# 1NC

## 1

#### 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.

## 2

#### Plan: The United States federal government should remove implied immunity from its antitrust laws for the FCC\*.

\*federal communications commission.

#### 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.

#### Securities have implied immunity now, the plan broadly overturns engaging a floodwave of litigation

Tyler 21 (Eleanor Tyler Legal Analyst With assistance from Peter Rasmussen, Legal Analyst, Bloomberg Law. “ANALYSIS: Securities Markets Face Scrutiny Under Antitrust Bill”, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-securities-markets-face-scrutiny-under-antitrust-bill)

But also tucked into CALERA are sections that would all but end a fairly obscure judicial doctrine called “implied immunity.” The doctrine currently disallows antitrust complaints about conduct that is regulated under another complex federal statutory framework. In other words, where Congress is silent on the issue of antitrust law overlapping with another statute, courts have occasionally stepped in to close off areas from antitrust scrutiny.

The defense of “implied immunity” doesn’t come up that often, and it is mostly successful in securities markets. Defendants have long argued that applying antitrust law to conduct that is legal under the securities laws infringes on the regulatory authority of the Securities and Exchange Commission and harms financial markets. Core functions of the securities market, like participating in exchanges and listing and selling stocks and options, should only be subject to one set of rules, they argue.

Right now, if the securities acts apply to conduct related to core securities market functions—and the SEC doesn’t explicitly forbid that conduct—then that conduct can be immune from antitrust claims. CALERA would greatly narrow that rule: Instead, implied immunity could only attach to conduct that other laws “explicitly require or authorize.” In short, conduct within the vast gray areas of the securities law wouldn’t qualify for implied immunity under CALERA; only conduct that the securities laws “explicitly require or authorize” would.

Furthermore, CALERA says that the antitrust laws “shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments.” That language counters a Supreme Court statement in Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP that a regulatory framework designed to deter anticompetitive harm probably doesn’t warrant the addition of antitrust scrutiny, even if Congress explicitly preserved the application of the antitrust laws to that regulatory framework.

Together, these provisions mean that courts can’t second-guess whether the antitrust laws should apply to conduct in regulated markets, or water down the antitrust laws when applying them to that conduct. Unless the regulator explicitly permits or requires the conduct, market participants can challenge it under the Sherman Act.

What Conduct Is at Risk?

In practice, few antitrust defendants have successfully pleaded implied immunity from the federal antitrust laws in court. Nevertheless, a wide variety of defendants have argued that their conduct should be immune from the antitrust laws.

Cases in which the defense was raised have included not only antitrust claims against financial market conduct, but also complaints about anticompetitive conduct in, patent infringement, horse racing, merging hospitals, and seeking FDA approval for a generic drug.

Most successful cases have been in the securities or commodities context. The current test for implied immunity comes from Credit Suisse Securities (USA) LLC v. Billing, a 2007 Supreme Court decision that dismissed claims that underwriters colluded to drive up prices for initial public offerings (IPOs). Specifically, the plaintiffs complained about underwriting contracts that required them to buy shares at prearranged escalating prices in the aftermarket in order to get access to an IPO, a practice called “laddering.” Laddering isn’t currently permitted under Regulation M (and was at best disfavored in 2007 when the Court decided Credit Suisse); however, the Supreme Court held that it can only be addressed by the SEC and not by those harmed by inflated share prices under the Sherman Act.

Other financial markets practices shielded under the doctrine have included underwriting contractual provisions prohibiting “flipping” (immediately reselling) of IPO shares, restricting trade in stock options, charging fixed commission rates for stock trades, and restricting trade in mutual funds on the secondary market.

In short, if the myriad kinds of restrictive conduct that are explicitly intended to boost prices for stocks and derivatives become subject to the antitrust laws, many practices, at all levels of the financial system, are likely to come under scrutiny. That scrutiny could include enforcement actions by federal or state regulators or private actions for treble damages under the Sherman Act.

Narrow Wedge, Big Shift

For decades, the markets around the offering and listing of stocks have been largely a walled garden, protected from pruning by the Sherman Act. There is likely a lot that would interest plaintiffs in that overgrowth. That’s an issue that investment bankers, brokers, compliance professionals, and lawyers may need to assess.

All of that depends, of course, on whether CALERA looks likely to be enacted. The key issue, therefore, is which parts of Klobuchar’s proposals have enough bipartisan support to get through the Senate.

More fundamentally, however, the implied immunity provision of CALERA expresses a belief that the antitrust laws should be at least on equal footing with other federal statutes. Aside from shining a light on financial markets, therefore, ending implied immunity would remove a tool that Klobuchar believes judges have used to de-fang the Sherman and Clayton Acts. If that sentiment survives in CALERA’s text, it could signal a new phase of antitrust enforcement.

#### Bulls 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.

## 3

#### The United States Congress should

#### delegate statutory authority for agencies to regulate anticompetitive conduct;

#### statutorily inaugurate “net neutrality” legislation.

#### The United States ought to substantially increase regulations of anticompetitive conduct for at least internet service providers.

#### They’re wrong when it comes to structural regulations

Weinstein 19 (Samuel, “FINANCIAL REGULATION IN THE (RECEDING) SHADOW OF ANTITRUST”, Temple Law Review, VOL. 91 NO. 3 SPRING 2019)

There are many reasons to conclude that antitrust enforcement more effectively protects and promotes competition than sector-regulator competition enforcement. But can the same be said of the comparison to structural regulation of the types discussed above? The difficulty of prevailing on the sorts of antitrust claims that arise in markets involving competitive bottlenecks suggests that structural regulation indeed may do a better job safeguarding competition than antitrust enforcers or private plaintiffs suing under the antitrust laws can do under current law. One proposed approach to the bottleneck problems clearinghouses and exchanges pose is to address them through antitrust’s essential facilities doctrine.420 Some courts have found that firms controlling a facility to which access is required to compete in a relevant market cannot unreasonably deny such access to downstream rivals.421 An oft-cited articulation of the elements of this type of claim is found in the Seventh Circuit’s decision in MCI Communications Corp. v. AT&T. 422 That court identified in the case law four elements that plaintiffs must show to prevail on an essential facilities claim: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”423 The problem with relying on the essential facilities doctrine is that it is highly disfavored among courts and commentators.424 Professor Phillip Areeda famously asserted that essential facilities is “less a doctrine than an epithet, indicating some exception to the right to keep one’s creations to oneself, but not telling us what those exceptions are.”425 Critics have argued that the doctrine can dampen dynamic efficiency by undermining incentives for firms to create competing facilities or for monopolists to improve their own facility.426 Certain of these objections apply squarely in the case of clearinghouses. If potential members believe they will be forced ultimately to offer open access to their clearinghouse, they may be unwilling to make the significant capital investments starting and maintaining a clearinghouse would require.427 Further, even when courts are willing to consider liability under the essential facilities doctrine, the four-part test is difficult for plaintiffs to satisfy.428 Essential facilities allegations are closely related to refusal-to-deal claims,429 which also are challenging for plaintiffs. Unilateral refusals to deal are rarely actionable.430 Claims asserting unlawful concerted refusals to deal are sometimes successful but still can be difficult for plaintiffs to win.431 One suggestion for addressing this problem is to apply the theory of parallel exclusion to exclusionary conduct by clearinghouse members.432 Professors C. Scott Hemphill and Tim Wu, who developed this theory, have described parallel exclusion as “self-entrenching conduct, engaged in by multiple firms, that harms competition by limiting the competitive prospects of an existing or potential rival to the excluding firms.”433 In situations where members of a clearinghouse’s risk committee “arrive independently at policies” that exclude competitors, under current antitrust case law, courts may have little recourse to prevent the conduct.434 If the decisions indeed are made independently, section 1 of the Sherman Act would not apply.435 Courts might be able to solve this problem by using Hemphill and Wu’s theory to find a section 2 “shared monopoly” violation where clearinghouse members exclude rivals in a manner that unreasonably harms competition. In the absence of such a solution, there is a risk that big banks can harm competition in the derivatives markets free from the threat of antitrust liability.436 Structural regulation of derivatives clearinghouses and exchanges avoids the problems antitrust enforcement faces in these markets. The risk that exclusionary conduct by clearinghouse members working through risk committees or otherwise might fall into gaps in the antitrust laws is much less worrisome if the big banks cannot control risk committees or other levers of power in derivatives clearinghouses and exchanges. Absent that control, the big banks will find it difficult to exclude rivals. The structural solution would not require relying on uncertain ex post regulatory enforcement to ensure competition is protected. Sufficiently strict ownership caps, governance restrictions, or other forms of structural regulation address the problem without active agency involvement. One potentially serious drawback to this structural approach was suggested in the big banks’ responses to the CFTC’s and SEC’s proposed conflicts-of-interest rules.437 It may prove difficult to convince big banks to contribute sufficient capital to clearinghouses over which they do not have ultimate control.438 Without big-bank contributions, clearinghouses may face a liquidity shortage and may not be able to serve their systemic risk function.439 It is unclear, however, how much of a problem this will pose in practice. Under the agencies’ proposed rules, for example, big banks still can own significant stakes in clearinghouses and exchanges.440 And as a group, big banks can own up to 40% or even 100% of a clearinghouse or exchange.441 True, the rules’ governance restrictions limit the big banks’ control,442 but even under the strictest of the proposed limits, they still could have a significant presence on most committees and the board of directors. There will be some profit to be made by owning part of a clearinghouse or exchange and there are other advantages to membership.443 In sum, the competition-related benefits of structural regulation are strong and the drawbacks speculative. There is another potentially compelling reason to prefer structural regulation to antitrust in this context: increased competition in derivatives trading may not always be beneficial. Contemporary antitrust enforcement typically has one goal: eliminating unlawful barriers to competition to increase output of goods and services—thereby lowering prices—and spur innovation.444 In many markets, this goal may be in harmony with, or at least not inconsistent with, other public policy objectives. Markets for toxic products are an exception. Professor Daniel Crane has studied this issue with regard to the tobacco business.445 He observed that “[o]utput maximization remains the dominant goal of antitrust enforcement in the tobacco industry” and that “[i]n general, the antitrust establishment simply ignores the harmful nature of tobacco” when considering enforcement in that sector.446 To address this problem in antitrust law, Crane identified what he termed “net-harm markets,” which he described as markets where “(1) [t]he consumption of the good at any level of output produces greater total internal and external costs than internal and external benefits; or (2) [a]t the output level determined by a competitive market, consumption of the good produces greater total costs than total benefits.”447 Crane conceded that it may be difficult to identify net-harm markets but suggested that one way to do so is to look to whether public policy, expressed through government statements and actions, evinces a consensus that output of a product is harmful.448 This is the case for tobacco products, and in Crane’s view it means that tobacco is a net-harm market, which “should be eligible for extraordinary antitrust treatment.”449 Crane advised that in “net-harm markets, the antitrust agencies and courts should apply the antitrust laws to pursue a goal of harm-reduction rather than one of output maximization” and that in cases where a public policy consensus exists to reduce consumption of a product, “the antitrust laws should not be used to increase that product’s consumption.”450 Are derivatives a net-harm market? As Crane noted, it is difficult to determine quantitatively if a market produces greater costs than benefits.451 There is persuasive evidence that the derivatives markets were responsible for a significant portion of the damage the 2008 financial crisis caused.452 That damage was enormous. The Government Accountability Office stated in 2013 that studies have shown the crisis caused between a “few trillion” and over $10 trillion in lost output and led to “large declines in employment, household wealth, and other economic indicators.”453 The derivatives markets also provide important economic benefits, however, allowing companies to hedge risks, thereby expanding the amount of available credit in the economy.454 Whether those benefits outweigh the harms derivatives already have caused and may cause in the future likely is impossible to say with mathematical certainty. To the extent Dodd-Frank represents a public policy consensus on the treatment of derivatives, it is that to reduce systemic risk the vast majority of derivatives should be traded on transparent exchanges and centrally cleared.455 Dodd-Frank accordingly is biased toward standardized swaps that can be exchange-traded and away from exotic swaps that might not qualify for exchange trading. Arguably, the Act also at least implicitly aims to reduce output of derivatives contracts. By pushing most derivatives trades to regulated exchanges and central clearinghouses, Dodd-Frank increases the chances that certain trades will not be consummated, either because regulators having seen them will bar them or because clearinghouses will reject either the derivatives trader or a specific trade.456 That being said, there is no explicit mandate in Dodd-Frank to reduce the overall output of derivatives trades similar to government pronouncements in the tobacco markets. Nonetheless, because certain derivatives may threaten systemic safety, derivatives markets potentially are net-harm markets for which antitrust, with its goal of increasing output and innovation, is an awkward fit. While tobacco products generally are considered uniformly harmful, derivatives contracts can be beneficial in many circumstances.457 The challenge is to discourage swaps that unduly increase systemic risk, while permitting or encouraging benign and beneficial swaps. Antitrust enforcers are not attuned to these distinctions and, indeed, are not concerned with them.458 Antitrust’s role is to increase output and innovation, not to pick and choose between financial products.459 Financial regulators are much better positioned to distinguish helpful and harmful swaps.460 Under Crane’s model, antitrust enforcers and courts would give the derivatives markets different antitrust treatment than non-net-harm markets.461 At least under current antitrust law and agency policy that approach seems unlikely to be implemented. The problem is avoided altogether, however, if competition issues in the derivatives markets are addressed by structural regulation with sector-regulator oversight, rather than antitrust enforcement.462 In this scheme, the structural regulations “perform[] the antitrust function” that sector regulators are unequipped for, freeing them to concentrate on their core competency—ensuring that the derivatives markets do not unduly increase systemic risk.463 In doing so, the sector regulators can judge how much competition and innovation is healthy in these markets and they can decide which swaps to promote (with the goal of increasing output and lowering price) and which to discourage. While many regulated markets likely do not raise similar concerns about toxic products, the advantages of structural regulation we see in the derivatives sector nonetheless may be broadly relevant to other regulated markets where antitrust immunity or displacement of antitrust on regulatory grounds is a risk. In the potential absence of antitrust enforcement in markets where the sector regulators are unprepared or unwilling to perform the antitrust function, structural regulation can fill the gap. Some sector regulators may be willing and competent guardians of competition; when that is the case, there is less need to consider the structural alternative. But, particularly in the financial markets, structural regulation should be considered a primary option when it is clear that the shadow of antitrust is receding.

## 4

#### Trinko & Credit Suisse are the ultimate preservation of Chevron deference—overturning greenlights a flood of suits that strip agency interpretation authority. CP Avoids it

Srago 3/16/21 (Josh Srago, EFF Legal Fellow, Why Can’t You Sue Your Broadband Monopoly? EFF (2021) https://www.eff.org/document/why-you-cant-sue-your-broadband-monopoly)

Where does this leave us in regards to the FCC, its oversight authority, and antitrust claims? Under the Chevron framework, unless Congress expressly spoke to a given issue in a statute discussing a regulated industry, it will be left for the agency granted oversight authority to interpret the statute. So long as they do so reasonably, the courts will defer to the agency’s interpretation and judgment. The 1996 Act provides for specific rules for telecommunications service providers. Under Trinko, and its expansion in Credit Suisse, we find that “the Supreme Court's decision prevents . . . courts from engaging in [an antitrust] inquiry at all for claims that push the boundaries of antitrust in the context of a regulated industry.”47 Telecommunications service providers must work with the FCC in order to offer the services in compliance with the 1996 Act and any other rules or regulations laid down by the FCC. As a result of telecommunications being a regulated market with agency oversight, including the ability to monitor for anticompetitive behavior and enforce penalties for such behavior, the courts will defer to the FCC’s conclusions. Howard Shelanski, former Director of the Federal Trade Commission’s (FTC’s) Bureau of Economics put it most succinctly:

By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, Trinko and Credit Suisse would likely have blocked the suit by the U.S. Department of Justice ("DOJ") that in 1984 broke up AT&T's monopoly over telephone service, considered among the most important antitrust enforcement actions in history.48

The Court’s creation of antitrust immunity for regulated industries extends the premise that if an antitrust claim were to include conduct that has been approved by the regulating agency, any such enforcement of antitrust laws could be contrary to the enforced regulatory regime. The FTC drew upon this comparison in its amicus filing in Credit Suisse where it stated “the complaint’s allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct.”49 And further that, “the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambiguous allegations that focus on immune conduct.”50 The Court agreed, stating that in order for the antitrust suit to be allowed, there must be, “a plain repugnancy between . . . antitrust claims and the federal . . . law.”51 Therefore, if the FCC establishes regulations that dictate that 1996 Act’s competition policies are no longer applicable under its regulatory structure, the Court will be required to dismiss an antitrust claim as being implicitly precluded under the telecommunications laws, as to do otherwise would violate the authorized regulatory regime.

#### Nuke war

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## 5

**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."

## 6

**COVID-related enforcement is key to effective recovery---it’s a key priority**

**OECD 20** (The Role of Competition Policy in Promoting Economic Recovery – Note by the United States, 12-2, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/economic_recovery_us.pdf>, y2k)

1. The Antitrust Division of the **D**epartment **o**f **J**ustice (DOJ) and the U.S. **F**ederal **T**rade **C**ommission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee’s review of the **role** of **competition policy** in promoting **economic recovery**. In this paper, we highlight some **key steps** that the Agencies have taken to respond to the present **COVID-19 crisis** in the United States and to help promote **a rapid** and **sustained economic recovery.**

2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that **competition policy** has an important role to play in the **COVID-19 recovery** process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers.

2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity

3. Deterrence of **unlawful commercial activities** has long been **a key mission** of the Agencies, rendered even more **critical** by the **social** and **economic disruptions** caused by the COVID-19 crisis.1 While most Americans have acted to help their neighbors and communities during the past year, **crisis-related disruption** increases the risk that some individuals will make **unlawful windfall profits** at the expense of **public safety** and **the health** and **welfare** of their fellow citizens.2

4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies.

2.1. COVID-19 Hoarding and Price Gouging Task Force

5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.3 The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because **health care products** and **markets** are central in **responding to the health care crisis** and eventually to **economic resilience** and **recovery**, the Task Force focuses on **protecting** the availability of those **products** designated **essential** by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products.

6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division’s Criminal Program. Each United States Attorney’s Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division’s role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior.

2.2. Procurement Collusion Strike Force

7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require **substantial** **investment** by national, state, and local authorities, with $3.48 trillion appropriated to date.4 The size and pace of such efforts unfortunately create opportunities for **fraud** and **collusion** affecting government **procurement** and **grant-making**. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.5

8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division’s five criminal offices and 13 U.S. Attorneys’ Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process.

9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.6 Over a third of the Antitrust Division’s current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come.

2.3. Protecting Competition in Labor Markets

10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.7 The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”8

11. Given the special **impact** of COVID-19 on **medical staffing** and **employment**, the Agencies are focused on preventing **employers**, including health care staffing companies and recruiters, from engaging in **collusion** or other **anticompetitive** conduct in **labor markets**, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a $100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.9 In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.10

2.4. Consumer Protection

12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.11 In addition, the FTC has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic.

13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.12 In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.13 The FTC on its own has issued more than 225 additional warning letters to marketers.14 The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.15

14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.16 For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.17

15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.18

3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, GovernmentWide Response Effort

16. The FTC and DOJ also have **shared** their **competition expertise** with other international and federal agencies in order to facilitate **COVID-19 response** and **recovery** while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.19 The purpose of the Agreement is to **maximize** the effectiveness of the **manufacture** and **distribution** of critical healthcare resources **nationwide** to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies’ responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below.

3.1. International Advocacy

17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation.

18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.20 The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic.

19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.21 In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19.

3.2. Doctrinal Responses

20. While procedural aspects of the Agencies’ work have changed as a result of COVID-19, the Agencies’ view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.22

21. In particular, the Agencies continue to take the view that the failing firm defense is “narrow in scope,” and should be invoked selectively.23 The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely “failing” firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines24 and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.25 As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors.

3.3. Competition Advocacy

22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over “certificate of need” laws26 and other restrictions on the availability of health care resources.27 Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector.

23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).28 The FTC comment supported the IFC’s provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners’ entry is limited or reimbursement requirements are overly restrictive, consumers’ access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC’s rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages.

24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.29

25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.30 For example, FTC staff sent advocacy letters to the Texas Attorney General and the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.31 FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice.

26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.32 The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event.

4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis

27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.33 In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decisionmaking will not be challenged, absent extraordinary circumstances.34

28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVIDrelated business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters:

1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;35

2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”36

3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;37 and

4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”38 29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws.

5. Revised Rules Regarding Merger Enforcement

30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.39 Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC’s electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.40 For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.41

31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies’ enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.42 In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides “greater transparency and predictability regarding the Division’s approach to remedying a proposed merger’s competitive harm,” including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.43 Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact **merger activity**, which is why continuing to improve the Agencies’ approach to **reviewing** and **remedying** potentially anticompetitive mergers **remains a priority.**

**Plan causes a trade-off and devastates antitrust agency effectiveness**

**Sacher & Yun 19** (Seth B. Sacher, Economist, & John M. Yun, Antonin Scalia Law School, George Mason University, TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT, 26 Geo. Mason L. Rev. 1491, y2k)

VII. Fallacy Seven: Not Recognizing That Their Proposals Will **Strain** Competition Agency **Resources**, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. 131As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how **neo-antitrust proponents** view the agencies, many of their proposals run a serious risk of **adversely** affecting competition agency **performance**.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. 133Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). 134Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own. 135

First, advocates of neo-antitrust would like to see the **responsibilities** of the antitrust agencies **expanded** in a number of ways. This includes more **aggressively** enforcing existing antitrust laws, as well as the consideration of issues **beyond those currently within that purview**. 136Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 137 will require **significantly** more active **market supervision** than is **currently the case**. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, 138 there is certainly a point at which **expanding** the antitrust agencies will have "**bureaucratic" diseconomies** of scale. Fully following the recommendations of **neo-antitrust** advocates could very well require many antitrust agencies to **expand** beyond some **critical point**, which will inevitably lead to significantly **larger bureaucracies** and **associated inefficiencies**.

Second, many of the above proposals would require not only **more staff**, but also staff with differing **expertise** from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

**Failed COVID recovery triggers multiple hotspots**

**Wright 20** (Robin Wright, a contributing writer and columnist @ The New Yorker, The Coronavirus Pandemic Is Now a Threat to National Security, 10-7, https://www.newyorker.com/news/our-columnists/america-the-infected-and-vulnerable, y2k)

The broader danger is the world’s **perception** now of America as **inept** and vulnerable, Doug Lute, a retired lieutenant general who was the director of operations for the Joint Chiefs and a deputy national-security adviser to Presidents George W. Bush and Barack Obama, told me. “There are two things that would drive our competitors—the general sense of incompetence by the executive branch and a reading that we are totally self-absorbed internally,” he said. “There’s an overlapping of the pandemic, the protests, and now the election that amplifies that image. In broad terms, those conditions internally will be viewed by external competitors as **opportunities**.” America faces **threats** from a spectrum of **overseas adversaries**, the retired Marine General John Allen, who is now the president of the Brookings Institution, told me. “I’m deeply concerned that there will be **foreign actors**, all the way from **jihadists** to **state actors,** that try to **take advantage** of a level of duress that we haven’t seen for a long time. It has not been lost on our adversaries, or those who would seek to gain ground, that the United States has consciously chosen to withdraw.” The sense of “**sheer confusion**” surrounding American politics in 2020 compounds the **temptation** of foreign actors to make **moves**, either for their own gains or to diminish America, Allen said. The most obvious perils are from the **big powers**, which may calculate that the White House will **not** counter their moves elsewhere in the world during such **domestic turbulence**, especially on the eve of an election, former military and Pentagon officials told me. From Russia, President Vladimir **Putin** could dig **deeper** into Ukraine, meddle in unstable **Belarus**, or **test** the strength of the **Baltic states** to resist. From China, President **Xi** Jinping could further threaten **Taiwan**, exert its claim to islands in the **S**outh **C**hina **S**ea by deploying equipment or personnel, or take more draconian actions in **H**ong **K**ong. Both countries have moved steadily to deepen their **presence** and **influence** across Asia and deep into the **Mid**dle **East**—with its access to the **Mediterranean** and the West. For Moscow and Beijing, overt challenges would be a big bet, especially with an erratic and sometimes reckless President (currently on steroids) in the White House. Yet both countries will also understand that the American public has little appetite for more trauma, the military and security officials said. “I’m sure that **foreign adversaries’** intelligence services have their collection systems turned up **high** so that they understand exactly how **disruptive** this pandemic is on our **national-security structure**,” the former C.I.A. director John Brennan said on CNN this week. **No**rth **Ko**rea and **Iran** may also try to **exploit** the moment, although both have fewer capabilities than Russia or China. Tehran is still smarting from the U.S. assassination, in January, of General Qassem Suleimani, the head of its élite Quds Force, a wing of the Revolutionary Guards, which supports several militias that have attacked U.S. troops in Iraq and Lebanon. “I suspect Iran is not done seeking revenge for the killing of Suleimani,” Lute told me. Tehran’s strength is in the proxy forces it arms, aids, and often directs across the Middle East, particularly Lebanon, Iraq, and Yemen. Since Suleimani’s death, attacks by the Popular Mobilization Forces on U.S. troops and the American Embassy in Iraq have steadily escalated; the P.M.F., backed and sometimes directed by Iran, is the umbrella for some sixty predominantly Shiite militias that operate in separate brigades. Last month, the campaign sparked a diplomatic crisis when Secretary of State Mike Pompeo warned the Iraqi government that the United States would close its Embassy in Baghdad—one of the largest American diplomatic facilities in the world—if the government did not prevent the militias from firing on the U.S. compound and American troops based elsewhere in Iraq. “Our global deterrence at the high end—nuclear and conventional deterrence in Europe, Asia, and the Gulf—will not be tested,” Lute said. “But there may be challenges at **lower levels** through **cyber** or by **proxies**.”

## 7

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

#### limit implied immunity from its antitrust laws to actively administered regulations of anticompetitive conduct.

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

#### A multistate AG antitrust enforcement over state antitrust statutes solves the aff---causes federal follow-on

Artega 19 (Juan A. Arteaga is an experienced antitrust attorney and a former Deputy Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, The Role of US State Antitrust Enforcement, Global Competition Review, 11-19, <https://www.lexology.com/library/detail.aspx%3Fg%3Dd423301d-f4d1-4550-a99c-1880869e67e7+&cd=11&hl=en&ct=clnk&gl=us>, y2k)

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition. In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions. This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage. Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process. As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States. This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations. Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices. These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints. The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’. No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications. To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices. During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC. State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies. After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’

The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees)in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.

None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support. In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.

After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.

Given that companies will increasingly have to engage with state attorneys general in a meaningful manner with respect to antitrust matters, this chapter discusses key issues related to state antitrust enforcement in the United States. Specifically, this chapter discusses:

the federal and state antitrust laws under which state enforcers operate;

the processes through which state enforcers coordinate with each other and their federal counterparts;

the opportunity for coordination and conflict between state enforcers and private counsel during litigation;

strategic and practical considerations when engaging with state attorneys general; and

certain noteworthy enforcement actions that state enforcers have recently prosecuted.

Statutory regime governing US state antitrust enforcement

Civil enforcement of federal antitrust laws

Enforcement actions on behalf of state governmental entities

Under the federal antitrust laws, state attorneys general have the express authority to bring civil actions on behalf of their state, municipalities, and governmental entities for harm suffered when directly purchasing goods or services. In bringing such actions, state attorneys general can seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees.

In actions seeking monetary relief, state attorneys general typically allege that the state plaintiffs were forced to pay higher prices by an unlawful horizontal conspiracy, such as a price-fixing or bid-rigging scheme, and seek to recover the overcharges. In some cases, state attorneys general have sought to recover damages arising out of anticompetitive unilateral conduct, such as overcharges paid by state governmental entities due to a defendant’s actual or attempted monopolisation of a specific market.

In seeking injunctive relief, state attorneys general often argue that such relief is proper because the business practice or transaction in question – in addition to harming the state plaintiffs – has or will cause injury to the state’s general economy. While general harm to a state’s economy can serve as a basis for injunctive relief, state attorneys cannot base their request for damages on such harm.

Parens patriae enforcement actions

A well-settled principle in the United States’ legal system is that ‘the States have a quasi sovereign interest in protecting their citizens from ongoing economic harm’. Consequently, the federal antitrust laws expressly authorise state attorneys general to file parens patriae actions in federal court that seek to redress the harm suffered by their citizens due to federal antitrust violations. In providing state attorneys general with parens patriae authority, the federal antitrust laws permit state antitrust enforcers to seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees. State attorneys general have been empowered to seek such broad and substantial relief on behalf of their citizens to allow them ‘to deter further economic harm and to obtain relief for the injury inflicted on their economies and their citizens’.

In exercising their parens patriae authority, state attorneys general have often sought to protect their citizens and state economies from the harm caused by anticompetitive business practices. For example, in the e-Books Litigation, 33 state attorneys general alleged that Apple, Inc and various book publishers unlawfully conspired to fix the prices of electronic books, which resulted in their citizens paying higher prices and harm to their states’ general economies. Ultimately, these state attorneys general, working alongside private class counsel, secured settlements from the defendants that provided nearly US$600 million in direct refunds to their citizens. In a pending lawsuit brought against various manufacturers of generic pharmaceuticals, 44 state attorneys general have alleged that the defendants unlawfully conspired to fix the prices for numerous generic drugs, which forced their states and citizens to pay billions of dollars in overcharges, as well as significantly harmed their states’ general economies.

State attorneys general have also invoked their parens patriae authority to protect their citizens and state economies from the harm caused by anticompetitive transactions. For instance, in their pending challenge to T-Mobile’s proposed acquisition of Sprint, nearly 20 state attorneys general have alleged that the transaction will result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states’ general economies. Likewise, the state attorneys general that joined the DOJ’s successful challenges to the proposed Anthem/Cigna and Aetna/Humana mergers alleged that these mergers would have harmed their citizens and the general economies of their states by reducing the number of large health insurance providers from five to three.

There are, however, important limitations on the parens patriae authority conferred to state attorneys general under the federal antitrust laws. For instance, the monetary relief sought by state attorneys general must: (1) arise out of a Sherman Act violation; (2) have been incurred by natural persons residing in their states (i.e., the losses suffered by business organisations cannot be included in the alleged damages); (3) exclude harm suffered by indirect purchasers of the goods and/or services in question; (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries; and (5) arise out of actual financial losses rather than general harm to their state’s economy. Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.

In seeking to prove the monetary harm suffered by their citizens, state attorneys general can employ many of the same methods utilised by private plaintiffs. In price-fixing cases, for example, state attorneys general can prove the claimed aggregate damages by utilising ‘statistical or sampling methods’, ‘comput[ing[ [the] illegal overcharges’, or relying on any other methodology deemed ‘reasonable’ by the court. In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle parens patriae actions, which the state attorneys general challenging the T-Mobile/Sprint merger have done.

Civil enforcement of state antitrust laws

Most states have enacted state antitrust laws that are comparable to Sections 1 and 2 of the Sherman Act. In addition, some states have passed antitrust laws that are similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act. These state antitrust laws typically contain provisions expressly requiring that ‘they be construed in conformity with comparable [f]ederal antitrust statutes’.

State antitrust statutes typically provide state attorneys general with broad authority to investigate possible violations, including the power to ‘issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations’. Like the federal antitrust laws, most state antitrust laws authorise state attorneys general to file civil lawsuits on behalf of their states and state governmental entities whenever a violation has caused them to suffer harm in their capacity as direct purchasers of goods or services, as well as parens patriae actions on behalf of their citizens.

## 1st adv

#### Inequality is statistically insignificant – there’s zero need for antitrust.

Wright et. al ‘19 [Joshua D., Elyse Dorsey, Jonathan Klick, and Jan M. Rybnicek; University Professor and Executive Director, Global Antitrust Institute at Scalia Law School; Attorney Advisor to Commissioner Noah Joshua Phillips, United States Federal Trade Commission; Professor of Law, University of Pennsylvania; Counsel in the antitrust, competition, and trade practice of Freshfields, Bruckahus Deringer LLP; Arizona State Law Review, “REQUIEM FOR A PARADOX: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” vol. 51; KP]

2. The Empirical Evidence: Is Inequality Really Growing?

All of the papers discussed above assume that inequality has increased in recent years. This view is fairly common among economists and would seem to be borne out as seen in Figure 2 below, which presents the Gini coefficient for U.S. incomes for the last fifty years.166

Chart, line chart

Description automatically generated

Figure 3, which plots the ratio of the share of US income among the fifth quintile of income-earning households to the share among the first quintile of households167 tells a similar story.

Chart, line chart

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Robert Kaestner and Darren Lubotsky underscore the point that inequality measures can be significantly affected by a failure to account for government transfers and employee benefits that presumably substitute for cash income.168 Given that healthcare costs have grown faster than inflation in recent years, a failure to account for health insurance benefits could significantly affect economic inequality measures. Reviewing estimates from the literature, Kaestner and Lubotsky find that including health insurance substantially reduces the gap between incomes at the high end of the distribution and those at the low end.169 Interestingly, however, the authors find that there is still an upward trend in inequality over time when the cash equivalent of health insurance and government transfers are included.170 The trend, however, is substantially muted.171 Specifically, including government transfers and the imputed value of employer subsidized health insurance, Kaestner and Lubotsky indicate that the ratio of income between households at the ninetieth percentile and the tenth percentile was about five in 1995, growing to 5.2 in 2004 and to 5.6 in 2012.172

Although yearly estimates of this more complete measure of income inequality are not available, and the time series span is somewhat limited, another approach might be to examine consumption inequality since consumption will be a function of effective income, and consumption data are more readily available. Also, consumption might be a better measure of welfare as argued by Bruce Meyer and James Sullivan.173 When determining the desirability of antitrust enforcement to address economic inequality, presumably one not only wants to examine the indirect effects on people’s incomes and wealth, but also the direct effect on consumer welfare, for which consumption might be a useful proxy.

Considering the arguments raised above regarding the desirability of using antitrust to fight inequality, one might reason that higher prices coming from increased concentration make both the well-off investors and executives and the lowly consumer worse off, but the investors and executives are compensated through high incomes due to their monopoly profits. Under these arguments, we should see an upward trend in the consumption ratio between the haves and the have-nots. Figure 4, which uses data on average consumption by households in the various income quintiles from the Bureau of Labor Statistics Consumer Expenditure Survey,174 shows that while the ratio has grown over time, the growth is much smaller than that found for income itself. Further, unlike income, the growth is not nearly as consistent with periods of increasing inequality and decreasing inequality alike.

#### Market concentration can’t explain inequality or wage stagnation, and antitrust won’t solve.

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This paper highlights some empirical findings from the new literature on the effect of labor and product market concentration on wages. We address three questions about market concentration that have not always been placed front and center in this literature. The first question is, “Does concentration adversely affect wages at a point in time?” The second question is, “Has concentration grown over time?” The third question is, “Can growing concentration by itself explain a significant portion of the change in wage trends in recent decades?” We find there is evidence to answer “yes” to the first and second questions but not the third. To be clear, the failure to answer affirmatively to the third question is not a criticism of these studies. The studies are not claiming that rising concentration alone can explain wage stagnation or inequality. Yet too many readers have taken these studies’ findings to this conclusion.

Finally, this paper makes two broader points about market power. First, market concentration is not the only source of power—particularly employer power—in markets. Second, even unchanged employer power (like that conferred by market concentration) can play a role in growing wage suppression and inequality if it is accompanied by a collapse of workers’ market power. The new literature on market concentration tells us a lot about employer power, but further exploration of what has happened to workers’ market power remains a key research agenda.

This paper highlights the need to tackle sluggish wage growth and rising inequality with a broad menu of policy interventions that go beyond those provided by competitive models to focus on employer and worker power, and even beyond the antitrust agenda suggested by focusing exclusively on market concentration.

Following are our key conclusions:

Labor market concentration is negatively correlated with wages, but the scope of its downward pressure on wages is limited.

New research shows that labor market concentration is negatively correlated with wages. However, the effect of labor market concentration is comparatively modest when scaled against what we consider the most significant wage trend in recent decades: the growing gap between typical (median) workers’ pay and productivity.

The new literature on market concentration has not yet provided concrete empirical estimates of a key labor market trend of recent decades—rising compensation inequality. This should be a priority for this research agenda in the future.

The new concentration literature does allow us to estimate the effect of market concentration on the share of overall income claimed by labor compensation. These estimates suggest that concentration has not risen enough, nor is its effect on labor’s share of income strong enough, to account by itself for an economically important share of the divergence between economywide productivity and the typical worker’s pay in recent decades.

The new research on labor market concentration implies that this concentration reduced wage growth by roughly 0.03 percent annually between 1979 and 2014, a decline that would explain about 3.5 percent of the total divergence between the median worker’s pay and economywide productivity over the same period.

One important study shows that the “average” labor market is “highly concentrated.” But differences between measures of concentration of the average labor market and the labor market experienced by the average worker have important implications for how to assess the impact of labor market concentration on long-term wage trends. In other words, many labor markets suffer from high degrees of concentration, but most people work in labor markets with only low-to-moderate degrees of concentration.

Nonetheless, labor market concentration is a particular challenge for rural areas and small cities and towns. This is an important finding for those looking to provide economic help to residents of those areas.

#### Populism won’t cause great power war

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Several reasons present themselves. First, nuclear weapons have given the prospect of a global war, or any great-power war, a possibility of civilization-ending finality that it did not have in the past. Second, the security architecture created under U.S. leadership after World War II has arguably worked to reduce the likelihood of major armed conflict among the great powers. Third, the existence of a network of international institutions, both inside and outside the UN system, has pushed in the same direction. Fourth, it is very possible that, as John Mueller and Christopher Fettweis have argued, decision-makers have to come see great-power war as “subrationally unthinkable, or not even part of the option set for the great powers.”[ii] The extreme destructiveness of the twentieth century’s world wars, fueled partly by developments in technology, might well have produced long-term effects on how leaders and publics think about global or great-power war, in a way, for instance, that the Napoleonic Wars, for all their horror and bloodiness, did not. Phil Arena’s recent contribution to this series argues that if the U.S. under a Trump administration signals an unwillingness to defend its allies, then Putin might be tempted to gamble on an invasion of the Baltics or Kim Jong-Un similarly might gamble on an invasion of South Korea (and that would drag in China). Putting aside Kim Jong-Un for the moment as a special case, let’s consider Putin. As long as NATO exists – and Trump, despite his statements about the unfairness of the distribution of cost burdens, has not suggested, as far as I’m aware, that he wants to dissolve the alliance – then Putin would have to assume that an attack on the Baltics would trigger a NATO response. Even if Putin does not see great-power war as unthinkable or outside his “option set,” one would assume that for reasons of pure self-interest he would not want to risk a nuclear war. Nor, one might think, would he want to jeopardize the prospect of better (from his standpoint) relations with a U.S. administration less concerned with, among other things, his commission of war crimes in Syria or his annexation of Crimea than the Obama administration has been. For these reasons, I’m not too worried that the advent of the Trump administration will lead to a war with Russia over the Baltics. The Korean peninsula is, perhaps, a more worrisome situation. Chances are, however, that Trump, after taking office, will be prevailed upon to make reassuring noises about the U.S. commitment to South Korea, and that should suffice to deter Kim Jong-Un from doing anything too rash. The cautionary point here, admittedly, is that it’s not clear whether Kim can be counted on to behave in a minimally rational fashion. Putin, whatever one might think of him, is rational. It’s not entirely clear whether Kim is. However, if Kim is irrational then all bets are off regardless of what U.S. policy pronouncements are forthcoming. World politics is not invariably cyclical and states can learn from experience (as even Gilpin acknowledged). If one admits this and pays due attention to history, then it is plausible to think that the force of populist nationalism, as expressed in more erratic and/or less ‘internationalist’ official policy, will not, whatever its other effects may be, increase the low likelihood of a global war.

#### Democracy won’t mediate tensions with Russia or China.

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Whether influenced by Hollywood or Santa Monica (the California headquarters of RAND), the history of war as Freedman relates it is essentially conceptual. The end of the dominant Cold War paradigm is a case in point. The ahistorical euphoria of the supposed “end of history” misled many western experts into predicting that an age of perpetual peace would at long last come into view because, as one specialist in this period wrote, the “absence of war between democracies comes as close as anything we have to an empirical law in international relations,” thus undergirding the rise of global governance ideals of liberal internationalism. The way forward in those early years after the fall of the Iron Curtain seemed therefore not technological, but conceptual. The key to peace lay in finding ways to help this one supposedly empirical historical law to take hold. Rather than bring peace, however, the pursuit of the concept of perpetual security through democracy only produced a new idea of war. It convinced western leaders of the need to advance the speed of historical progress through carefully managed military action against a select number of dictators. As prosecuted by George W. Bush, Tony Blair, and their advisers, the new paradigm not only made it possible for great powers to consider meddling in the domestic politics of smaller states, it impelled them to do so. By making more states democratic, through the use of force if necessary, these interventions would make the world safer. The idea was at least as old as Woodrow Wilson, but the eras of the world wars and the Cold War had made it too difficult to put in practice. After 1989, with the seemingly insurmountable dominance of western military organizations, the absence of a Soviet Union to balance western intervention, and the general post-Cold War hubris of western leaders, the environment was right for it to return. The result, of course, has not been an end of history and perpetual peace, but an extension of conflict and a reawakening of older grievances. The central problem, as “The Future of War” depicts it, was an all-too-eager willingness to accept the basic principle of democratic peace theory without thinking through the limits of the theory or fully examining alternatives. One clear alternative theory had already begun to emerge from the minds of theorists like Mary Kaldor and Rupert Smith. Their works essentially argued that war as once understood no longer existed. The future belonged to the side that could best exploit the disintegration of state authority, control the messaging, and work among the people in the new megacities. Anne-Marie Slaughter saw the inevitable splintering of the “sovereign state” into sub-sovereign centers of governance power, thereby squeezing out sovereignty in favor of power exercised by non-sovereign or less-than-sovereign institutions, on the one hand, and the ascendant rule of supra-national institutions, on the other. One might argue, although Freedman does not, that Hezbollah, FARC, Hamas, al-Qaeda, the Islamic State, and others have been able to survive against much more technologically sophisticated states because they have indeed made the intellectual shift to the kind of conflict that Kaldor and Smith described. The west has struggled against such adversaries not on the technological level but on the conceptual one. The west had two models on which to draw, neither of which helped them conceptualize the central problem. The “aid to civil power” model suggested building up the capabilities of local authorities so that they could care for their own security needs and maybe even become an exporter of regional security. The second model focused on “peacekeeping,” which required armies to act impartially even when, as in Yugoslavia, such a model indirectly empowered malicious actors like Slobodan Milosevic. Both models were frustrating, but they had just enough successes to keep them viable and allow them to survive intellectual challenges like the ones posed by Kaldor and Smith.

## 2nd

#### Between broad court oversight and forced sharing, the plan spills over and decks innovation

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Big Tech platforms have indeed created infrastructure that “renders them uniquely suited to serve their customers.” But forced sharing would reduce the incentive to create those incredibly valuable platforms. In recommending that Congress overturn Trinko, the HJC Report barely recognizes how such an action would reduce incentives to create the platforms in the first place.

An antitrust duty to deal is at the outer boundary of Section 2 liability for a reason: it is extremely difficult for a court or a regulator to achieve the correct balance between ex ante incentives to innovate and ex post incentives to restrict anticompetitive behavior. In cases where conduct is ambiguous as to its anticompetitive effects, the error-cost framework cautions against imposing a duty to deal.

Reviving the much broader essential facilities doctrine and applying it to Big Tech platforms will surely reduce the incentives to build the next Amazon, Google, Facebook, or Apple. While critics believe these monopolies are unassailable without government intervention, the history of the Internet suggests this is far from true: Facebook overtook MySpace, Google overtook Yahoo, Amazon overtook Barnes & Noble and Borders, Apple’s iPhone overtook BlackBerry. Applying the essential facilities doctrine to Big Tech would reduce the incentives of new entrants to undertake the tremendous investment and risk required to create the next big thing.

Difficulty of Enforcing Remedies

Just as importantly, the Trinko Court learned from the difficult history of judicial enforcement of antitrust remedies that courts are ill-suited to act as central planners. In Terminal Railroad Association itself, the Supreme Court struggled to enforce its remedies. As disputes reached the Court three different times over the next twelve years, the Court declined to impose the dissolution remedy and left the regulation of rates and terms of service largely up to the Interstate Commerce Commission. By comparison, as the Trinko Court recognized, the remedy of extending nondiscriminatory admission to non-members to join the club was easy. The remedies for complainants that allege Big Tech platforms are essential facilities would require considerably more judicial oversight of prices, platform rules, the level of first-party competition, and many other issues courts would have a hard time assessing.

If every time the App Store or Google Play rejected a developer became grounds for a lawsuit over the “reasonableness” of the platform’s rules, or if every time Google or Facebook changed its pricing for ads it became a case about the whether the price was “fair,” the courts would be tied up with litigation over enforcement of remedies.

Conclusion

The essential facilities doctrine is a relic which has no place in modern antitrust jurisprudence. Reviving it in order to battle Big Tech platforms is a mistake. It is essential to protect the innovation of the Internet age. The essential facilities doctrine is ill-suited to that end.

#### That turns all their impact scenarios

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Innovation, in particular, technology-based innovation, is the key driver for both economic competitiveness and national security. Other nations, with interests adverse to the United States, recognize this fact. In an increasingly interconnected world, nation states seek to accumulate innovation prowess, and hence economic strength, as a key element of their geopolitical power. Especially savvy nation states also pursue such ends as a mechanism to influence or diminish the national security and geopolitical power of the United States. There is no need to inflict upon the world the carnage of war if one’s geopolitical aims can be achieved via alternative competitive means.

Several authors suggest China’s long-term ambitions include unseating the United States as the world’s economic and political leader.1 More compelling than opinions, several United States (“U.S.”) government and private studies document a systematic and coordinated effort by China to achieve technical and economic dominance through misappropriation of U.S. technology.2 These efforts are additionally supported by a companion effort to weaken international economic institutions and norms designed to protect U.S. intellectual property and free trade.3 The Chinese tactics include illegal means, and sophisticated use of legal means, to misappropriate U.S. technology and weaken the U.S. innovation infrastructure including: a) Leveraging the open university and laboratory ecosystem via direct sponsorship and engagement of Chinese nationals;4 b) Devaluing U.S. positions in patents and technology platforms;5 and c) Accessing private sector U.S. technology through acquisitions and ownership stakes in existing firms, funding of high-tech start-ups, and forced joint ventures and other contractual agreements as a prerequisite for entering the Chinese market.6

This particular form of competitive strategy targeting the innovation ecosystem in the United States is labeled by the Authors as “Innovation Warfare,”7 and it is defined as an executable competitive strategy: a) Reflecting an innovation, intellectual property, and technology strategy articulated and executed by the state (e.g. China); b) Using illegal means, political means, and legal economic activities—of the type previously residing solely in the province of commercial enterprise, to achieve the state’s objectives; c) Employing these economic and innovation activities to achieve both economic geopolitical power and to enhance military capabilities; and d) Functioning as a military, national security, and defense doctrine not solely as a reflection of the state’s economic policy goals nor commercial competition in the ordinary course.

Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.

#### Aff doesn’t solve---the problem is lack of providers, not lack of competition---increased antitrust worsens digital gap

Manne 21 (Geoffrey A. Manne is the President and Founder of the International Center for Law & Economics (ICLE). Kristian Stout is ICLE’s Director of Innovation Policy. Ben Sperry is Associate Director of Legal Research with ICLE. Build Broadband Better: Focus on Competition, Not Competitors, 6-28, <https://truthonthemarket.com/2021/06/28/build-broadband-better-focus-on-competition-not-competitors/>, y2k)

In our paper, we argue that the real public policy issue for broadband isn’t curbing the pursuit of profits or adopting price controls, but making sure Americans have broadband access and encouraging adoption. In areas where it is very costly to build out broadband networks, like rural areas, there tend to be fewer firms in the market. But having only one or two ISPs available is far less of a problem than having none at all. Understanding the underlying market conditions and how subsidies can both help and hurt the availability and adoption of broadband is an important prerequisite to good policy.

The basic problem is that those who have decried the lack of competition in broadband often look at the number of ISPs in a given market to determine whether a market is competitive. But this is not how economists think of competition. Instead, economists look at competition as a dynamic process where changes in supply and demand factors are constantly pushing the market toward new equilibria.

In general, where a market is “contestable”—that is, where existing firms face potential competition from the threat of new entry—even just a single existing firm may have to act as if it faces vigorous competition. Such markets often have characteristics (e.g., price, quality, and level of innovation) similar or even identical to those with multiple existing competitors. This dynamic competition, driven by changes in technology or consumer preferences, ensures that such markets are regularly disrupted by innovative products and services—a process that does not always favor incumbents.

Proposals focused on increasing the number of firms providing broadband can actually reduce consumer welfare. Whether through overbuilding—by allowing new private entrants to free-ride on the initial investment by incumbent companies—or by going into the Internet business itself through municipal broadband, government subsidies can increase the number of firms providing broadband. But it can’t do so without costs―which include not just the cost of the subsidies themselves, which ultimately come from taxpayers, but also the reduced incentives for unsubsidized private firms to build out broadband in the first place.

If underlying supply and demand conditions in rural areas lead to a situation where only one provider can profitably exist, artificially adding another completely reliant on subsidies will likely just lead to the exit of the unsubsidized provider. Or, where a community already has municipal broadband, it is unlikely that a private ISP will want to enter and compete with a firm that doesn’t have to turn a profit.

#### The Western model for the internet is just as illiberal---it’s not just China

Bagwandeen 21 (Mandira Bagwandeen is a Non-resident Senior Fellow in FPRI’s Africa Program, Don't blame China for the rise of digital authoritarianism in Africa, <https://www.fpri.org/article/2021/09/dont-blame-china-for-the-rise-of-digital-authoritarianism-in-africa/>, y2k)

The Chinese state is the poster child of using digital tools for domestic surveillance and censorship. But China is not the only country exporting digital technologies that can be used for authoritarian modes of governance. Reliant on importing new technologies, Africa risks becoming a passive consumer between rival Chinese and Western tech giants, each exporting their own brand of surveillance capitalism.

Digital technologies have provided governments worldwide with the tools to communicate with citizens, gauge popular sentiment, assess political risks, adjust policies and be more responsive. However, these same technologies have also provided autocratic and illiberal governments with new means of stifling dissent and blocking opposition, including greater avenues for control.

Surveillance, propaganda and disinformation are age-old strategies used by governments to stifle opposition and secure rule. But, as the digital age continues to permeate ever larger swathes of our lives, various technologies emerge that ‘make repression and control more pervasive, efficient, and subtle’.

Digital authoritarianism is challenging what has become known as digital democracy – whereby online platforms are increasing citizen participation in public life – to the extent it is often said to be ‘reshaping the power balance between democracies and autocracies’. It takes many forms such as online harassment, the dissemination of fake news, cyber-attacks, internet shutdowns and targeted surveillance through social media, artificial intelligence (AI) and facial recognition software.

Nowhere is the art of digital authoritarianism displayed in all its glory more so than in China. The Chinese state is the vanguard of using digital tools for domestic surveillance and censorship – from its Great Firewall to the use of CCTV cameras, data censorship, AI tracking and the implementation of its social credit system. Surveillance and censorship mechanisms are so omnipresent in Chinese society that it is almost invisible, making it the poster-child for a modern Orwellian state. Because of Beijing’s longstanding experience in using technology for censorship and surveillance, China is often the preferred supplier of tools and tricks for many countries in Asia, South America and, especially, Africa.

In recent years, Chinese tech firms (such as CloudWalk, Huawei, Hikvision and Yitu) have expanded their presence across Africa. At the time of writing, there are 266 Chinese technological initiatives on the African continent, ranging from 5G infrastructure to data centres, smart-cities, surveillance projects aimed at reducing crime and improving public safety, and education and skills development programmes. However, given Africa’s less than stellar track record with corruption and authoritarian rule, some regimes could use these technologies to implement extensive surveillance measures should they want to. Several African states – including Chad, Ethiopia, Zimbabwe, the Republic of Congo, Burundi, Togo, Guinea, Tanzania and Uganda – have employed digital authoritarian practices. Over the last two decades, internet shutdowns, online surveillance, social media taxes and imprisonment over anti-government posts have threatened basic freedoms and rights in many African nations, raising concerns about the future of democracy in the region. Huawei technicians helping Ugandan and Zambian forces to spy on political opponents is commonly cited as an example of how African regimes may use Chinese-exported surveillance technology for nefarious purposes.

What about the West?

Solely blaming China for the rise of digital authoritarianism in Africa is, however, somewhat foolhardy. Western nations, and particularly the US, have not hesitated to accuse China of exporting digital authoritarianism to the continent, overlooking the active role of African agency in acquiring Chinese surveillance technologies, while simultaneously failing to hold African regimes and leaders accountable.

By pointing fingers at China alone, western partisans run the ‘risk of oversimplifying a complex environment’ (Africa, after all, is not a country) and overlooking the roles of other distributors. These accusations are parochial and seem to imply that other serial offenders do not exist – offenders such as Russia and Saudi Arabia. Both these states make use of technology for repressive purposes and have influenced the use of authoritarian digital tactics and tools in Africa.

Moreover, the narrative that China is championing digital authoritarianism on the continent cannot be analysed without the miasma of hegemons waging tech wars and overarching struggles for dominance. By portraying China (and, by extension, its tech companies) as deviant actors that want to diminish digital democracy, the US places itself on higher moral ground. However, this moral edifice is one thinly lacquered – after all, they too spy on their citizens (thanks to Edward Snowden for enlightening us on extensive surveillance by US intelligence). Furthermore, countries such as France, the US, the UK, Israel and Germany also supply high-end surveillance technology, spyware, hacking software and censorship applications to fragile democracies and illiberal governments.

Let’s face it, if the US was really serious about restricting the spread of so-called ‘authoritarian technology’, then it should also impose comprehensive measures and restrictions on both democratic and autocratic producers.

Ultimately, the argument that China is bent on exporting its tech-governance model around the globe is as flawed and hypocritical as it is accusatory. Instead, like its Western counterparts, it is more likely that China, through its tech giants, is exporting aspects of its brand of surveillance capitalism. We must avoid becoming trapped by conveniently amnesiac arguments and generalisations that paint China as this digital baddy. It would be more prudent to assess African countries that import Chinese technology on a case-by-case basis to determine whether there really is a causal link (supported by evidence and data) that Chinese tech tools are being used for malignant purposes with the intent to replicate aspects of Beijing’s brand of tech-governance.

#### Eagleman is a hack --- the internet will never entirely collapse because of mutual interests, there are alternative ways to prevent disease, and it empirically doesn’t solve their impacts

**Mnookin 12** Seth Mnookin teaches science writing at MIT and blogs at the Public Library of Science, Download the Universe, March 23, 2012, "The Frozen Future of Nonfiction", http://www.downloadtheuniverse.com/dtu/2012/03/why-the-net-matters-how-the-internet-will-save-civilization-by-david-eagleman-canongate-books-2010-for-ipad-by-set.html

At least, that’s what I assumed before I read Why The Net Matters, Eagleman’s frustrating 2010 e-book about how and why the Internet will save civilization. (I reviewed the $7.99 iPad version, which is the platform it was designed for; a stripped-down, text-based version is available on the Kindle for the portentous price of $6.66.) The problems start with Eagleman’s premise, which is so vague and broad as to be **practically** meaningless. There are, he writes, just “a handful of reasons” that civilizations collapse: “disease, poor information flow, natural disasters, political corruption, resource depletion and economic meltdown.” Lucky for us (and Eagleman does offer readers “[c]ongratulations on living in a fortuitous moment in history”), the technology that created the web “obviates many of the threats faced by our ancestors. In other words...[t]he advent of the internet represents a watershed moment in history that just might rescue our future.” On the other hand, it just might not: In order to make his point, Eagleman **either ignores or doesn’t bother to look** for any evidence that might undercut it. The first of six “random access” chapters that make up the bulk of Why The Net Matters is devoted to “Sidestepping Epidemics,” like the smallpox outbreak that helped bring down the Aztec Empire. In the future, Eagleman writes, the “protective net,” in the form of telemedicine, telepresence (“the ability to work remotely via computer”), and sophisticated information tracking, will save us from these outbreaks. That all sounds lovely, but what of the fact that we’re currently experiencing a resurgence in vaccine-preventable diseases such as measles...a resurgence which is fueled in no small part by misinformation spread over that very same “protective net”? A few chapters later, in a section celebrating the benefits of the hive mind, Eagleman invokes Soviet pseudoscientist Trofim Lysenko, a famed quack who took over the U.S.S.R.’s wheat production under Stalin. Because the Soviet Union spanned 13 time zones, Eagleman writes, “central rule-setting was disastrous for wheat production. … Part of the downfall of the USSR can be traced to this centralization of agricultural decisions.” That sounds nice, and might even be true—but it’s not a point that’s supported by Lysenko, whose main shortcoming was not that he believed in a one-size-fits-all approach; it was that he was a fraud. Moving to the present day, Eagleman addresses wildfires that swept through Southern California in 2007, which, he writes, “brought into relief the relationship between natural disasters and the internet.” At the beginning of the outbreak in October, Californians were glued to their television screens, hoping to determine if their own homes were in danger. But at some point they stopped watching the televisions and turned to other sources. A common suspicion arose that the news stations were most concerned with the fate of celebrity homes in Malibu and Hollywood; mansions that were consumed by the flames took up airtime in proportion to their square footage, which made for gripping video but a poor information source about which areas were in danger next. So people be­gan to post on Twitter, upload geotagged cell phone photos to Flickr, and update Facebook. I had been fairly obsessed with the wildfires, and since I didn’t remember this “common suspicion,” I decided to check the article Eagleman cites as the source of this info, which was a Wired blog post titled “Firsthand Reports from California Wildfires Pour Through Twitter.” It contained no references to a celebrity-obsessed news media; instead, the piece described how “the local media [was] overwhelmed.” It also talked about a San Diego resident who was “[a]cting as an ad hoc news aggregator of sorts” by “watching broadcast television news, listening to local radio reports and monitoring streaming video on the web” and then posting information, along with info gleaned from IMs, text messages, and e-mails, to his Twitter account.

# 2NC

## T

#### They don’t—There’s a clear test: can the practice described by the AFF ever legally occur after the plan? If it’s ever still allowed, it’s not prohibited!

Martin G. Vallespinos 20, LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### Per se prohibitions are how ‘practices’ are prohibited.

Robert Cooter 94, Prof of Law, Boalt Hall, School of Law, University of California at Berkeley. EPSTEIN/TITLE VII SYMPOSIUM: “Market Affirmative Action,” 31 San Diego L. Rev. 133

Although cartels are inherently unstable, the U.S. antitrust framework does not merely withhold enforcement from contracts to create cartels. In addition, the original U.S. legislation, which was enacted at the end of the nineteenth century, outlaws cartels and other "conspiracies against trade." 46 The courts have interpreted the law to prohibit certain collusive practices ("per se prohibitions"), such as retail price maintenance, regardless of whether collusion occurred in fact. 47 These prohibitions greatly increase the difficulty of sustaining a cartel. 48 Similarly, U.S. civil rights laws prohibit business practices involving "disparate treatment" of those persons belonging to any one or more protected classes. 49 The illegality of conducting certain business transactions with the intent to discriminate greatly increases the difficulties involved in explicit discrimination, especially in large organizations.

Over the years, the effective scope of antitrust law expanded from banning cartels to suppressing monopolies. 50 A monopoly can arise even without collusion or engaging in practices that are illegal per se. For example, monopoly power can be "thrust upon" a producer due to economies of scale in production. Such monopolies are evaluated for their legality in the United States according to a balancing test. 51 The balancing test is intended to determine whether the savings in cost from scale economies outweigh the risk to the public of having only one or two producers. Balancing tests have their own history that I cannot discuss in detail, but a relevant episode is the [\*155] rise and fall of the "structural approach." 52 In the 1970s, the antitrust authorities prosecuted some very large manufacturers with the intention of restructuring whole industries in order to increase the number of producers. However, this approach was deemed a failure and abandoned in the 1980s for a variety of reasons. 53

## Regs

#### ‘Antitrust laws’ are Sherman, Clayton, and FTC.

FTC ’13 [Federal Trade Commission; first saved on the Wayback Machine’s Internet Archive on December 14, 2013; “The Antitrust Laws,” https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws]

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

#### Targeted regulations don’t use the hammer of antitrust

Bakst and Beaumont-Smith 20 – Daren Bakst is a senior research fellow in Regulatory Policy Studies at the Heritage Foundation. Gabriella Beaumont-Smith is a senior policy analyst for Trade and Macroeconomics in the Center for Data Analysis (CDA). (“A Conservative Guide to the Antitrust and Big Tech Debate,” BACKGROUNDER No. 3563 | December 1, 2020 https://www.heritage.org/sites/default/files/2020-11/BG3563\_0.pdf)//gcd

Antitrust Should Be Used Judiciously and Not Used for Unrelated Issues. Unlike targeted regulations that address specific problems, antitrust law can be used to completely reshape an industry and potentially the entire economy by reshaping numerous industries. Therefore, antitrust is not a policy tool to be used lightly. Yet, many proposed reforms, such as in the recent House Subcommittee report, would use concerns about Big Tech as a way to make broad-based changes to antitrust law. Just because a concern is raised about the power of Big Tech, this does not mean that antitrust is the tool to address that concern. For example, policymakers may want to address Big Tech’s censorship of speech or address data and privacy issues. These issues, though, are distinct from the competition issues addressed by antitrust law. Trying to use antitrust to address these unrelated issues will undermine antitrust and gives the impression that the goal is simply to punish Big Tech.

#### Trinko & Credit suisse only matter in-so-far as there’s no regulation!

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For over a century, antitrust law has provided the principal framework for competition enforcement in the United States, with the Department of Justice (DOJ), the Federal Trade Commission (FTC), and private plaintiffs pursuing cases under the Sherman Act and Clayton Act. For at least as long, however, federal regulatory agencies have also implemented competition policy pursuant to statutes governing industries like telecommunications, electric power, transportation, securities, health care, and agriculture. Sometimes industry specific regulations limit competition, and at other times they protect and promote competition.2 Even when regulations appear to block competitive entry, they usually do so to manage a separate market failure and mitigate its harmful consequences. The Federal Communications Commission (FCC), for example, blocked competitive entry into the long-distance telephone business so that high-priced long-distance service could subsidize local telephone rates, which state regulators held to a low level to prevent "natural" local service monopolies from exploiting ratepayers.' The FCC feared that a competitor entering the long-distance market would target the most profitable customers and siphon off the revenues the Bell System used to cross-subsidize regulated local rates. Whether rules appear to foster or limit competition, regulation has played an important role alongside antitrust law in U.S. competition policy.

This Feature examines the relationship between antitrust enforcement and the changing level of regulation in the economy. Because both antitrust and regulation are forms of government intervention, it might seem logical to assume that they should rise and fall together with different administrations' views about the proper role of government. Contrary to that political logic, this Feature argues that antitrust enforcement should instead run countercyclical to regulation, especially during strongly deregulatory cycles. The comparative importance of countering deregulatory shifts arises because while increased regulation can trigger doctrinal barriers that keep antitrust enforcement out of regulated markets, reduced regulation triggers no such mechanism for pushing antitrust back into deregulated markets. ' Enforcement gaps can therefore emerge when agencies withdraw rules that govern competition, especially where antitrust has been inactive due to that regulation. It is thus particularly important that antitrust authorities pay attention to changes in industry regulation, so they can step into any gaps caused by receding competition-related rules.

Because regulation can limit the scope of antitrust enforcement, an administration's approach to regulation has important implications for its overall competition policy. An administration inclined toward greater intervention might expand use of its regulatory authority, possibly issuing competition-focused rules that displace antitrust law in markets where the rules apply. Whether such new rules would improve consumer welfare depends on the comparative effectiveness of antitrust enforcement and regulation in the affected markets and on what other benefits or costs the rules might bring. By contrast, an administration that pursues a deregulatory agenda might repeal competition-focused regulations or refrain from enforcing them, leaving anticompetitive activity in the affected markets unaddressed unless antitrust enforcement steps in.6

Empirical evidence shows that antitrust enforcement and regulation have not always changed in the same direction.' Beyond the fact that both policy tools represent forms of government intervention, there is no clear reason why they should. Comparative policy priorities offer one reason why the political intuition that antitrust and regulation move together might not hold. Regulation tends to follow specific policy concerns -the environment, worker safety, immigration, and health care, for example - and therefore might increase for some objectives and stay steady or retreat for others, depending on an administration's policy goals. A given administration might or might not choose to prioritize antitrust enforcement's objective of promoting competition, possibly causing antitrust to rise or fall independently of regulation.

Ideological and pragmatic considerations might also lead to varying relationships in the trends of antitrust and regulation. A strongly market-oriented administration might decide that neither competition-enforcing rules nor antitrust is necessary, and reduce both forms of intervention. Alternatively, an administration suspicious of regulation might view antitrust as a less burdensome way to govern competition and replace regulation with antitrust enforcement, causing the two kinds of intervention to trend in opposite directions. The relationship between antitrust enforcement and regulation thus depends on policy choices about the importance of competition enforcement and the institutions through which to accomplish that enforcement. Those policy choices raise an underlying normative question: how should antitrust enforcement and regulation relate to each other?

In addressing that question, this Feature argues that economics, legal doctrine, and current debates over competition policy all provide good reasons for antitrust enforcement to run counter to deregulation. Part I discusses why deregulation can lead to an enforcement gap, especially during an aggressive deregulatory cycle. Part II then turns to the question of how antitrust authorities should respond to the enforcement gaps potentially created by deregulatory cycles, explaining why sound economic policy, the clarification of precedent, and the politics surrounding competition enforcement all weigh in favor of keeping antitrust enforcement strong as regulatory intervention weakens.

#### Regulation is ‘more effective.’

D. Daniel Sokol 20, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “Antitrust's "Curse of Bigness" Problem, The Curse of Bigness: Antitrust in the New Gilded Age”, Michigan Law Review, Volume 118, Issue 6, 118 Mich. L. Rev. 1259, April 2020, Lexis

CONCLUSION

Antitrust works well because it is technocratic in that a singular (but flexible within its economics) goal is administrable institutionally. To introduce the world of political imperfections into a technical process that examines markets would create further distortions affecting consumers. 152Antitrust does well dealing with antitrust problems. To the extent that there are other related problems, the right answer is not to create an antitrust that lacks democratic accountability (because antitrust becomes regulation via the backdoor) and exceeds its mandate of the past forty years. Rather, the better solution is to identify the underlying problem and solve it with more effective tools. If the problem is one of redistribution, tax is a better choice than antitrust. 153 If the problem is one of privacy, strengthen privacy laws. 154 If the problem is one of financial institutions or sector regulators not doing what they need to do, correct structural problems with sector regulators. Antitrust has increasingly moved out of sector regulation 155 and toward advocacy. 156The advocacy budget of the antitrust agencies is tiny, and to the extent that the problem is the rules of the game for particular industry sectors, Wu falls short by not suggesting greater competition advocacy.

Wu's concern with big tech companies because they are big (p. 126) is as misplaced now as it was earlier in antitrust history. Antitrust has gone through various moments in which it had reevaluated whether it has the proper tools to combat anticompetitive behavior in technology-related markets. 157It does have such tools and can bring important cases in these markets. 158 [\*1281] It was just a decade ago that we were told that Walmart was taking over shopping, that eBay was the largest online marketplace, or that Facebook was the primary way in which users shared information. Today, Uber competes with Lyft, Amazon has eclipsed eBay, Facebook is a legacy service, and younger people use any other set of applications to share information--such as Pinterest, Twitter, or Snapchat. In a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics. To ask antitrust to go beyond its institutional capacity sets up antitrust to fail, because Wu's deeper concern is with how society is structured. That structure can be changed through elections to the presidency and Congress and through changes as to the makeup of the Supreme Court. Antitrust history shows that it is the Supreme Court that changes antitrust law and policy the most because of antitrust's common law-like nature. 159

#### Regulations actually grow stronger over time---antitrust is unenforced.

Shelanski ’18 [Howard; May 2018; Professor of Law at Georgetown University, Ph.D. and J.D. from the University of California at Berkeley; Yale Law Journal, “Antitrust and Deregulation,” vol. 127]

Certain characteristics of competition-enforcing rules might make them particularly vulnerable to repeal or non-enforcement. Notably, competition-oriented rules might have fewer fixed costs but higher recurring costs for firms than other kinds of regulation, which more likely require companies to make initial investments to meet regulatory standards. Rules such as those governing emissions reductions, toxic chemicals, workplace safety, transportation safety, agricultural standards, and the like often require companies to invest upfront in new technologies, compliance systems, or ways of doing business when a standard changes. To the extent such investments are fixed rather than recurring, repeal of the underlying regulation might not save much for the regulated firms going forward compared to what the rule has already cost them.69 In such cases, the constituency for repeal of the rule will be much weaker than the constituency that might have existed to prevent initial promulgation of the rule. Indeed, regulated firms, having already sunk the costs of compliance, might want to keep the rule in place so that new competitors would have to incur the same regulatory costs to enter the market. This is particularly true for rules that require regulated firms to invest in new technology or other capital improvements. The OECD reports that “[i]n regulated sectors, licensing procedures, territorial restrictions, safety standards, and other legal requirements may unnecessarily deter or delay entry. In some cases, these regulations seem to be the result of lobbying efforts by incumbent firms to protect their businesses.”70

The economic logic that can drive incumbent firms to accept existing rules or even lobby for additional regulation no longer holds for rules that do not impose upfront costs and that increase rather than reduce competition for incumbent firms. Because such rules erode rather than protect incumbent firms’ market positions, it seems likely that such rules will have a much stronger constituency for repeal. Regulated firms have much greater incentive to seek removal of rules that cause rather than impede competition.

## Ineq

#### Inequality’s declining.

Gramm ’21 [Phil and John Early; March 23; a former chairman of the Senate Banking Committee and a visiting scholar at the American Enterprise Institute; served twice as assistant commissioner at the Bureau of Labor Statistics; Wall Street Journal, “Incredible Shrinking Income Inequality,” <https://www.wsj.com/articles/incredible-shrinking-income-inequality-11616517284>; KP]

Twice over the past 50 years, the Census Bureau has significantly changed how it collects and records income statistics. In 1993 and 2013 the Census Bureau changed its methods in an effort to collect better information from high-income households. These changes created two major discontinuities and distorted the time-series so that the change in measured income inequality in those years was as much as 15 times the average annual change found for the entire 50-year period. At the time, the Census Bureau explained in detail what it had done. It also explained the limitations the changes imposed on the use of its income-inequality measure to look at changes over extended periods. In subsequent use of the data by the Census Bureau and others, however, those warnings have been neglected.

The simple solution would have been to isolate the distortions caused solely by the changes in data-collection techniques and adjusted the previous years’ measures to reflect the effect of the changes. We made these adjustments and they are shown in the nearby figure. The blue line is the actual reported Census Bureau measurement of income inequality. The yellow line eliminates the effects of the 1993 and 2013 discontinuities caused solely by changes in measurement technique. The black line shows income inequality when the value of all transfer payments received is counted as income, income is reduced by taxes paid, and the two technical corrections are made.

Lo and behold—income inequality is lower than it was 50 years ago.

The raging debate over income inequality in America calls to mind the old Will Rogers adage: “It ain’t what you don’t know that gets you into trouble. It is what you do know that ain’t so.” We are debating the alleged injustice of a supposedly growing social problem when—for all the reasons outlined above—that problem isn’t growing, it’s shrinking. Those who want to transform the greatest economic system in the history of the world ought to get their facts straight first.

#### Their ev about increasing inequality omits important benefits

Elyse Dorsey et al. 20—Adjunct Professor at Antonin Scalia Law School; Geoffrey A. Manne, president and founder of the International Center for Law and Economics; Jan M. Rybnicek, Antitrust Attorney, former Advisor at FTC, Editor for the Antitrust Law Journal; Kristian Stout, ICLE’s Director of Innovation Policy; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission. ("Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement," June 2, 2020, from Pepperdine Law Review, Vol. 47, No. 861, https://ssrn.com/abstract=3592974)

First, consider the evidence on inequality trends. Populist claims regarding increasing inequality largely rely upon analysis of the Gini coefficient for US incomes over the last 50 years, which appears to show a steep increase in inequality. Examining the ratio of the share of US income among the 5th quintile of income-earning households to the share among the 1st quintile of households likewise seems to show increasing inequality.83

While these data points offer interesting insights, it is again important to understand their limitations. As Robert Kaestner and Darren Lubotsky emphasize, for example, failing to account for government transfers and employee benefits—that presumably substitute, in part, for cash income—can meaningfully affect these kinds of inequality measures.84 One important example they explore is that of healthcare benefits. As healthcare costs have rapidly increased in recent years, omitting a measure of health insurance benefits (provided by employers or by the government) could significantly affect ultimate inequality findings. Kaestner and Lubotsky, in fact, analyze inequality measures accounting for this omission, and find that including health insurance benefits substantially lessens the difference between high-end and low-end incomes.85 They find the ratio of income between households at the 90th percentile and the 10th percentile to be approximately 5 in 1995, 5.2 in 2004, and 5.6 in 2012.86 So while their findings support the notion that inequality is increasing, they also suggest that the trend is significantly smaller than reported.

Examining household consumption trends tells a similar story. Scholars have argued that consumption might be a superior measure of welfare, given a “closer link between consumption and well-being.”87 Consumption trends would also seem to be relevant when considering antitrust enforcement efforts, as they offer more information regarding economic effects than isolated income or wealth measurements. Examining household consumption over the last couple decades indicates that inequality is increasing but at a muted rate.

Accordingly, the evidence does seem to indicate inequality is increasing by some amount. Potentially more-accurate

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measures of income and welfare, however, suggest this trend is not as significant as populists claim. So, the first assumption in this particular populist theory appears to be valid, if often overstated. That leads us to the second—and for this discussion, the critical—assumption that antitrust enforcement is driving the apparent inequality trend.

#### No empirical or statistical evidence that antitrust decreases inequality

Jonathan Klick et al. 19—University of Pennsylvania Law School, Erasmus School of Law; Elyse Dorsey, Adjunct Professor at Antonin Scalia Law School; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Jan Rybnicek, Freshfields Bruckhaus Deringer LLP. ("Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," January 9, 2019, from George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3249524)

To unpack these results, Table 5 presents the effect of investigations on real average consumption expenditures for the 1st and 5th quintile households by income. For brevity, we only present the specifications with 2 lags and the time trend.

Table

Description automatically generated

On the whole, the relationship between the enforcement metrics and consumption is comparable for the households in both the first and fifth income quintiles. There is not much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality. And certainly not evidence significant enough to justify the aggressive policy proposals recently injected into discussion of competition policy.

Stepping away from this aggregate analysis for a moment, it is interesting to note that the new(-old) focus on “big is bad” when it comes to inequality ignores an impressive literature on the effects of one of the biggest players in the US in recent decades – Walmart. Work by Jerry Hausman and Ephraim Leibtag shows that when Walmart Supercenters enter a market, food prices paid by consumers in the market drop by about 3 percent, and because they have detailed longitudinal data on household expenditures, they are able to estimate household welfare effects due to this price decrease. They find that the welfare effects are substantial and they are most pronounced for those at the lower end of the socio-economic spectrum.158 In addition to this price effect, David Matsa shows that Wal-Mart’s entry into a market induces competitor supermarkets to improve the quality of their service so as to avoid losing even more business to Wal-Mart and its lower prices.159 Thus, in the posterchild case for big is bad, the behemoth Wal-Mart would appear to improve inequality by its very existence.

Although we believe consumption is the most relevant measure for assessing the welfare effects (in absolute or, as here, in relative terms) of antitrust policy, we provide similar analyses of income and wealth. Using Census data,160 in Table 6, we again provide estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

Table

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As with consumption measures, there is generally no statistically significant effect (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the income shares of those at the bottom or the top of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the opposite effect. Further, many of the investigation coefficients are positive for the fifth quintile income share as well. If we examine combined ratios of the shares as we did with the consumption data, we still find no support for the assumption that an increase in antitrust enforcement has any systematic effect on inequality.16

#### No impact---populist governments aren’t sustainable

Denis **MacShane 17**, Former UK minister for Europe, 4-26-2017, "Judy Asks: Is Populism on the Run?," Carnegie Europe, http://carnegieeurope.eu/strategiceurope/68775?lang=en

Populism is the most overused word in today’s political lexicon. The most populist parties after 1945 were the Communists, then the Greens. The EU and immigration are targets of choice for populist parties, as are globalization and the Bilderberg Group of transatlantic elites. Populist movements of the Left like Spain’s Podemos or Greece’s Syriza have been as strong as those of the Right like the Alternative for Germany (AfD) or the UK Independence Party (UKIP). Populists announce they represent the true interests of the people against the elite establishment and its ruling parties. Populists promise much but deliver little. The problem for populism is that when it succeeds, it becomes part of the establishment and the target for the next anti-elite populist demagogue. In most cases, existing parties adopt populist ideas—many parties have become green, and the British Tories have adopted UKIP’s anti-European rhetoric. Extreme populism as embodied in Britain’s vote to leave the EU and the election of U.S. President Donald Trump can win. Then comes a backlash. The military-judicial state in America is exerting counterpressure against Trump’s populism. The electoral wins for pro-EU forces in Austria, the Netherlands, and France followed the triumph of Brexit populism, which is mainly confined to England outside London. When she wins her populist election on June 8, UK Prime Minister Theresa May will have to swap populism for realism unless she wants to do lasting damage to Britain.

#### No Russia OR China wars---even if revisionist.

Bruce **Jones 19**. Jones is vice president and director of the Foreign Policy program at Brookings Institution, Washington, DC, USA, a senior fellow in the Institution’s Project on International Order and Strategy, and a consulting professor at the Freeman Spogli Institute at Stanford University. 2019. “A Not Quite Multipolar World.” Think Tanks, Foreign Policy and the Emerging Powers, edited by James G. McGann, Springer International Publishing, pp. 61–78. Crossref, doi:10.1007/978-3-319-60312-4\_3.

The Rising Powers: Reformers, Not Revolutionaries With the notion that the BRICS are a unified force capable of challenging the United States shown to be more fiction than fact, it becomes clear that the rising non-Western powers are better positioned to shape the global order, gaining greater influence from acting within the international system rather than overthrowing it.32 The larger rising powers, such as India and Brazil, as well as traditional US allies like Korea and Turkey, have repeatedly demonstrated that they do not seek to break the international order, but rather to profit from it while their own power continues to grow. For these nations, a collapse of the international order would only result in unprofitable chaos, offering little incentive for rising powers to reject the US-led system for anarchy. Certainly, in this changing environment, the emerging powers will press for a greater role at the global high table, rather than merely accept Western edicts. Yet, in pursuing their own independent agendas, the emerging powers face a dilemma. They may have an impulse to rivalry and some interest in restraining US influence, but they also hold fundamental stakes in a stable global economy, and in protecting the sea and air routes through which global trade and energy flow. This is particularly true of China, which needs to maintain very rapid growth both to sustain its domestic stability and to project international influence—but this requires energy imports, the flow of which largely depends on the security maintained by American military might.33 In the end, these states will not forget that their very rise came about through integration in

to the established global economic system, not by rebelling against it. Select actors, like China and Russia, will continue efforts to curtail US leadership in certain domains. However, even these revisionist powers are likely to elect to cooperate with Washington and its allies in some fields, namely counter-terror and nuclear non-proliferation, the latter illustrated by the investment by Russia and China in the recently successful nuclear negotiations with Iran by the P5+1 (the five permanent members of the United Nations [UN] Security Council, China, France, Russia, the United Kingdom, and the United States, plus Germany). Their own need for continued economic growth constrains these would-be revolutionaries. On its own, neither Moscow nor Beijing is strong enough to completely topple the US-led system—they can only challenge American leadership if others follow, and so far they have found few takers. The rising middle-income nations should provide these missing followers; yet they are absent. The fundamental reality is that, for most of these states, their stories mirror that of the majority of the BRICS: the allure of remaining in the US-led system is greater than the potential benefits of working against it. As with India and Brazil, the second-tier powers have grievances with the current international order. However, these aspects point them towards reform, not revolt. Emerging potential middle powers from Nigeria to Indonesia have experienced tremendous economic growth under the Western-organized order, growth that their leaders know cannot be guaranteed if the global economic system were to collapse.34 Similarly, they appreciate the greater danger inherent in a more anarchic world. While the Western order cannot fully prevent conflict, the US-backed post-1945 norm against interstate aggression has contributed to a decline in interstate warfare since the mid-twentieth century.35 The second-tier nations have benefited significantly from this fact. For governments seeking to maintain economic growth, not having to dedicate vast resources to territorial defense is a large boon. What is more, many of these emerging middle-income countries are in Asia, and there they cast a wary eye on a growing and increasingly assertive China, clearly preferring the continuation of the existing order to what would amount to an international free-for-all. Moreover, the middle-income states paradoxically benefit most from a halfhearted BRICS challenge to the global order. In pressing the West for revisions to the international order, the BRICS shoulder the burden of opening the door for a conversation on reforming the international system. However, this push lacks the momentum to successfully create a new order. Instead, it leaves an opening for the second-tier states to put forward their own demands. Furthermore, as the BRICS economies stumble and the group’s cohesion frays, this opening only expands, enabling these middle powers to punch above their weight. Thus, these second-tier nations are likely to engage in a strategy akin to the geopolitical balance of power theory, except in economic terms. Alternating support for Western-backed institutions, such as the World Bank and IMF, will be matched with endorsements of BRICS alternatives as the middle powers effectively hedge against either group gaining concrete dominance over the international economic order. Within this framework of support for the general tenets of the international order, the emerging powers possess a strong impulse towards rivalry with the United States. At a minimum these countries have a strong impulse towards autonomy, grounded in what I call the “psychology of rise,” in which rising powers seek to undo the humiliation done unto them in their first encounters with a globalizing West and in their resulting positions within the post-war order. The psychology of rise is most evident in China’s assertive stance in defense of its interests and influence in East Asia, but it is equally present in India’s defense of its interests in the evolving climate change regime, and in Brazil’s aspiration for a bigger role in global security affairs. And, despite some economic constraints and challenges, the emerging powers have the tools to advance their aims, and even, at times, to reshape portions of the international order. China is on track to augment its regional sway through the economic diplomacy of the nascent Asian Infrastructure Investment Bank (AIIB), which has successfully drawn in US allies and partners from across the globe. Though Delhi appears to be flirting with increased use of its hard power, India enjoys a wide range of soft-power assets to draw upon.36 It boasts, as Peter Martin notes, “Bollywood, Yoga, Buddhism, and a rich philosophical tradition. It has a world-class cadre of global public intellectuals from Amartya Sen to Salman Rushdie. It also has an extensive, wealthy, and increasingly politically engaged diaspora spread across the political and economic capitals of the world.”37 While the permanent members of the UN Security Council rejected the 2010 Turkish-Brazilian diplomatic foray to broker a nuclear deal with Iran, the initiative itself, as well as global reaction, reflected Brasilia’s increasing weight in the international arena. Thus, while the rising powers will strive for autonomy, this struggle is unlikely to entirely overcome the incentives for restraint towards, and even cooperation with, the current international order and the United States. This balance between the impulse to rivalry and the incentives for restraint is the most important dynamic in contemporary international affairs; and for the moment, the balance tips towards restraint.

## Internet

#### Overall competition in the broadband market is healthy

Manne 21 (Geoffrey A. Manne is the President and Founder of the International Center for Law & Economics (ICLE). Kristian Stout is ICLE’s Director of Innovation Policy. Ben Sperry is Associate Director of Legal Research with ICLE. Build Broadband Better: Focus on Competition, Not Competitors, 6-28, <https://truthonthemarket.com/2021/06/28/build-broadband-better-focus-on-competition-not-competitors/>, y2k)

The data show that the state of competition in broadband is generally healthy. ISPs routinely invest billions of dollars per year in building, maintaining, and upgrading their networks to be faster, more reliable, and more available to consumers. FCC data show that average speeds available to consumers, as well as the number of competitors providing higher-speed tiers, have increased each year. And prices for broadband, as measured by price-per-Mbps, have fallen precipitously, dropping 98% over the last 20 years. None of this makes sense if the facile narrative about the absence of competition were true.

#### Eagleman is a hack --- the internet will never entirely collapse because of mutual interests, there are alternative ways to prevent disease, and it empirically doesn’t solve their impacts

**Mnookin 12** Seth Mnookin teaches science writing at MIT and blogs at the Public Library of Science, Download the Universe, March 23, 2012, "The Frozen Future of Nonfiction", http://www.downloadtheuniverse.com/dtu/2012/03/why-the-net-matters-how-the-internet-will-save-civilization-by-david-eagleman-canongate-books-2010-for-ipad-by-set.html

At least, that’s what I assumed before I read Why The Net Matters, Eagleman’s frustrating 2010 e-book about how and why the Internet will save civilization. (I reviewed the $7.99 iPad version, which is the platform it was designed for; a stripped-down, text-based version is available on the Kindle for the portentous price of $6.66.) The problems start with Eagleman’s premise, which is so vague and broad as to be **practically** meaningless. There are, he writes, just “a handful of reasons” that civilizations collapse: “disease, poor information flow, natural disasters, political corruption, resource depletion and economic meltdown.” Lucky for us (and Eagleman does offer readers “[c]ongratulations on living in a fortuitous moment in history”), the technology that created the web “obviates many of the threats faced by our ancestors. In other words...[t]he advent of the internet represents a watershed moment in history that just might rescue our future.” On the other hand, it just might not: In order to make his point, Eagleman **either ignores or doesn’t bother to look** for any evidence that might undercut it. The first of six “random access” chapters that make up the bulk of Why The Net Matters is devoted to “Sidestepping Epidemics,” like the smallpox outbreak that helped bring down the Az

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tec Empire. In the future, Eagleman writes, the “protective net,” in the form of telemedicine, telepresence (“the ability to work remotely via computer”), and sophisticated information tracking, will save us from these outbreaks. That all sounds lovely, but what of the fact that we’re currently experiencing a resurgence in vaccine-preventable diseases such as measles...a resurgence which is fueled in no small part by misinformation spread over that very same “protective net”? A few chapters later, in a section celebrating the benefits of the hive mind, Eagleman invokes Soviet pseudoscientist Trofim Lysenko, a famed quack who took over the U.S.S.R.’s wheat production under Stalin. Because the Soviet Union spanned 13 time zones, Eagleman writes, “central rule-setting was disastrous for wheat production. … Part of the downfall of the USSR can be traced to this centralization of agricultural decisions.” That sounds nice, and might even be true—but it’s not a point that’s supported by Lysenko, whose main shortcoming was not that he believed in a one-size-fits-all approach; it was that he was a fraud. Moving to the present day, Eagleman addresses wildfires that swept through Southern California in 2007, which, he writes, “brought into relief the relationship between natural disasters and the internet.” At the beginning of the outbreak in October, Californians were glued to their television screens, hoping to determine if their own homes were in danger. But at some point they stopped watching the televisions and turned to other sources. A common suspicion arose that the news stations were most concerned with the fate of celebrity homes in Malibu and Hollywood; mansions that were consumed by the flames took up airtime in proportion to their square footage, which made for gripping video but a poor information source about which areas were in danger next. So people be­gan to post on Twitter, upload geotagged cell phone photos to Flickr, and update Facebook. I had been fairly obsessed with the wildfires, and since I didn’t remember this “common suspicion,” I decided to check the article Eagleman cites as the source of this info, which was a Wired blog post titled “Firsthand Reports from California Wildfires Pour Through Twitter.” It contained no references to a celebrity-obsessed news media; instead, the piece described how “the local media [was] overwhelmed.” It also talked about a San Diego resident who was “[a]cting as an ad hoc news aggregator of sorts” by “watching broadcast television news, listening to local radio reports and monitoring streaming video on the web” and then posting information, along with info gleaned from IMs, text messages, and e-mails, to his Twitter account.

#### Total collapse is impossible

Jonathan Strickland 10, "HowStuffWorks "What would happen if the Internet collapsed?"," 2-10-12, HowStuffWorks, http://computer.howstuffworks.com/internet/basics/internet-collapse4.htm, DOA: 10-1-2014, y2k

Here's the good news -- a total collapse of the Internet would be almost impossible. The Internet isn't a magic box with an on/off switch. It's not even a physical thing. It's a collection of physical things and it's constantly changing. The Internet isn't the same entity from one moment to the next -- machines are always joining or leaving the Internet. It's possible for parts of the Internet to go offline. In fact, this happens all the time. Whether it's a particular server that crashes and needs to be rebooted or replaced or a cable under the ocean gets snagged by an anchor, there are events that can disrupt Internet service. But the effects tend to be isolated and temporary. While there is such a thing as the Internet backbone -- a collection of cables and servers that carry the bulk of data across various networks -- it's not centralized. There's no plug you could pull out from a socket or a cable you could cut that would cripple [destroy] the Internet. For the Internet to experience a global collapse, either the protocols that allow machines to communicate would have to stop working for some reason or the infrastructure itself would have to suffer massive damage. Since the protocols aren't likely to stop working spontaneously, we can rule out that eventuality. As for the massive damage scenario -- that could happen. An asteroid or comet could collide with the Earth with enough force to destroy a significant portion of the Internet's infrastructure. Overwhelming gamma radiation or electromagnetic fluctuations coming from the sun might also do the trick. But in those scenarios, the Earth itself would become a lifeless hulk. At that stage it hardly matters whether or not you can log in to MySpace. The positive way to look at this is to realize that the men and women who helped design the Internet created an amazing tool that's remarkably stable. Even when sections of the Internet have a technical hiccup, the rest carries on with business as usual. While the collapse of the Internet would be a catastrophic event, it's not one you need to worry about.

#### The Western model for the internet is just as illiberal---it’s not just China

Bagwandeen 21 (Mandira Bagwandeen is a Non-resident Senior Fellow in FPRI’s Africa Program, Don't blame China for the rise of digital authoritarianism in Africa, <https://www.fpri.org/article/2021/09/dont-blame-china-for-the-rise-of-digital-authoritarianism-in-africa/>, y2k)

The Chinese state is the poster child of using digital tools for domestic surveillance and censorship. But China is not the only country exporting digital technologies that can be used for authoritarian modes of governance. Reliant on importing new technologies, Africa risks becoming a passive consumer between rival Chinese and Western tech giants, each exporting their own brand of surveillance capitalism.

Digital technologies have provided governments worldwide with the tools to communicate with citizens, gauge popular sentiment, assess political risks, adjust policies and be more responsive. However, these same technologies have also provided autocratic and illiberal governments with new means of stifling dissent and blocking opposition, including greater avenues for control.

Surveillance, propaganda and disinformation are age-old strategies used by governments to stifle opposition and secure rule. But, as the digital age continues to permeate ever larger swathes of our lives, various technologies emerge that ‘make repression and control more pervasive, efficient, and subtle’.

Digital authoritarianism is challenging what has become known as digital democracy – whereby online platforms are increasing citizen participation in public life – to the extent it is often said to be ‘reshaping the power balance between democracies and autocracies’. It takes many forms such as online harassment, the dissemination of fake news, cyber-attacks, internet shutdowns and targeted surveillance through social media, artificial intelligence (AI) and facial recognition software.

Nowhere is the art of digital authoritarianism displayed in all its glory more so than in China. The Chinese state is the vanguard of using digital tools for domestic surveillance and censorship – from its Great Firewall to the use of CCTV cameras, data censorship, AI tracking and the implementation of its social credit system. Surveillance and censorship mechanisms are so omnipresent in Chinese society that it is almost invisible, making it the poster-child for a modern Orwellian state. Because of Beijing’s longstanding experience in using technology for censorship and surveillance, China is often the preferred supplier of tools and tricks for many countries in Asia, South America and, especially, Africa.

In recent years, Chinese tech firms (such as CloudWalk, Huawei, Hikvision and Yitu) have expanded their presence across Africa. At the time of writing, there are 266 Chinese technological initiatives on the African continent, ranging from 5G infrastructure to data centres, smart-cities, surveillance projects aimed at reducing crime and improving public safety, and education and skills development programmes. However, given Africa’s less than stellar track record with corruption and authoritarian rule, some regimes could use these technologies to implement extensive surveillance measures should they want to. Several African states – including Chad, Ethiopia, Zimbabwe, the Republic of Congo, Burundi, Togo, Guinea, Tanzania and Uganda – have employed digital authoritarian practices. Over the last two decades, internet shutdowns, online surveillance, social media taxes and imprisonment over anti-government posts have threatened basic freedoms and rights in many African nations, raising concerns about the future of democracy in the region. Huawei technicians helping Ugandan and Zambian forces to spy on political opponents is commonly cited as an example of how African regimes may use Chinese-exported surveillance technology for nefarious purposes.

What about the West?

Solely blaming China for the rise of digital authoritarianism in Africa is, however, somewhat foolhardy. Western nations, and particularly the US, have not hesitated to accuse China of exporting digital authoritarianism to the continent, overlooking the active role of African agency in acquiring Chinese surveillance technologies, while simultaneously failing to hold African regimes and leaders accountable.

By pointing fingers at China alone, western partisans run the ‘risk of oversimplifying a complex environment’ (Africa, after all, is not a country) and overlooking the roles of other distributors. These accusations are parochial and seem to imply that other serial offenders do not exist – offenders such as Russia and Saudi Arabia. Both these states make use of technology for repressive purposes and have influenced the use of authoritarian digital tactics and tools in Africa.

Moreover, the narrative that China is championing digital authoritarianism on the continent cannot be analysed without the miasma of hegemons waging tech wars and overarching struggles for dominance. By portraying China (and, by extension, its tech companies) as deviant actors that want to diminish digital democracy, the US places itself on higher moral ground. However, this moral edifice is one thinly lacquered – after all, they too spy on their citizens (thanks to Edward Snowden for enlightening us on extensive surveillance by US intelligence). Furthermore, countries such as France, the US, the UK, Israel and Germany also supply high-end surveillance technology, spyware, hacking software and censorship applications to fragile democracies and illiberal governments.

Let’s face it, if the US was really serious about restricting the spread of so-called ‘authoritarian technology’, then it should also impose comprehensive measures and restrictions on both democratic and autocratic producers.

Ultimately, the argument that China is bent on exporting its tech-governance model around the globe is as flawed and hypocritical as it is accusatory. Instead, like its Western counterparts, it is more likely that China, through its tech giants, is exporting aspects of its brand of surveillance capitalism. We must avoid becoming trapped by conveniently amnesiac arguments and generalisations that paint China as this digital baddy. It would be more prudent to assess African countries that import Chinese technology on a case-by-case basis to determine whether there really is a causal link (supported by evidence and data) that Chinese tech tools are being used for malignant purposes with the intent to replicate aspects of Beijing’s brand of tech-governance.

#### No Chinese data localization laws

Lu 20 (Xiaomeng Lu is Access Partnership’s Senior Policy Manager and China practice lead, Is China Changing Its Thinking on Data Localization? 6-4, <https://thediplomat.com/2020/06/is-china-changing-its-thinking-on-data-localization/>, y2k)

Under pressure from the COVID-19 economic downturn, China’s authorities revealed mild interest in exploring less restrictive data localization measures. Global tech companies have long advocated for this approach, to no avail, and their Chinese counterparts have been only slightly more successful in getting the same message across.

Now, some emerging provincial proposals aim to allow cross-border data flow in free trade zones.

In January 2020, China’s Hainan provincial legislature discussed the regulatory proposal “Administrative Rules for International Internet Access for Enterprises and Individuals” and studied other aspects of cross-border data flow. A few months later China’s Cabinet, the State Council, published the “Hainan Free Trade Harbor Construction Plan,” which includes a pilot project for “secure cross-border data flow” and “measures to facilitate more convenient personal date outbound flow.”

This is not the first time the holiday island’s provincial government attempted to explore wider access to the free internet. In 2018, they briefly posted a three-year action plan on an official government website announcing that tourists entering Hainan’s special designated zones, Haikou and Sanya, will be able to access some websites blocked by China’s great firewall, namely Twitter, Facebook, and YouTube. It also planned to hire 50,000 English-speaking foreign workers and buy 2,000 minutes of advertising time a year on international networks, including the BBC, CNN and CNBC. The intent was to market this new feature of the free trade zone in order to boost tourism and spur economic growth.

In fact, Hainan is not the only provincial government trying to push the envelope on data localization in pursuit of commercial benefits. Also in 2018, the Hong Kong privacy commissioner for personal data, Stephen Kai-yi Wong, presented a cross-border data flow policy proposal, including a white list regulatory mechanism, in Beijing to advocate for the converging of data flow mechanisms across mainland China and Hong Kong. Such an alignment will shore up economic activities across the Greater Bay Area and enhance Hong Kong’s competitiveness as one of Asia’s financial hubs.

Unfortunately, these proposals appear to run counter to China’s long-standing censorship regime and stringent data localization principal as stipulated by the 2017 Cybersecurity Law. Is this a sign of provincial and local governments moving the needle on data localization policy in China, or is it simply a case of the central government’s failure to notice?

In the case of the Hainan legislative proposal, the Communist Party Politburo Standing Committee member Han Zheng visited the province in November 2019 and discussed the next steps for Hainan’s free trade harbor plan. At this meeting Han specifically mentioned further measures in opening data governance and cross-border data flow. So it appears that this recent round of data flow discussions in Hainan has been carried out in coordination with the country’s top decision makers.

In parallel with the Hainan effort, the Shanghai municipal government issued a new five-year guideline in April for its free-trade zone, which includes new experiments to explore cross-border internet governance and data exchange. It presents options for relaxing restrictions, such as setting up offshore data centers and generating a white list to explore how select companies can directly access the “international internet.” Unlike the Hainan three-year plan, which was removed from government website within hours, the Shanghai five-year guideline has been widely reported by Chinese media and is still available online, weeks after being posted.

One reason for the potential rethinking of data localization policy is the daunting economic pressure China faces post-COVID-19 pandemic. In the first quarter of 2020, the national GDP suffered an unprecedented 6.8 percent contraction. To revitalize the economy and get people back to work, Beijing authorities launched an ambitious $1.4 trillion digital infrastructure investment plan, calling on governments and private entities to forge ahead in 5G, artificial intelligence, the Internet of Things, and other emerging technologies development and deployment.

In March, Premier Li Keqiang told China’s State Council, “We must implement targeted policies to arrest the slide in foreign trade and foreign investment, to forestall damage to the wider economy.” Around the same time, Vice Commerce Minister Wang Shouwen held hours-long conference calls with the American Chamber of Commerce in China and the European Union Chamber of Commerce in China to answer questions about China’s economic outlook and policy response. At the National People’s Congress, in May, Li outlined three priorities for 2020: stabilizing employment, ensuring living standards, and winning the battle against poverty – all objectives that rely on economic recovery supported by foreign investment.

Following this guidance from the top, Chinese officials from the central, provincial, and local levels are going out of their way to help foreign investors revive supply chains and keep manufacturing jobs in China. As the political focus shifts to post-COVID-19 economic revitalization, these local government proposals for moderation of data localization rules are potentially back on the table.

Major global technology companies have been advocating for cross-border data flow liberalization for years. The U.S. government repeatedly raised this market barrier issue on behalf of companies like Microsoft, Google, Amazon Web Services (AWS), IBM, and Oracle at U.S.-China bilateral trade negotiation venues during the Obama years, as well as in the context of the Trump administration’s Phase One trade deal. Today, there are still indications data localization issues are in discussion related to Phase Two negotiations. However, most China observers don’t have much hope for Phase Two progress. After all, the Phase One deal itself is in danger as President Trump increasingly sees it as a political liability in an election year amid a sliding economy and climbing unemployment rate.

Yet global tech leaders never cease to work on this important issue through their local partners. For example, last year Microsoft sponsored a legal research paper titled “Proposal for Hong Kong to be a Data Center Hub for the Greater Bay Area and China.” The study recommends a special pilot project of free data flow within the Greater Bay Area and describes related requirements and criteria for a gradual approach to liberalization depending on the nature of the data (e.g. non-critical information/non-personal data, pure commercial data, R&D data, personal data, and sensitive/national security data). It also analyzes the feasibility of the recommendations from both legal and policy perspectives.

More importantly, in addition to the advocacy efforts of Western tech companies, Chinese internet companies have also been quietly working to soften China’s draft data localization rules. As Chinese firms expand their presence overseas, these internal rules limit their ability to transfer and process data in locations that best serve business, operational, and data security purposes. Both Alibaba and Tencent have produced studies on the negative economic and innovation impact of data localization measures. Their representatives have argued at public forums that the overly burdensome General Data Protection Regulation regulatory model stifles the innovation of Chinese companies, making them less competitive vs. Google, Facebook, and AWS. Behind closed doors, they pressured Chinese regulators for a more lenient data localization model. As a result of these efforts, they were able to slightly loosen the tight restrictions proposed in the first draft of data localization rules and successfully delayed the completion of these rules for over two years.

These free trade zone data flow policy proposals present an interesting policy advocacy opportunity to tech and service companies that rely on data to operate and innovate. As data regulators become open to explore new models to manage cross-border data issues, companies could leverage their interest and shape the conversation on data flows policy in China.

# 1NR

## 1NR

#### 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 limited 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 heading 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 an 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 nuclear weapons. 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.

#### 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

#### Stability is essential and the plan upends it

Rogerson 20—(\*Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology; \*\*Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law). \*William Rogerson & \*\*Howard Shelanski. June 2020. “Antitrust Enforcement, Regulation, and Digital Platforms”. University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911.

I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

#### Negativity bias outweighs—reactions are short-term and cascade.

Barkin 19 (Tom; July 11; the president and CEO of the Federal Reserve Bank of Richmond, where he is responsible for monetary policy, bank supervision, payment services and the Fed’s National IT organization, M.B.A. from Harvard University; the Federal Reserve Bank of Richmond, “Confidence, Expectations and Implications for Monetary Policy,” https://www.richmondfed.org/press\_room/speeches/thomas\_i\_barkin/2019/barkin\_speech\_20190711)

In addition, the business reaction function has gotten faster. Short-termism has increased as activism in the market for corporate control has shifted companies’ focus. Just as with consumers, I think firms’ resilience is down. They start with lower confidence—another “hangover” from the Great Recession. At the same time, businesspeople tell me the length of the current upturn makes them nervous that another recession might be right around the corner.

The speed of the reaction function may be exacerbated by higher leverage. Corporate debt as a percentage of GDP is at an all-time high. Levered companies—and their creditors—have a bias toward taking action on negative news. This can mean cutting costs, reducing staff or pricing for volume.

Taken together, all these factors lead to an asymmetry in which firms are much more cautious about the downside than they are optimistic about the upside.

Perhaps both consumers and businesses have a higher bar for spending decisions. It’s possible that some of the tepid recovery from the Great Recession was a self-fulfilling lack of belief in the strength of the economy. Firms’ fear of failure could have prevented them from making investments even in the presence of reasonable returns.

This negative tilt, or asymmetry, continues today. Firms are frustrated with political polarization and uncertainty about trade and regulation. This limits their pricing courage and caps the upside on their spending and investment decisions.

For these reasons, a drop in confidence could lead to lower investment, lower output and eventually lower employment. If employment is placed at risk, consumption won’t be far behind. And that would place us in more serious difficulty. Put another way, I don’t discount the idea that we could talk ourselves into a recession.

#### The threat created by the plan will be perceived as encouraging over-caution in other industries

Crews 19 (Clyde Wayne Crews, VP for policy & director of technology studies at the Competitive Enterprise Institute, “The Case against Antitrust Law,” 4/16/19, https://cei.org/studies/the-case-against-antitrust-law/)

The issue has taken on greater urgency, as populist politicians from both left and right push for more aggressive antitrust enforcement. Regulators in the United States and the European Union have expressed an interest in pursuing antitrust actions against tech giants known as the FAANG companies— Facebook, Apple, Amazon, Netflix, and Google. President Trump has specifically singled out Facebook, Google, and Amazon as antitrust targets. Entire business models, such as franchising, are at risk from potential antitrust regulation.

The mere threat of legal penalties—and the environment of over-caution it engenders—also has a chilling effect on entrepreneurs who want to try new business practices and innovate. Such opportunity costs are impossible to measure.

Few large antitrust cases have been brought in the United States recently, and overall enforcement activity has been slower than in previous eras, but there is a large pool of potential cases that populist politicians are interested in pursuing.

#### enforcement actions have subtle over-deterrence effects and it’s better to err on the side of less regulation

Auer 18 (Dick Auer, Senior Fellow, International Center for Law & Economics, “Comments of the International Center for Law & Economics: Topic 4: Antitrust law and the consumer welfare standard,” FTC Hearings on Competition & Consumer Protection in the 21st Century, https://www.ftc.gov/system/files/documents/public\_comments/2018/10/ftc-2018-0074-d-0071-155999.pdf)

One of the important lessons of economics in antitrust is that economic tools are uniquely capable (although still imperfectly so) of distinguishing competitive from anticompetitive conduct — the perennial challenge of (non-cartel) antitrust enforcement and adjudication. Non-economic evidence (so-called “hot docs,” for example) can be counter-productive and can obscure rather than illuminate the competitive significance of challenged conduct. A rigorous adherence to economic principles and economic reasoning is essential if antitrust enforcers are to ensure that their interventions actu-ally benefit consumers.

Thus, a necessary corollary to reliance on the consumer welfare standard in antitrust cases is that an evidence-based approach rooted in error-cost analysis is crucial. Particularly in innovative markets where unfamiliar business strategies are attempted, and the relative knowledge of regulators and enforcers is low, it is critical to hew to an evidence-led, error-cost approach to antitrust evaluation.57

The error-cost framework in antitrust originates with Easterbrook’s seminal analysis,58 itself built on twin premises: first, that false positives in enforcement are more costly than false negatives because self-correction mechanisms mitigate the latter but not the former; and second, that errors of both types are inevitable, because distinguishing procompetitive conduct from anticompetitive conduct is an inherently difficult task.59

A key virtue of employing the error-cost framework is that it helps to avoid the bias of economists, who frequently fail to conduct their analyses in a realistic institutional setting and avoid incorporating the social costs of erroneous enforcement decisions into their recommendations for legal rules.

Antitrust over-deterrence is not costless — the losses from erroneously deterred innovative business practices may be unseen, but they function as a drag on society nonetheless. The goal of the error-cost approach is optimal enforcement that errs on the side of permitting innovative practices that might otherwise be difficult to square under existing antitrust rules.

#### Fiating the courts magnifies the link—plan is perceived as an ideological shift away from leniency for big business.

Crane 21—(Professor of Law, University of Michigan). Daniel A. Crane. 2021. “Antitrust Antitextualism”. 96 Notre Dame Law Rev. 1205. <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>. Accessed 9/12/21.

Finally, if the system lacks democratic legitimacy, there is the question of how to begin unwinding it—and whether anyone has the incentive to try. Most committed textualists are also committed economic conservatives;264 it would take abundant motivation from pure principle for the average Federalist Society judge to restore the original meaning of the Robinson-Patman Act or the Clayton Act’s incipiency presumption, much less mount a cataclysmic return to section 1’s absolutist prohibition on agreements restraining trade. Progressive judges, perhaps looking for leverage to unwind the perceived laxity of Chicago School antitrust, might invoke statutory text or original meaning as a foil, but they too face Pandora’s Box. To insist on taking at face value Congress’s words and ostensible purposes—words and purposes to which Congress itself might not have been fully committed—would risk considerable backlash after the long reign of moderating common law and the system’s reliance on the courts to correct Congress’s textual overstatements. So maybe it should count in favor of the system’s normative legitimacy that it has worked for 130 years without anyone complaining too much.

#### Best ev

Miao et al. 12 (Jianjun Miao† , Pengfei Wang‡ , and Lifang Xu§. †Department of Economics, Boston University ‡Department of Economics, Hong Kong University of Science and Technology, §Department of Economics, Hong Kong University of Science and Technology, “Stock Market Bubbles and Unemployment”, https://pdfs.semanticscholar.org/51ee/14529d89b630638b0ca428e929f56d7f3b48.pdf)

This paper provides a theoretical study that links unemployment to the stock market bubbles and crashes. Our theory is based on three observations from the U.S. labor, credit, and stock markets. First, the U.S. stock market has experienced booms and busts and these large swings may not be explained entirely by fundamentals. Shiller (2005) documents extensive evidence on the U.S. stock market behavior and argues that many episodes of stock market booms are attributed to speculative bubbles. Second, the stock market booms and busts are often accompanied by the credit market booms and busts. A boom is often driven by a rapid expansion of credit to the private sector accompanied by rising asset prices. Following the boom phase, asset prices collapse and a credit crunch arises. This leads to a large fall in investment and consumption and an economic recession may follow.1 Third, the stock market and unemployment are highly correlated.2 Figure 1. plots the post-war U.S. monthly data of the price-earnings ratio (the real Standard and Poor’s Composite Stock Price Index divided by the ten-year moving average real earnings on the index) constructed by Robert Shiller and the unemployment rate downloaded from the Bureau of Labor Statistics (BLS).3 This figure shows that, during recessions, the stock price fell and the unemployment rate rose. In particular, during the recent Great Recession, the unemployment rate rose from 5.0 percent at the onset of the recession to a peak of 10.1 percent in October 2009, while the stock market fell by more than 50 percent from October 2007 to March 2009.

[Insert Figure 1 Here.]

Motivated by the preceding observations, we build a search model with credit constraints, based on Blanchard and Gali (2010). The Blanchard and Gali model is isomorphic to the Diamond-Mortensen-Pissarides (DMP) search and matching model of unemployment (Diamond (1982), Mortensen (1982), and Pissarides (1985)). Our key contribution is to introduce credit constraints in a way similar to Miao and Wang (2011a,b,c, 2012a,b).4 The presence of this type of credit constraints can generate a stock market bubble through a positive feedback loop mechanism. The intuition is the following: When investors have optimistic beliefs about the stock market value of a firm’s assets, the firm wants to borrow more using its assets as collateral. Lenders are willing to lend more in the hope that they can recover more if the firm defaults. Then the firm can finance more investment and hiring spending. This generates higher firm value and justifies investors’ initial optimistic beliefs. Thus, a high stock market value of the firm can be sustained in equilibrium.

There is another equilibrium in which no one believes that firm assets have a high value. In this case, the firm cannot borrow more to finance investment

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and hiring spending. This makes firm value indeed low, justifying initial pessimistic beliefs. We refer to the first type of equilibrium as the bubbly equilibrium and to the second type as the bubbleless equilibrium. Both types can coexist due to self-fulfilling beliefs. In the bubbly equilibrium, firms can hire more workers and hence the market tightness is higher, compared to the bubbleless equilibrium. In addition, in the bubbly equilibrium, an unemployed worker can find a job more easily (i.e., the job-finding rate is higher) and hence the unemployment rate is lower.

[Insert Figure 2 Here.]

After analyzing these two types of equilibria, we follow Weil (1987), Kocherlakota (2009) and Miao and Wang (2011a,b,c, 2012a,b) and introduce a third type of equilibrium with stochastic bubbles. Agents believe that there is a small probability that the stock market bubble may burst. After the burst of the bubble, it cannot re-emerge by rational expectations. We show that this shift of beliefs can also be self-fulfilling. After the burst of the bubble, the economy enters a recession with a persistent high unemployment rate. The intuition is the following. After the burst of the bubble, the credit constraints tighten, causing firms to reduce investment and hiring. An unemployed worker is then harder to find a job, generating high unemployment. Our model can help explain the high unemployment during the Great Recession. Figures 2 and 3 plot the hires rate and the job-finding rate from the first month of 2001 to the last month of 2011 using the Job Openings and Labor Turnover Survey (JOLTS) data set.5 These figures reveal that both the job-finding rate and the hires rate fell sharply following the stock market crash during the Great Recession. In particular, the hires rate and the job-finding rate fell from 4.4 percent and 0.7, respectively, at the onset of the recession to about 3.1 percent and 0.25, respectively, in the end of the recession.

#### Markets will whether current storm

Martin 10/1/21 (Katie, Financial Times, “The optimists still at the bull market party”, https://www.ft.com/content/3b25bba9-831a-4e04-8762-4cf8b217e177)

Right now, the list of reasons not to be cheerful is particularly nasty: inflation is defying sober expectations, and central banks know they cannot seek to puncture it without potentially torpedoing the financial stability they have worked so hard to foster since Covid-19 hit. The price of, well, everything — equities, risky corporate bonds, cryptocurrencies, used cars — you name it, is sky-high. Supply chains are in a mess. The debt strains at Evergrande highlight the challenges to the Chinese property market, which accounts for a cool 28 per cent of the economy. Oh, and how about a poorly anticipated global energy crisis, just for good measure. Any or all of these things could spoil the fun in risky markets that are priced for perfection and highly sensitive to a switch in tack from monetary policy. But several of them have been true for some time and have failed to leave a mark on a Teflon-coated rally in global stocks. The quarter that just ended was a little more challenging — the S&P 500 benchmark index of US stocks ended flat. But if you were lucky or clever enough to get in at the rock bottom in March last year, you would have gained around 100 per cent. MFS Investment Management points out that this year has delivered more than 50 new equity market highs — not bad with three months still to go. We have also seen the longest positive run in shares without a pullback of more than 5 per cent since the early 1980s. Some investors just do not get what everyone is so worried about. Alex Ely, chief investment officer for US growth equity at Macquarie Asset Management, is one of them. “We’re not cautiously optimistic,” he said. “We’re fully bullish on the equities markets.” Might inflation throw a curveball? What about a premature tightening of policy from the Federal Reserve? How about US markets’ strong reliance on a small clique of big tech stocks? He did not bite. “You are not going to get much to worry me,” he replied. To say this is not how most of my conversations with fund managers pan out would be an understatement. But at the heart of Ely’s apparently indomitable optimism running through the $6bn he oversees in three funds lies his strategy of hunting for disruption, the “digitalisation of everything”. That outweighs any debate about inflation and the next steps from the Fed, in his view. “Macro doesn’t matter,” he said. Consumer technology, retail, media and other industries have already reshaped our daily lives and markets. Sectors still ripe for a revamp include banking, which is shifting from a reliance on bricks-and-mortar branches to mobile phones. The pandemic has accelerated that process, and the likely continued rebound in the economy next year will provide a further boost, he believes. “At best, we are about halfway through the bull market running in the equity markets. We think the S&P 500 will triple in the 2020s,” Ely added. That sounds outlandish. In fact, it represents a gain of slightly more than 11.5 per cent a year. The S&P has churned that out, and more, almost every year since 2009. This sort of positive attitude is rare, but not unique. Fizzing with enthusiasm in early September, Stuart Kirk, global head of research at HSBC Asset Management, remarked in a note to clients that three-month returns for the US stocks benchmark had gone for 320 days without turning negative. “Apart from a couple of times mid last century, that is a record since the Great Depression,” he said, advising readers to remember this extraordinary resilience “whenever markets panic”. “It shows the enduring triumph of human ingenuity, productivity and resilience — measured in the value of US companies. Not two world wars, oil crises, disruptive technological change, countless financial meltdowns, terrorism, or a global pandemic have altered a steady upward trajectory,” he wrote, concluding: “Buy equities on a dip if you can, or buy them high. It doesn’t matter in the end.” Can it really be that easy?

#### Losses were muted

Miao 11/9/21 (Hannah, CNBC, “Stocks dip after three-decade high in inflation, but losses were limited”, https://www.cnbc.com/2021/11/09/stock-market-futures-open-to-close-news.html)

Stocks dipped Wednesday after the latest consumer price reading showing the biggest jump in more than 30 years, but losses were muted as investors shrugged off inflation worries.After opening down, shares eased off their lows. Technology shares remained weak, weighing down the market. The Dow Jones Industrial Average shed about 111 points, or 0.3%. The S&P 500 ticked down 0.4%. The tech-heavy Nasdaq Composite dipped 0.7%. The consumer price index jumped 6.2% from a year ago, well above the 5.9% estimate from economists polled by Dow Jones and the largest annual increase since 1990. On a monthly basis, the CPI increased 0.9% against the 0.6% estimate. The CPI is a basket of products ranging from gasoline and health care to groceries and rents. “Wednesday’s Consumer Price Index showed another month of inflation data well above the Federal Reserve’s inflation target, primarily due to continued supply chain issues and labor shortages. If inflation doesn’t subside, the Federal Reserve may need to taper at a more substantial rate and hike interest rates, which could hurt stocks and bonds,” Nancy Davis, founder of Quadratic Capital Management, said. Following the CPI data, traders moved up their expectations for when the first Fed rate hike would occur. The Fed funds futures market now sees greater odds of the central bank’s first full rate hike coming in July 2022. The 10-year Treasury yield climbed after the CPI report. Rising rates discount the value of future earnings and therefore can hit growth stocks like technology names particularly hard. Advanced Micro Devices pulled back more than 4%, Nvidia retreated more than 2% and Google-parent Alphabet dipped more than 1%. Tesla, the leader of the bull market whose shares have come under pressure recently, added about 4% to cut losses for the week to about 13%. The stock was the top gainers on the S&P 500 on Wednesday. Electric vehicle makers are in focus Wednesday with Amazon-backed EV startup Rivian set to go public. Meanwhile, investors sought out inflation hedges after the hot CPI print. Gold and bitcoin rose as investors looked for assets that could hold up better than stocks or bonds as prices rise. On Tuesday morning, the Labor Department reported a 0.6% increase in the October producer price index, which was in line with the Dow Jones consensus estimate. Wholesale prices jumped 8.6% in October from a year ago, however, the hottest annual pace on record in almost 11 years. Earnings season continues to be strong, with most of the S&P 500 companies who have already reported beating estimates. Disney, Affirm, Bumble and The Honest Company are all scheduled to report earnings Wednesday after the bell.

#### No hike

Irwin 11/3/21 (Neil, senior economics correspondent for The New York Times, “What Jerome Powell Didn’t Do: Lay the Groundwork for Higher Rates”, https://www.nytimes.com/2021/11/03/upshot/powell-fed-rates-inflation.html)

The thing that Mr. Powell didn’t do was give any hint that persistently high inflation in recent months was leading him to rethink his patient approach to raising the Fed’s interest rate target. Rather, he repeated his longstanding belief that high inflation was mostly caused by disruptions in global supply networks and other ripple effects of the pandemic — problems that the Fed can’t do much about.

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It is a delicate moment. President Biden must decide whether to reappoint Mr. Powell to a second term leading the Fed. High inflation is causing economic discontent for Americans, according to surveys, and helping to drag down the president’s approval ratings. Global bond markets have been gyrating amid uncertainty about whether the era of ultralow interest rates may be coming to an end.

On interest rates, Mr. Powell rejected the thinking of leaders at several other leading central banks and of a handful of his own colleagues. They think that excess demand in the economy is a big part of the inflation problem and that rate increases would help address it — and that current high inflation could become ingrained in economic decision-making, with long-lasting consequences.

If he had expressed more alarm about those inflationary pressures, it would have been a signal that the Fed might act to raise rates more abruptly than it once planned. The Bank of Canada, the Reserve Bank of Australia and the Bank of England have recently done just that. Several Eastern European central banks are going a step further, aggressively raising rates to try to combat inflation (including a 0.75-percentage-point rate increase by the Polish central bank on Wednesday).

Mr. Powell himself has essentially conceded in recent appearances that surging prices due to supply disruptions are on track to last longer than he expected. He said in late September that it was frustrating that supply chain bottlenecks weren’t improving and might be getting worse, and said this would hold inflation higher for longer than the Fed had thought.

But he was steadfast on Wednesday in not suggesting that those developments were a reason to accelerate the Fed’s interest rate hike plans. He suggested those would need to wait until the tapering of bond purchases was complete and until Fed officials concluded the economy had achieved maximum employment.

“We understand the difficulties that high inflation poses for individuals and families,” Mr. Powell said Wednesday. But he continued: “Our tools cannot ease supply constraints. Like most forecasters, we continue to believe that our dynamic economy will adjust to the supply and demand imbalances, and that, as it does, inflation will decline to levels much closer to our 2 percent longer-run goal.”

With language like that, he was declining to embrace the use of “open-mouth policy,” or of essentially trying to assuage inflation fears by using more specific language to suggest the Fed had a hair-trigger readiness to take immediate action to head off higher prices.

He appeared to be applying the lessons of the 2010s labor market in setting the central bank’s course. Over that decade, unemployment kept falling lower, with participation in the work force rising higher than many analysts had thought plausible. With hindsight, the Fed may have erred by raising interest rates prematurely, slowing that process of labor market improvement.

In a 2021 context, that means allowing more post-pandemic healing of the labor market before assuming, for example, that many of the Americans who currently say they are not in the labor force will return as public health conditions improve.

“There’s room for a whole lot of humility here as we try to think about what maximum employment would be,” Mr. Powell said. The last economic cycle, he said, showed that “over time you can get to places that didn’t look possible.”

He also appeared to be deploying another lesson from the 2010s — namely those learned in the 2013 “taper tantrum” when global markets went haywire as Chair Ben S. Bernanke moved to taper the Fed’s bond purchases.

A key lesson of that era is that tapering needs to be telegraphed far in advance, and separated as much as possible from the decision to raise interest rates. In that episode, markets experienced a double-whammy as they envisioned both a winding down of the Fed’s bond buying and rapidly raising rates.

With his assurances Wednesday that the Fed wasn’t in a hurry to raise rates, Mr. Powell was essentially trying to avoid that problem.