggest online platforms from favoring their own goods and services. "These bills would jeopardize Amazon's ability to operate a marketplace for sellers, potentially resulting in hundreds of thousands of small and medium-sized businesses losing access to Amazon's customers and services."

Another measure would shift the burden of proof for Big Tech acquisitions under antitrust law. Companies with a market cap of $600 billion or more — including Apple, Amazon, Facebook and Google — would have to prove that a proposed merger wasn't anticompetitive.

GOP Sen. Josh Hawley's antitrust bill goes much further, essentially banning acquisitions by companies with a market cap over $100 billion.

Skepticism about Big Tech and excessive corporate power is clearly bipartisan. That helps explain why Khan's nomination as commissioner sailed through the Senate with 21 Republican votes. Yet Biden didn't reveal until after the vote that he intended to name Khan FTC chair, which might have given some **senators pause**.

Fundamental **changes** to **antitrust law** are **unlikely to pass** the **closely divided** Congress this year, Goldman Sachs analysts say. Some Democratic lawmakers have **voiced opposition** to the House antitrust package. Meanwhile, Hawley's Trust-Busting for the 21st Century Act has **zero** co-sponsors.

**1) Threshold low—bull market drives irrational action**

**Landsman 10/31/21** (CNBC, “Market’s biggest bull sees year-end rally, but warns it’s setting up Wall Street for a scare next year”, https://www.cnbc.com/2021/10/31/market-is-melting-up-to-new-records-but-2022-looks-rough-wells-fargo.html)

The S&P 500, Nasdaq and Dow ended the week in record territory. The S&P and Nasdaq were up 7% in October while the Dow gained 6%.

“What we’re seeing from a lot of individuals and investors is they **feel like the market is unbreakable** at this point in time. We’ve had several pullbacks. You’ve bent it, but you’ve never broken,” said Harvey. “That brings another level of FOMO [fear of missing out], **and that brings in a level of confidence**.”

Harvey lists strong economic fundamentals, better-than-expected earnings, low capital costs and massive cash on the sidelines **as fuel for gains.**

“It’s late in the bull market,” he said. “**Now is a period where irrationality becomes much more rational**. Things you don’t expect to happen can happen, and most likely will.”

Harvey contends momentum names, which include banks, will be major drivers into year-end. He calls financials a “stealth leadership play” that will get traction from the Federal Reserve’s taper plans.

**2) FGI is at 58—increasing fear and decreasing confidence causes a crash**

**Guggenberger 10/19/21** (Ferdinand, M.Sc., “Stock market crash 2021”, https://meine-renditeimmobilie.de/en/blog/geldanlage/boersencrash-2021/)

The stock **market is all about confidence**. So when a bubble forms, it depends on whether investors trust that the company will **still match the value of the share**. If this confidence is lacking, investors **are anxious to sell their company shares as quickly as possible**. This leads to supply being greater than demand. The natural consequence of this: The price falls. The more investors sell their shares, the further the price falls. Investors should therefore act as quickly as possible. The longer they wait, the more money they lose and the worse the consequences of a stock market crash are for them. Unless you can sit out a stock market crash and wait until the share price recovers and rises again.

Fear and greed determine the market

Hardly any capital investment is as **emotionally charged** as investing in shares. The stock market is largely driven by two emotions: fear and greed. If fear prevails, as in the scenario described above, investors want to get rid of their shares and prices fall. If everything goes well, people become greedy and demand grows. Prices rise. This is why there is the so-called Fear & Greed index.

This index shows which phase a market is currently in. Various factors are taken into account. Among other things, it observes how the risk behaviour of investors is changing. For example, government bonds are considered a safe form of investment. If it is found that shares are more popular than bonds, this is an indication that the tendency is more towards greed than towards fear. The trading volume of share purchases and sales is also compared, as well as the trading volume of rising and falling shares. The sum of these results in a value that indicates whether fear or greed dominates the market. In the event of a stock market crash, **the value is far below 50**. Those who regularly follow this index and are aware of **the causes of a stock market crash can roughly estimate when or if a stock market crash is coming.**

A picture containing diagram

Description automatically generated

#### In fact, most class actions were against new entrants to the market!

Sampson & Gaubinger 21 (Zinie Sampson; Elisabeth Gaubinger Cornerstone Research provides economic and financial consulting and expert testimony in all phases of complex litigation and regulatory proceedings. The firm works with an extensive network of prominent faculty and industry practitioners to identify the best-qualified expert for each assignment. “Number of Securities Class Action Filings Falls to Lowest Level Since 2015 SPAC-related filings increase sharply in first half of 2021)

Menlo Park, Calif.—Plaintiffs filed 112 new securities class action lawsuits in federal and state courts in the first half of 2021, down 25% from the second half of 2020. This was the lowest number of filings since the first half of 2015, according to a report released today by Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse.

The report, Securities Class Action Filings—2021 Midyear Assessment, found that the decline in filing activity was largely driven by a 66% drop in filings related to mergers and acquisitions compared to the second half of 2020. Of the 112 filings in the first half of 2021, only 12 were M&A filings. Federal and state court class actions alleging claims under the Securities Act of 1933 also declined, continuing the trend observed in 2020.

As SPAC IPOs continued to explode in 2020 and earlier this year, filings against SPAC-related entities also increased sharply in the first half of 2021.

Despite the substantial decrease in total filings, federal filings related to special purpose acquisition companies (SPACs) doubled in the first half of 2021 compared to all of 2020. There were 14 SPAC filings in the first six months of 2021, with more than half alleging that the potential targets defrauded investors by misrepresenting their product’s viability.

“As SPAC IPOs continued to explode in 2020 and earlier this year, filings against SPAC-related entities also increased sharply in the first half of 2021,” said Alexander “Sasha” Aganin, report coauthor and Cornerstone Research senior vice president. “Former SPACs have experienced a Section 10(b) litigation rate of approximately 14% after completion of their mergers, which is roughly comparable to the cumulative litigation rate experienced by traditional IPOs over the subsequent three years.”

The report also found a sharp decline in the number of 1933 Act filings in state rather than federal court, continuing the trend observed in the Securities Class Action Filings—2020 Year in Review. All five 1933 Act claims filed in state court in the first half of 2021 were brought in New York.

“The better the market for investors, the worse the market for class action securities lawyers,” observed Joseph A. Grundfest, director of the Stanford Law School Securities Class Action Clearinghouse, and a former Commissioner of the Securities and Exchange Commission. “Plaintiff lawyers typically rely on sharp price declines for their best cases, and if the market isn’t generating those declines, plaintiffs’ ability to file big ticket securities fraud actions is limited.”

COVID-19 filings began tapering off in the first half of 2021, with six of the 10 pandemic-related filings occurring in January and February and only one filing in May or June. Of these filings, 50% were related to treatments or vaccines that failed to make it to market.

#### Securities and merger cases are dropping

Kevin Lacroix 21—Attorney and Executive Vice President, RT ProExec, a division of R-T Specialty, LLC. ("Federal Court Securities Lawsuit Filings Decline in Year’s First Half," June 30, 2021, from D&O Diary, https://www.dandodiary.com/2021/06/articles/securities-litigation/federal-court-securities-lawsuit-filings-decline-in-years-first-half/)

Federal court securities class action lawsuit filings declined in the first half of 2021 to the lowest semiannual levels in several years. Several factors contributed to this relative decline, most significantly the shift by plaintiffs’ lawyers toward filing federal court merger objection lawsuits as individual actions rather than as class actions. In addition, as discussed further below, other factors contributed to the relative decline. The filing levels in the year’s first six months puts the filing for the full year 2021 on pace for the lowest annual filing levels since 2015, after several intervening years in which filings were at historically high levels.

The Number of First Half 2021 Filings: By my count, there were a total of 108 federal court securities class action lawsuit filings in the first half of 2021. (Please note that this tally does not include separate state court securities class action lawsuit filings.) The 108 securities suit filings in the first six months of the year is the lowest semiannual number of filings since the first half of 2015, when there were 102 securities class action lawsuits filed. The 108 federal court securities lawsuit filings in the year’s first half is also the below the 1996-2019 semiannual average of 112 securities suit filings.

The Annualized Pace of Securities Suit Filings This Year: The 108 first half securities suit filings in the first half of 2021 puts the year on pace for a year-end total of 216 securities suit filings, which would be the lowest annual number of securities suit filings since 2015, when there were 208. In the years since 2015 up until this year, there had been a significant run-up in the annual filing totals, with the annual totals during the period 2017-2019 at historically high levels. The number of securities suit filings declined in 2020 relative to the 2017-2019 period, but the 2020 annual total number of securities lawsuit filings of 322 was still well above the annual totals in the years preceding the 2017-2019 surge. The filings so far this year are more consistent with the pace of securities filings in the years before 2017-2019.

Decline in First Half 2021 Filings Compared to the First Half of 2020: The 108 federal court securities suit filings in the year’s first half of this year is well below the 182 securities class action suit filings in the first half of 2020. The 74 fewer lawsuits filed in the first six months of this year compared to the first half of 2020 represents a year over year decline of over 40%.

#### Best datasets agree! Merit-based suits hurt value more!

Klock 15 (Mark, B.A., The Pennsylvania State University, 1978; Ph.D. in Economics, Boston College, 1983; J.D. (with honors), University of Maryland, 1988. Admitted to the Maryland Bar, 1988; admitted to the District of Columbia Bar, 1989. Member of the Executive Board, Center for Law, Economics, and Finance, The George Washington University School of Law; Professor of Finance, The George Washington University School of Business, Washington, D.C. The author has benefited from participants at the 2013 Canadian Law and Economics meeting and the 2013 Midwestern Law and Economics meeting “Do Class Action Filings Affect Stock Prices? The Stock Market Reaction to Securities Class Actions Post PSLRA”, Mark Klock, Do Class Action Filings Affect Stock Prices? The Stock Market Reaction to Securities Class Actions Post PSLRA, 15 J. Bus. & Sec. L. 109 (2016)https://core.ac.uk/download/pdf/228477267.pdf)

This study has endeavored to conduct and document a replicable event study on securities class action filings subsequent to the PSLRA using the largest available set of data. A large data set provides the most power in test statistics, meaning that we are less likely to accept a null hypothesis of no impact when in fact the event does have an impact on the value of the companies’ stocks. 152 We do find that, overall, all securities class action filings have a negative impact at the filing date, and there is a statistically significant decline in value before filing occurs. This suggests that the market partially anticipates the filing of securities class actions. We also find in the baseline case that the full drop in valuation because of the class action is completed one day after the filing, and the market does not over-react because there is no subsequent statistically significant bounce back towards prior valuation. Interestingly, the greatest decline in stock value occurs for firms that have a 10(b) claim against them. Other types of claims that are not coupled with a 10(b) claim do not result in as large of drops. Also noteworthy is the fact that frivolous suits, defined as those that are subsequently dismissed on motion, also cause a statistically significant drop in value, but not as large as merit-based suits. This might suggest that the market has some ability to distinguish between frivolous and non-frivolous suits, but even frivolous suits are costly to corporate value. We also note that the circuit filed where the complaint is filed is correlates with the valuation change. Filings in the Ninth Circuit have a valuation drop that is much larger than those in the Second Circuit, and suffer some persistence in a continued valuation drop weeks after the filing. The economic sector also makes a difference to the magnitude of the valuation drop. Non-service firms lose more value than service firms. Within service firms, financial firms lose most. Excluding financial service firms, transportation and communications service firms lose more value than other types of service firms. Securities class action lawsuits provide benefits in the form of deterring fraud, redressing fraud, and promoting investor confidence in the market. 153 They also come with costs associated with attracting nuisance suits, which damage value either through resource expenditures or damage to corporate reputation.154 An optimal level of class action filings would result in marginal costs that equal the marginal savings.155 Whether the total costs exceed the total benefits is a topic that will surely continue to be debated, but it is clear from the data that the magnitude of both costs and benefits is non-trivial.

#### We answer your request for data—the plan legitimizes a behavioral constraint on organizations that valuation, explicitly don’t have to win a “damages” internal link

Bizjak 95 (John, Texas Christan University, “The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm” Article in American Economic Review · February 1995)

This study provides large-sample docu- mentation of the implications for share- holder wealth of interfirm antitrust litiga- tion. The average wealth loss for defendants is a statistically significant 0.6 percent of the equity value of the firm, or an average loss of $4 million. We find some evidence that plaintiffs experience wealth gains upon the announcement of the filing of a lawsuit. The average wealth gain for a plaintiff is approx- imately 1.2 percent of the equity value of the firm, or equivalently an average gain of $3 million. We also document that the aver- age defendant loses more than the average plaintiff gains. Specifically, we find statisti- cally significant joint leakages in antitrust suits approximating $10 million on average. To our knowledge, this is the first study to document statistically significant positive effects on shareholder wealth for plaintiffs for any type of suit and negative cffccts for defendants upon filing of an antitrust action, Since managerial compensation is of• ten contingent on firm performance, SO long as enough violations are detected and pur- sued, the negative price reaction for the defendant a filing Suggests that law suits can provide significant incentives for firms to comply with antitrust laws. We also examine the effects that suit characteristics and organizational structure the obsened wealth changes to plaintiffs and defendants. Plaintiffs tiling under the Clayton Act do better than those filing under the Sherman Act, and those alleging horizontal violations do better than th'%e seeking damages from vertical allcga• tions. Furthermore, defendant wealth ef fects arc most negative when the plaintiff makes a horizontal allegation and when the ease is filed under the Clayton Act \_ The results on type of allegation are consistent with a higher incidence of follow-on suits for horizontal violations. Our results indicate that the threat of potentially trebled monetary damages lacks explanatory power for both plaintiff and de- fendant returns upon filing. In contrast, the potential imposition Of behavioral con- straints on the defendant (by way of injune tive relief) is associated with the transfer of wealth from defendants to plaintiffs. This suggests that the vigorous and seemingly perpetual debate over treble damage awards could profitably be redirected toward issues related to the nature of injunctive relief. The real concern of defendants appears not to be the threat of a large monetary transfer, but instead is likely to be the potential loss of the ability to engage in certain business practices. Many of these practices are currently the focus of debate in antitrust policy enforcement. The data do not support the contention that direct legal costs are sufficient to c plain the observed leakage. In Contrast, we find that potential bebavioral constraints through injunctive relief, follow-on suits, and litigation-induced changes in costs of financial distress are all sources of leakage. Finally, Our analysis reveals that these leak- ages affect the incentives to settle private antitrust lawsuits.

#### It’s impossible for courts to determine merits

Joshua P. Davis 10—Professor, Director of the Center for Law and Ethics, and Dean's Scholar, University of San Francisco School of Law. ("ANTITRUST, CLASS CERTIFICATION, AND THE POLITICS OF PROCEDURE," from George Mason Law Review, Summer 2010, 17 Geo. Mason L. Rev. 969, https://www.antitrustinstitute.org/wp-content/uploads/2020/08/ANTITRUST-CLASS-CERTIFICATION-AND-THE-POLITICS-OF-PROCEDURE.pdf)

In deciding whether to certify classes, courts traditionally refuse to resolve factual issues pertaining to the merits. 1 This approach governs in general and in antitrust cases in particular. 2 However, some courts have recently indicated that a change in the certification standard may be appropriate. 3 They seem to suggest that judges may—perhaps should or even must—find some facts relevant to the merits in ruling on certification. 4

We have raised concerns elsewhere about this potential procedural innovation. 5 One concern is that its rationale—that it is necessary to prevent corporations from being coerced into settling frivolous actions 6—lacks an adequate basis in theory or evidence. 7 Another concern is that it could wreak havoc with the orderly administration of litigation, either requiring a premature resolution of merits issues or a belated ruling on certification. 8 Yet another concern is that it effects a change in Federal Rule of Civil Procedure 23 through an improper process; that is, it does not follow the procedures \*970 required by the Rules Enabling Act for modifying the Federal Rules, nor does it abide by the protocols for enacting legislation. 9

After a cursory review of these points, this Article develops two additional criticisms of the potential new class certification standard, ones we have addressed briefly before but not yet fully explored. The first is that resolution of merits facts—particularly in antitrust cases—is apt to exacerbate a judicial tendency to impose requirements at class certification that serve no legitimate purpose. 10 The second is that the potential new standard risks violating the Seventh Amendment. 11

The first point is predicated on recognition that the decision whether to certify a class in an antitrust case tends to turn on whether plaintiffs have proposed a method of proving class-wide injury, or “common impact,” at the class certification stage. 12 The concept of common impact is the subject of considerable confusion among courts and commentators. 13 A source of that confusion is that common impact embodies two related issues: (1) whether the challenged conduct would be expected to have caused harm as a general matter; 14 and (2) whether the challenged conduct would have caused widespread harm to class members or, in its more extreme articulation, whether it would have harmed all (or virtually all) of them. 15

The latter issue tends to be the focus of recent class decisions. While the great bulk of courts hold that proof of widespread harm among class members is sufficient to establish common impact, some courts suggest—usually in dicta and without analysis or explication—that for a class to be certified, plaintiffs must propose a way to use common evidence at trial to show that all (or nearly all) of the class members suffered harm. 16

The combination of requiring a showing that all or nearly all class members were injured with a new emphasis on resolving facts —even facts relevant to the merits—at the class certification stage could be read as creating a wholly new and artificial standard, a standard insufficiently connected to any issue appropriate for consideration at either the class certification \*971 stage or at trial. 17 The class certification decision is supposed to focus on the practicality and fairness of litigation and, ultimately, the trial of a case on a class-wide basis. More specifically, to prevail on class certification under Federal Rule of Civil Procedure 23(b) (3), plaintiffs are required to demonstrate, in relevant part, that issues common to the class will predominate over issues specific to individual class members in the litigation and trial of the case. 18 The possible new class certification standard misinterprets this requirement in two ways.

#### Strengthening antitrust law encourages frivolous litigation---crushes the courts

Pate & Hates 06 (R. Hewitt Pate, Counsel of Record, Paul S. Hayes, Hunton & Williams LLP, “Brief of Amici Curiae Economists in Support of Petitioners,” BELL ATLANTIC CORPORATION, et al., Petitioners, v. William TWOMBLY, et al., Individually and on behalf of all others similarly situated, Respondents, 2006 WL 2506633, WestLaw)

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

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

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

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

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

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

#### The aff increase judicial congestion because of the lack of clarity—proven by all of our arguments about the lack of data

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

5. Impairment of Settlements

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

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

# 2NR

#### Decelerating economic bonds risks nuclear war in a variety of theatres.

**Kampf 20**(David; June 16; PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University; World Politics Review, “How COVID-19 Could Increase the Risk of War,” <https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war>)

Other theories posit that **economic bonds** between countries have **limit**ed wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to **preserve ties** when there are **high expectations for future trade**, but war becomes **increasingly possible** when trade is **predicted** to fall. If globalization brought peace, the recent wave of far-right **nationalism** and **populism** around the world may **increase the chances of war**, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike.

The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade.

This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945.

Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world.

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be **head**ing toward an increasingly multipolar or nonpolar world, which could prove **destabilizing** in its **own right**.

Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of **a**n unwanted U.S.-Russia **nuclear confrontation** is arguably as **high** as it has been since the Cuban missile crisis.

The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that **Tehran** will acquire **nuc**lear weapon**s**. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s **nuclear menace** doesn’t get even more **potent**.

In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a **less stable** world with more **nuclear actors**.

If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war.

If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of **World War III** and no two countries are destined for war, the odds of avoiding future conflicts don’t look good.

The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more **external meddling**, and these next proxy wars could soon **precipitate all-out international conflicts** if outsiders aren’t careful. With the **usual deterrents to conflict declining** around the world, **major wars** could soon return.