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Spillover DA

#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy---it’s impossible to distinguish specific industries because, unlike regulation, it’s enforced in generalist common law

Dr. William 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, and Dr. Howard Shelanski, 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, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust Enforcement, Regulation, and Digital Platforms”, University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911, June 2020, Lexis

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.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable shifts ruin biz con AND overall growth

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### Decline cascades---nuclear war

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

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Reg Neg CP

#### The United States federal government should convene binding negotiated rulemaking over whether to expand the scope of its core antitrust laws by rescinding its presumption against extraterritoriality because of comity in antitrust cases involving anticompetitive business practices by the private sector in the People’s Republic of China and implement the outcome.

#### The CP competes and solves by giving industry genuine input in antitrust design AND avoids reflexive opposition and a wave of litigation in response to mandatory prohibitions

Ira S. Rubinstein 11, Adjunct Professor of Law and Senior Fellow at the Information Law Institute at the New York University School of Law, JD from Yale Law School, BA in Philosophy from Clark University, “Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes”, I/S: A Journal of Law and Policy for the Information Society, 6 ISJLP 355, Summer 2011, Lexis

2. Negotiated Rulemaking

Negotiated rulemaking (also referred to as regulatory negotiation or "reg. neg.") is a statutorily-defined process by which agencies formally negotiate rules with regulated industry and other stakeholders as an alternative to conventional notice-and-comment rulemaking. The core insight underlying negotiated rulemaking is that conventional rulemaking discourages direct communication among the parties, often leading to misunderstanding and costly litigation over final rules. In contrast, negotiated rulemaking brings together agency personnel and representatives of the affected interested groups to negotiate the text of a proposed rule based on (more honestly presented) shared information and willingness to compromise. If the negotiations succeed by achieving a consensus on a proposed rule, the resulting final rule should be of better quality, easier to implement, enjoy greater legitimacy, and lead to fewer legal challenges.

The Negotiated Rulemaking Act of 1990 (NRA) establishes a statutory framework for negotiated rulemaking under which agencies have the discretion to bring together representatives of the affected parties in a negotiating committee (for example, industry, environmental and consumer groups, and state and local governments) for face-to-face discussions. If the committee reaches a consensus, the agency can then issue the agreement as a proposed rule subject to normal administrative review processes. Proposed rules emerging from a negotiated rulemaking process are also subject to judicial review. While the NRA augments Administrative [\*378] Procedure Act (APA) rulemaking, it does not replace it. Indeed, most of the language of the Act is permissive. If negotiations fail to reach a consensus, the agency may proceed with its own rule.

The promise of negotiated rulemaking is that by enlisting diverse stakeholders in the rulemaking process, responding to their concerns, and reaching informed compromises, better quality rules will emerge at a lower cost and with greater legitimacy. Critics counter that the process not only fails to deliver its purported benefits (and then only rarely) but that its very use undermines the foundations of administrative law by shifting the decision-making function from agencies tasked with protecting the public interest to a collection of interest groups with their own private agendas. In 2000, Jody Freeman and Laura Langbein published a comprehensive analysis and summary of an empirical study of negotiated rulemaking. The study compared participant attitudes toward negotiated versus conventional rulemaking. Based on their analysis, they concluded that "reg. neg. generates more learning, better quality rules, and higher satisfaction than conventional rulemaking" as well as increasing legitimacy, which they defined as "the acceptability of the regulation to those involved in its development." But even if this very positive analysis is taken at face value, Lubbers shows that the EPA use of negotiated rulemaking is in fact quite limited, having fallen off in recent years by almost two-thirds. Despite this decline, which Lubbers attributes to budgetary issues and the burdens of complying with federal advisory committee [\*379] requirements, Lubbers insists upon the proven value of reg. neg. in providing creative solutions to regulatory problems.

Other environmental law scholars have identified a few situations where negotiated rulemaking should provide the EPA with significant advantages. For example, Andrew Morriss and his colleagues point to situations "where the substance of the regulation requires the credible transmission of information between the regulated entities and other interest groups, and where the agency's preference for a particular substantive outcome is weak." Reg. neg. also requires "a relatively high degree of shared interest among the groups participating, the existence of gains from trade to allow parties to compromise, and a willingness by interest groups to reject the role of spoiler." These views are largely consistent with the findings of Daniel Selmi, who conducted a detailed study of the negotiation of a regional air quality rule. Selmi explained that the parties were willing to compromise for several reasons: (1) the industry believed that regulation was inevitable; (2) the environmental groups recognized that even though they preferred an outcome based on new and expensive technology, they lacked the political capital to achieve this result; and (3) the agency was not locked into a rigid, initial position, but remained open towards finding a solution that responded to information acquired during the negotiations. But the key factor in reaching a compromise was a very practical one-namely, that the facilitator had the necessary skills to assist the parties in identifying their priorities and to help them make tradeoffs in which they each achieved some of their goals.

In sum, both Project XL and negotiated rulemaking have strengths and weaknesses. Key strengths of a well-designed covenanting approach include innovation (because covenants invite firms to tap [\*380] into their own ingenuity); flexibility (in the form of tailored rules that either match the circumstances of an individual firm, as in Project XL, or the underlying conditions faced by a regulated industry based on superior expertise, as in negotiated rulemaking); greater commitment (because companies write or at least negotiate their own rules rather than having them imposed externally); more effective compliance (because internal discipline as practiced by firms that agree to rules of their own devising is likely to be more extensive and cheaper for everyone than government investigations and prosecutions); and, as a result of these benefits, lower-cost solutions. On the other hand, covenants have a number of obvious weaknesses, including higher administrative burdens associated with negotiating the rules (although this might be mitigated by lower overall costs for compliance and litigation); legal uncertainty in the case of Project XL; and a bias against small firms, which typically lack the resources necessary to negotiate facility-based standards or to participate in a negotiating committee.

C. Normative Framework for Assessing Self-Regulatory Initiatives

Having identified different types of self-regulation and their co-regulatory characteristics, and having investigated environmental covenants such as Project XL and regulatory negotiations (in keeping with Hirsch's suggestion that such covenants may provide the basis for innovative approaches to privacy regulation), this Article now presents a normative framework for evaluating the effectiveness of co-regulatory programs. Part III will apply this normative framework to four instances in which regulators have used co-regulation in the field of information privacy and assess their relative merits. The normative framework developed here melds the discussion of standard public policy criteria in Part II.A with the central features of second- generation strategies as reflected in the analysis of covenants in Part II.B. The resulting framework consists of six elements that are critical to the success of co- regulatory initiatives: efficiency, openness and transparency, completeness, strategies to address free rider problems, oversight and enforcement, and use of second-generation design features.

[\*381]

1. Efficiency

Efficiency may be defined as "achieving regulatory objectives at the lowest attainable cost." For all forms of self-regulation, efficiencies arise from harnessing industry expertise in the development of industry codes, which are inherently more flexible than legislation and may be tailored to the circumstances of individual firms, or adjusted to changes in market conditions or new technologies. In general, self-regulation costs less for government than regulatory rulemaking and enforcement because it shifts costs to industry. Whether it costs less for industry depends on the form of self-regulation and whether industry passes on its costs to consumers.

2. Openness and Transparency

Openness refers to whether the self-regulatory system allows the public to play any role in developing the underlying rules and enforcement mechanisms. Transparency, on the other hand, is a function of a system's ability "to produce and promulgate two kinds of information: (1) information about the normative standards the industry has set for itself; and (2) information about the performance of member companies in terms of those standards." In general, self-regulatory schemes publicize the existence and content of their principles (especially if their rules are determined by statute and hence publicly available). Purely voluntary codes may involve public interest groups at the discretion of member firms. When firms decide to develop codes using a consensus-based process, however, a wider range of interests is likely to be represented. Finally, performance data is not usually shared with the public and most self-regulatory organizations treat enforcement proceedings as private, but may publicly announce the outcome of any enforcement actions involving member firms.

[\*382]

3. Completeness

Completeness is the straightforward matter of whether a self-regulatory code of conduct addresses all relevant aspects of the standards governing industry practices. In privacy terms, these standards are embodied in the FIPPs, which are the benchmark against which the FTC and privacy advocates evaluate any self-regulatory privacy scheme. Unless they adhere to a pre-existing industry standard, voluntary codes often omit principles or practices that their members find too burdensome. In contrast, where government establishes default requirements on a statutory basis, incompleteness is rarely an issue.

4. Strategies to Address Free Rider Problems

Free riding occurs in voluntary programs when members enjoy the benefits of a program without having to meet its obligations. As Fiorino notes, "It reduces confidence in the reliability and quality of participants and thus affects the program's credibility." There are two main versions of the free rider problem. First, some firms may agree to join a program but merely feign compliance. And second, certain firms in the relevant sector may simply refuse to join at all. Both versions are potentially fatal to self-regulatory programs because they create a competitive disadvantage for honest participants. The first version may be counteracted by "peer group pressure, shaming, or more formal sanctions" while the second may require that "government intervenes directly to curb the activities of non-participants." Obviously, free rider problems dissipate when regulated entities are required to participate in a self-regulatory program or when codes of conduct are subject to government review and approval. Self-regulatory initiatives need to incorporate such strategies in order to prove effective.

5. Oversight and Enforcement

At an early stage of the U.S. government's support for self-regulatory privacy guidelines, the DOC commissioned a study of the [\*383] criteria for effective self-regulation. In addition to substantive criteria based on FIPPs, the DOC study identified three oversight and enforcement criteria: (1) consumer recourse, or the availability of affordable mechanisms for resolving complaints and perhaps awarding some compensation to an injured party; (2) verification, or the nature and extent of audits or more cost-effective ways to verify that a companies' assertions about its privacy practices are true and to monitor compliance with a program's requirements; and (3) consequences for failure to comply with program requirements, such as cancellation of the right to use a seal, public notice of a company's non-compliance, or suspension or expulsion from the program. Voluntary codes are often deficient in all three components. Once again, required government approval of these oversight and enforcement mechanisms ensures that baseline regulatory objectives are met.

6. Use of Second-Generation Design Features

The central features of second-generation environmental strategies are discussed at considerable length by Stewart and Fiorino. For present purposes, their insights may be boiled down (however inadequately) to the following catch phrase: self-interested mutual promises that reward good actors for superior performance. These strategies presuppose direct bargaining, information sharing, and the affected parties buying-in to cost-effective and innovative regulatory solutions. In view of these characteristics, second-generation strategies such as environmental (or privacy) covenants should achieve better outcomes than either conventional rulemaking or voluntary self-regulation.

III. Four Case Studies

This Article now presents four case studies of self-regulatory privacy schemes. The first case study focuses on the Network Advertising Initiative (NAI) Principles, a voluntary code established by an ad hoc industry advertising group that also oversees members' compliance. The second case study looks at a safe harbor solution for [\*384] U.S. firms needing to transfer data from the E.U. to the U.S. without running afoul of E.U. data protection requirements. To benefit from the safe harbor, firms have to certify that they will comply with privacy principles negotiated between the U.S. and E.U. but administered by industry seal programs. The third case study deals with FTC- approved safe harbor programs under COPPA, focusing, in particular, on that of the Children's Advertising Review Unit (CARU). Each of these three self-regulatory schemes will be classified using Priest's typology and evaluated in terms of the six factors identified above in Part II.C. The fourth and final case study begins with a brief overview of privacy covenants, both in the U.S. and abroad, and then turns to a very recent example of a voluntary covenanting approach to privacy. This last case study is less a detailed description and analysis of a specific program, and more a transitional step towards second-generation strategies.

A. The Network Advertising Initiative

On November 8, 1999, the DOC and the FTC held a public workshop on online profiling, which the FTC defined as the collection of data about consumers using cookies and web bugs to track their activities across the web. Although much of this information is anonymous in the narrow sense of not including a user's name, profiling data may include both personally identifiable information (PII) and non-personally identifiable information (non-PII). This data may also be "combined with 'demographic' and 'psychographic' data from third- party sources, data on the consumer's offline purchases, or information collected directly from consumers through surveys and registration forms." The resulting profiles often are [\*385] highly detailed and revealing yet remain largely invisible to consumers, many of whom react negatively when informed that their online activities are monitored.

The FTC recognized several benefits in the use of cookies and other technologies to create targeted ads, such as providing information about products and services in which consumers are interested and reducing the number of unwanted ads. More importantly, targeted ads increase advertising revenues, which subsidize free online content and services. On the other hand, the FTC acknowledged several major privacy concerns raised by online profiling such as the lack of consumer awareness; the scope of the monitoring activities, which occurs across multiple websites for an indefinite period of time; the potential for associating anonymous profiles with particular individuals; and the risk of companies using profiles to engage in price discrimination. Despite these concerns, the Commission, in June 2000, encouraged the network advertising industry to craft an industry-wide self-regulatory program.

Eight firms responded by announcing the formation of the NAI. Their key tenets included notice to consumers of what information network advertising firms collect and how that information is used, the ability to opt out of receiving tailored ads, and consumer outreach and education. Less than a year later, the NAI completed a [\*386] voluntary code of conduct that won the FTC's praise and informal endorsement. Under the original NAI Principles, network advertisers engaging in online preference marketing (OPM) are required to offer consumers notice and choice, both of which vary depending on whether the data collected is non-PII or a combination of PII and non-PII. The use of non-PII requires member firms to post on their websites "clear and conspicuous" notice of profiling activities, including what type of data is collected and how it is used; procedures for opting out of such uses; and the retention period for such data. The opportunity to opt-out must be accessible on the firm's or the NAI's website. Moreover, NAI firms that enter into a contract with a publisher for OPM services must require that they offer similar privacy protections to consumers. The merger of PII and non-PII for OPM purposes are subject to substantially similar notice requirements, but the choice options are more complex. Network advertisers merging PII with previously collected non-PII must first obtain a consumer's affirmative (opt-in) consent, whereas mergers of PII and non-PII collected on a going forward basis must afford consumers "robust notice" and an opt-out choice; the latter rule also applies to using PII collected offline when merged with PII collected online. Enforcement is another requirement that applies to [\*387] all NAI members, and the NAI offers several additional consumer protections as well.

For the next seven years, the NAI principles remained unchanged until two highly publicized incidents sparked renewed concerns over online profiling practices. The first incident involved a civil subpoena to Google seeking search query records. The second involved disclosure of millions of search queries by AOL. Both incidents involved leading search firms, whose business models are premised on providing free searches and a host of related services in exchange for serving targeted ads to customers based on their search queries and other data collected from users of these services. Over the next two years, consumer privacy organizations began filing complaints regarding online advertising practices and the proposed mergers between industry giants such as Google and DoubleClick. Both E.U. data protection agencies and the FTC started reviewing these activities, while the industry responded to the regulatory pressure by proposing new practices and technologies for improving search [\*388] privacy and addressing online profiling practices. Then, in 2007, the FTC held a two-day workshop focused on behavioral targeting. In connection with this workshop, the World Privacy Forum (WPF) prepared a highly critical report attacking the effectiveness of the NAI's self-regulatory scheme during the previous seven years. NAI responded to these and other criticisms by releasing a draft update to its original NAI Principles (this time soliciting public comments on the proposed changes). The newly expanded organization then published its revised code of conduct to mixed reviews.

Clearly, the NAI Principles constitute a voluntary code of conduct, exhibiting virtually all of the relevant characteristics as described in Part II.A. As such, do the original (or revised) NAI principles suffer from the shortcomings associated with voluntary codes, or do they live up to their promise of protecting consumer privacy? In other words, how do the principles fare when assessed against the six elements of the normative framework described in Part II.C?

To begin with, the principles are efficient for member firms, but less so for government (given the ongoing costs of FTC oversight) and for the public (given the negative externalities associated with behavioral profiling). Second, when the original principles were [\*389] issued in 2000, privacy advocates complained about the NAI's lack of transparency. Although the principles were posted online, the preliminary discussions between the NAI firms and the FTC were far less transparent-they took place largely behind closed doors. Third, the original principles were considered weak on notice, choice, and access; and critics were not much happier with the retrograde forms of notice, choice, and access permitted under the 2009 revised Principles. Fourth, at least in the early years, network advertising firms suffered from both versions of the free rider problem (feigned compliance and non-participation) and the NAI program did not include any mechanisms that capably addressed them. It remains to [\*390] be seen whether these issues will persist now that the FTC is again encouraging self- regulation, although current policy may change depending on whether or not Congress enacts new privacy legislation. Fifth, the NAI program is also deficient with respect to all three oversight and enforcement criteria identified in the DOC study referred to above. In terms of consumer recourse, the NAI Principles make formal provision for consumers to file complaints (which are now handled in-house) but are silent on remedies. As to verification and consequences for failure to comply, the NAI track record is extremely poor both on auditing compliance and invoking remedies (such as revocation, public suspension of membership, and referral to the FTC). Indeed, it is not clear whether such actions have occurred during its previous nine years of operation, although NAI's approach to audits seems to be changing for the better. Finally, although the more open process NAI used in revising its principles in 2009 is a good first step towards using second-generation strategies, it is still deficient in terms of direct negotiations, Coasian bargaining, and mutual buy-in.

B. The U.S.-E.U. Safe Harbor Agreement

Article 25 of the European Union Data Protection Directive (E.U. Directive) limits the transfer of personal data to a third country unless it provides an "adequate" level of privacy protection. Unlike the E.U. Directive, which is an omnibus statute protecting all personal information of European citizens, U.S. privacy protection relies on a combination of sectoral laws, FTC enforcement powers, and self-regulation. As a result of these differences, U.S. firms were uncertain about the legality of data flows from the E.U. to the U.S. under the [\*391] Article 25 adequacy standard. After several years of discussion, the European Commission (EC) and the DOC entered into a Safe Harbor Agreement (SHA) spelling out Privacy Principles that would apply to U.S. companies and other organizations receiving personal data from the E.U.

The SHA creates a voluntary mechanism enabling U.S. organizations to demonstrate their compliance with the E.U. Directive for purposes of data transfers from the E.U. They must self-certify to the DOC that they adhere to the Privacy Principles that mirror the core requirements of the E.U. Directive (i.e., notice, choice, onward transfer, security, data integrity, access, and enforcement), and repeat this assertion in their posted privacy policy. Although the FTC has agreed to treat any violation of the Privacy Principles as an unfair or deceptive practice, the SHA also defines the mechanism that firms should use to ensure compliance with these principles. These include: (1) readily available and affordable independent recourse mechanisms for investigating and resolving individual complaints and disputes; (2) verification procedures regarding the attestations and assertions businesses make about their privacy practices, which may include self- assessments (which must be signed by a corporate officer and made available upon request) or outside compliance reviews; and (3) remedies for failure to comply with the Privacy Principles, including not only correction of any problems, but also various sanctions such as publicizing violations, suspension, removal from a seal program, and compensation for any harm caused by the violation. Truste, [\*392] BBBOnline, and several other self-regulatory privacy programs already in operation when the SHA took effect then developed Safe Harbor programs specifically designed to satisfy (1) and (3). The verification requirement is satisfied by self-assessment or third-party compliance reviews.

The SHA has been described as an "uneasy compromise" between the comprehensive regulatory approach of the E.U. and the self-regulatory approach preferred by the U.S. This partly reflects the fact that in providing the Privacy Principles and related documents that form the SHA, the DOC lacked any direct statutory authority to regulate online privacy and therefore had to rely solely on its enabling statute, which only grants authority to foster, promote, and develop international commerce. Applying Priest's typology, it is clear that SHA seal programs more closely resemble regulatory self-management programs than voluntary codes of conduct. One might expect, therefore, that such programs would fare better than NAI in demonstrating greater transparency, fewer free rider issues, better coverage, and meaningful oversight and enforcement. Unfortunately, this is not borne out by the available evidence.

First, as a government initiative, the SHA Privacy Principles are highly transparent, at least in terms of DOC announcing the relevant standards that industry would need to follow. But second, as noted below, virtually no information is available regarding the performance of firms in terms of these standards. Third, SHA seal programs fare better than NAI in terms of formulating program guidelines that-at least in theory-adhere to all of the Privacy Principles. However, both the E.U. Study and the Galexia Study found that a high percentage of [\*393] participating firms did not incorporate all seven of the agreed upon Privacy Principles in their own posted privacy policies. Fourth, the SHA, like the NAI agreement, also suffers from both versions of the free rider problem- many firms self-certify their adherence to the Privacy Principles without even revising their posted privacy policies in accordance with SHA requirements and, even if one excludes firms that rely on alternative methods for demonstrating adequacy, the roughly 2,000 participants on the DOC's Safe Harbor List represent only a tiny fraction of firms that transfer data from the E.U. to the U.S. Fifth, as to oversight and enforcement, the E.C. Study noted that no complaints have been received and handled "despite frequent and even flagrant inconsistencies and violations in implementation," while according to the Galexia Study, fewer than one in four companies registered for safe harbor were in compliance with the Enforcement Principle and even fewer offered an affordable dispute resolution process. Indeed, it was not until the summer of 2009 that the FTC announced its first enforcement action against a U.S. company for violation of the SHA.

The SHA allows firms to meet the verification requirements of the Enforcement Principle either through self-assessment or outside [\*394] compliance reviews. Under the former, the firm must have in place "internal procedures for periodically conducting objective reviews" and must retain any relevant records. They must make the records available upon request in the context of an investigation or a complaint, but have no obligation to share this information with third parties. The same record-keeping requirement applies in the case of outside reviews subject to the same limitation. Thus, both internal and external compliance reviews remain opaque, making it difficult to draw any firm conclusions. Finally, while the SHA in theory fits neatly under Priest's regulatory self-management category, in practice it more closely resembles a voluntary code of conduct given the lack of accountability to government, the free rider problems, the lax monitoring of compliance by seal programs and government agencies, and until quite recently, the absence of enforcement actions or sanctions. In short, it displays none of the characteristics defining second-generation strategies.

C. The COPPA Safe Harbor

Congress enacted the Children's Online Privacy Protection Act of 1998 (COPPA) to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personal information from and about children on the Internet. The statute and Final Rule require operators of websites directed at children and of general audience websites with actual knowledge that a user is a child to meet five requirements: (1) notice; (2) parental consent prior to the collection, use, and/or disclosure of personal information from a child; (3) a right of parental review of such information; (4) proportionality; and (5) reasonable security policies.

[\*395]

COPPA provides both federal and state enforcement mechanisms and penalties against operators who violate the provisions of the implementing regulations. The statute by its terms also establishes an optional safe harbor program as an alternative means of compliance for operators that follow self-regulatory guidelines, which must be approved by the FTC under a notice and comment procedure. There are three key criteria for safe harbor approval. Self-regulatory guidelines must (1) meet or exceed the five statutory requirements identified above; (2) include an "effective, mandatory mechanism for the independent assessment of . . . compliance with the guidelines" such as random or periodic review of privacy practices conducted by a seal program or third-party; and (3) contain "effective incentives" to ensure compliance with the guidelines such as mandatory public reporting of disciplinary actions, consumer redress, voluntary payments to the government, or referral of violators to the FTC.

The avowed purpose of the COPPA safe harbor is to facilitate industry self- regulation, and it does so in two ways. First, operators that comply with approved self-regulatory guidelines are "deemed to be in compliance" with all regulatory requirements. To benefit from safe harbor treatment, operators need not individually apply for approval as long as they fully comply with approved guidelines that are applicable to their business. According to the COPPA Final Rule, such compliance serves "as a safe harbor in any enforcement action" under COPPA unless the guidelines were approved based on false or incomplete information. Second, the safe harbor allows "flexibility [\*396] in the development of self-regulatory guidelines" in a manner that "takes into account industry-specific concerns and technological developments." Industry groups interested in providing safe harbors must submit their self- regulatory guidelines to the FTC for approval. To date, the FTC has reviewed six safe harbor programs and approved four of them. With all of the approved safe harbor programs satisfying the three criteria set out in the preceding paragraph, the COPPA safe harbor exemplifies Priest's regulatory self-management category insofar as the statue sets regulatory policy and rules but assigns program sponsors the responsibility for drafting self-regulatory guidelines, implementing and operating the program, and enforcement. A brief assessment of CARU's monitoring and complaint-handling system shows the success of the safe harbor program from an enforcement standpoint.

Between 2000 and 2008, CARU reported on almost 200 cases; a few originated in consumer complaints and the rest resulted from CARU's routine monitoring of any website that may be reasonably expected to attract children or teen users. Issues ranged from inadequate privacy policies to the lack of a neutral age-screening process to collection or disclosure of PII from children without parental consent. The companies resolved all of the cases in question by agreeing to change their practices as directed by CARU. In [\*397] addition, CARU referred one case to the FTC that resulted in a $ 400,000 settlement. In a second case, the respondent entered into a consent decree with the FTC that included signing up for the CARU safe harbor. And in a third case, the FTC initiated a COPPA lawsuit based in part on CARU's determination of compliance shortcomings. This is an impressive record considering that since 2000, the FTC has brought a total of only fifteen COPPA enforcement cases. In short, CARU's compliance review and disciplinary procedures clearly have been successful in complementing the FTC's enforcement of COPPA, due in no small measure to its policy of engaging in widespread monitoring of child-oriented websites as opposed to members' sites only. This, in turn, allows the Commission to focus its resources on higher profile matters.

How well do COPPA safe harbor programs (and CARU, in particular) fare when evaluated against the now familiar normative criteria? Clearly, CARU harnesses industry expertise, but probably costs more to operate than the NAI or SHA seal programs given its extensive enforcement activities. Second, like the SHA, COPPA is very strong on producing and reporting information regarding relevant legal standards but weak on performance data. Third, as compared to both the NAI and SHA, only the COPPA safe harbor programs achieve full coverage of substantive privacy requirements as might be expected given the FTC's mandatory review of program guidelines, all of which must offer principles that "meet or exceed" statutory [\*398] requirements. Fourth, free rider problems are minimal in the COPPA safe harbor program because firms that resist joining an approved program remain subject to the statutory requirements, thereby deriving little competitive advantage from free riding. Additionally, the number of CARU investigations seems high enough to discourage feigned compliance by participating firms, especially given CARU's willingness to refer cases to the Commission, and the FTC's aggressive enforcement stance with respect to children's privacy issues. Fifth, as to oversight and enforcement, COPPA requires that approved safe harbor programs engage in ongoing monitoring of their members' practices to ensure compliance with program guidelines and the participant's own privacy notices. CARU's strong record of investigating compliance issues identified in complaints or as a result of routine monitoring (coupled with FTC's higher profile enforcement actions) rebuts the usual charge that self-regulatory programs are weak on enforcement. To the contrary, the COPPA safe harbor programs, like other well-organized and committed industry groups, "help free up scarce government regulatory resources to address the recalcitrant few rather than the compliant majority." The CARU program stands out both for publishing case reports on non-member compliance issues and for having, in fact, referred several cases to the FTC.

Finally, while the CARU program is far superior to either the NAI or SHA in terms of the preceding five criteria, it lacks many of the attributes of second- generation regulatory strategies. There is no [\*399] Coasian bargaining and too little industry buy-in. Moreover, the COPPA regulations are neither very flexible nor do they take into account "industry- specific concerns and technological developments." Although the Commission expressly characterized the assessment mechanisms and compliance incentives described in the Final Rule as "performance standards" that may be satisfied by equally effective alternatives, a review of the self-regulatory guidelines of CARU, Truste, ESRB and Privo shows relatively little differentiation by sector, technology, or innovative methods of assessment or compliance. This is at least partly the result of the safe harbor approval process, which requires a side-by-side comparison of the substantive provisions of the COPPA rule with the corresponding provisions of the guidelines. The reason firms participate in safe harbor programs is probably due less to regulatory flexibility, and more to a desire to share in the brand recognition of the program seal, to develop a closer working relationship with FTC staff, and to draw on the additional expertise of program staff.

\*\*\*\*\* [\*400]

The three preceding case studies all describe well-established self-regulatory programs and evaluates them against five public policy criteria and a sixth criteria focusing on second-generation regulatory strategies. This next section is different. It explores a few overseas cases of privacy covenants under law and then hones in on a very recent case in which U.S. firms, when threatened with prescriptive regulation, chose to engage in a multi-stakeholder process (known as the Global Network Initiative or GNI) to define privacy and free speech principles for the Internet. While it is too soon to assess the GNI against the public policy criteria, and while the GNI might fare poorly in operational terms when compared to a statutory safe harbor such as CARU, the GNI nevertheless points the way to the use of mutually self- interested bargaining to achieve superior performance by good actors.

D. Privacy Covenants

In his article discussing innovative environmental privacy tools, Hirsch's primary examples of a privacy covenant are the Dutch codes of conduct. Dutch data protection law (which is a comprehensive statute implementing the E.U. Data Directive) allows industry sectors to draw up codes for processing of personal data, which are then submitted to the Dutch Data Protection Authority (DPA) for review and approval. Specifically, organizations considered "sufficiently representative" of a sector and that are planning to draw up a code of conduct may ask the DPA for a declaration that "given the particular features of the sector or sectors of society in which these organizations are operating, the rules contained in the said code properly implement" Dutch law. Article 25(4) of the PDPA further provides that such declarations shall be "deemed to be the equivalent to" a binding administrative decision, making it similar in effect to FTC approval of COPPA safe harbor guidelines. According to Hirsch, the DPA has approved at least twelve such codes covering various industry sectors, each with its own tailored compliance plan that is nevertheless consistent with the broader requirements of the Dutch data protection law. Outside of Europe, other countries have [\*401] adopted a similar approach to privacy covenants. For example, Australian privacy law also permits organizations to develop sectoral privacy codes for the handling of personal information "designed to allow for flexibility in an organization's approach to privacy," while at the same time guaranteeing consumers "that their personal information is subject to minimum standards that are enforceable in law." Finally, New Zealand privacy law also treats approved codes of conduct as instruments of law with binding effect.

In the U.S., where comprehensive privacy law is lacking, there is no possibility of firms or industry negotiating privacy covenants with regulators, unless one wants to treat FTC consent decrees as a type of covenant. Thus, the covenanting approach in the U.S. arises only when there is a credible threat of federal privacy regulation and firms sit down with regulators to negotiate a code of conduct in lieu of regulation. In his article, Hirsch cites the OPA Guidelines as an "incomplete" step towards a covenanting approach, and gives three [\*402] reasons for this incompleteness. A more recent and telling example of a privacy covenant came about when three leading Internet firms were accused of Internet censorship in China, resulting in a very public controversy and threatened legislation.

In the winter of 2006, Yahoo!, Google and Microsoft had to contend with highly unfavorable publicity and Congressional hearings over their controversial roles in cooperating with Chinese government efforts to monitor and censor the Internet and persecute dissidents. A few months later, Rep. Chris Smith introduced a bill that would have rendered such practices illegal and forced U.S. companies to confront a Hobson's choice: disregard restrictive Chinese licensing requirements imposed on foreign companies as a condition of providing Internet services in the Chinese market or obey Chinese censorship rules in violation of U.S. law. The companies then sat down with a cross-section of human rights organizations, socially responsible investment firms, and academics, and agreed to work on voluntary guidelines for protecting freedom of expression and privacy on the Internet. After eighteen months of negotiations and defections by several NGOs, the multi-stakeholder group reached agreement and launched the GNI, jointly committing to a set of principles and implementation guidelines as well as an accountability [\*403] system based on independent, third-party assessments. More recently, a GNI member (Google) announced that it would shut down its Chinese search engine rather than continuing to censor the results, and began automatically redirecting Chinese customers to an uncensored version of Google search hosted in Hong Kong.

Why did Yahoo!, Google, and Microsoft agree to participate in a multi-stakeholder process in which a successful outcome required convening a group of actors with divergent interests (often at loggerheads with each other), engaging in difficult and protracted negotiations, and staying at the table until a consensus was forged? As described above, the GNI negotiations were an entirely voluntary effort, with no legal mandate as to process or substance. Rather, the parties proceeded on an ad hoc basis and agreed to principles that, while based on international human rights instruments, were not subject to any formal approval criteria or government oversight. Although the U.S. State Department welcomed the GNI initiative, it did not participate in any stakeholder meetings. Cynics may say that the three firms were merely responding to a public relations crisis related to their business operations in China, which forced them to pursue a covenanting approach not only to improve their public image, but to restore public faith in their company integrity and [\*404] mollify Congressional demands for government intervention. But even if GNI was initially spurred by negative publicity and a threat of government intervention, it represents a moderately successfully example of the covenanting approach at work.

#### Antitrust litigation is uniquely complex and resource-intensive---a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Efficient court review underpins patent-led innovation---that stops nuclear war and a range of existential threats

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.

### 1NC

T Ban

#### ‘Prohibition’ must ban all instances of anticompetitive behavior

James Lane Buckley 91, Judge on the United States Court of Appeals for the District of Columbia Court, BA and JD from Yale University, Former Undersecretary for Security Assistance at the State Department, Former United States Senator from New York, “Hazardous Waste Treatment Council v. Reilly”, United States Court of Appeals for the District of Columbia Circuit, 938 F.2d 1390, 1395-1396, 1991 U.S. App. LEXIS 16095, 7/26/1991, Lexis

Petitioners claim that the EPA considers a state law to "act as a prohibition" under the regulation only when it bans all treatment, storage, and disposal within a State, and they point to the ALJ's statement, based on his reading of the preamble to the regulations, 45 Fed. Reg. at 33,395, that the EPA "appears to have construed the phrase 'act as a prohibition' in [paragraph (b)] as equivalent to an outright ban or refusal to accept hazardous waste for treatment, storage, or disposal." ALJ Decision at 112. Petitioners contend that the regulation must embrace any law that would even indirectly, as in the instant case, prohibit any treatment facility; otherwise, a State could accomplish a total ban one facility at a time. Senate Bill 114, they charge, epitomizes the "NIMBY" syndrome: In response to the needs of the nation for treatment of hazardous waste, North Carolina has simply said, "Not in my backyard." By refusing to respond, petitioners urge, the EPA ignores its duty to monitor state programs.

Although, at oral argument, government counsel [\*\*13] attempted to defend the "ban on all treatment" position that petitioners ascribe to the EPA, that is not the basis on which the agency concluded that Senate Bill 114 did not act as a prohibition within the meaning of section 271.4(b). In explaining why the second condition of paragraph (b) had not been met, the Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act, and noted that a smaller plant could be built at the Laurinburg site. Final Decision at 2. We therefore construe the EPA's decision to mean that a state law "acts as a prohibition" on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more.

[\*1396] Such a construction is reasonable and merits deference. The language of paragraph (b), which uses the word "prohibit[]" rather than "impede[]" or "restrict[]" as in the case of paragraph (a), suggests that the former allows States greater latitude in regulating particular treatment facilities before a prohibition is found to exist. This is consistent with the preamble's expression of [\*\*14] a desire to encourage the development of state programs by avoiding the establishment of "very tight standards." See 45 Fed. Reg. at 33,385. Second, defining prohibition in terms of the ban of a particular technology falls well within the language of paragraph (b). Finally, we see nothing inconsistent between this construction and the language of the underlying statute, 42 U.S.C. § 6926(b), which merely asserts that a state program may not be authorized if "such program is not consistent with the Federal and State programs applicable in other States." This language allows the agency enormous latitude in structuring its own implementing regulations and in interpreting them.

#### The plan is regulation, not a prohibition.

#### Vote neg:

#### Limits---each case is multiplied by hundreds of conditions, standards, or modifications, overstretching research

#### Ground---a stable mechanism of bans creates predictable ground to generics like politics and biz con and core CPs like incentives or regulation---that’s key on a broad topic with no other thematic unity

### 1NC

Regulation CP

#### The United States federal government should require that the private sector in the People’s Republic of China be subject to the same regulation as United States-based companies.

#### The United States federal government should:

#### ---refrain from the use of comity by the federal judiciary;

#### ---financially induce all relevant corporations from engaging in anticompetitive business practices in the People’s Republic of China and establish fiscal responsibility reforms.

#### Regulation solves without ‘antitrust’ or FTC involvement

Dr. Howard Shelanski 18, 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, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust and Deregulation”, The Yale Law Journal, Volume 127, Issue 7, 127 Yale L.J., May 2018, https://digitalcommons.law.yale.edu/ylj/vol127/iss7/5/

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

### 1NC

T Expand Scope

#### ‘Expansion’ requires making antitrust law, itself, greater, not clarifying its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### ‘Scope’ refers to authority of law, not actions

Kenneth H. Kato 99, Judge on the Washington Appeals Court, Division Three, “Spokane v. Civil Serv. Comm'n”, Court of Appeals of Washington, Division Three, Panel Four, 98 Wn. App. 574, 576, 989 P.2d 1245, 1246, 1999 Wash. App. LEXIS 2158, 12/21/1999, Lexis

For purposes of RCW 41.56.100, which provides that a public employer is not required to collectively bargain with its employees when the subject matter involved has been "delegated to any civil service commission or personnel board similar in scope, structure and authority" to the state personnel board, "scope" refers to the body's jurisdiction or authority to take various actions.

#### Violation---the plan enforces existing antitrust law, it doesn’t increase its range of authority

#### Vote neg:

#### Limits---there are thousands of enforcement decisions: they could deny current mergers, reverse previous ones, launch new DOJ investigations, levy fines, or prosecute individuals. ‘Enforcement action-of-the-week’ cases massively overstretch research.

#### Ground---there are no overarching DAs or precedent-based effects since enforcement decisions do not change the contours of law.

### 1NC

Infrastructure DA

#### Infrastructure will pass but PC’s key

Matt Reese 9-14, Columnist for Ohio’s Country Journal, BA from Ohio State University, and Dale Minyo, General Manager for Ag Net Communications, LLC, Farm Broadcaster for the Ohio Ag Net, BA from Ohio State University, “Infrastructure Bill Moving Forward”, Ohio’s Country Journal, 9/14/2021, https://ocj.com/2021/09/infrastructure-bill-moving-forward/

From the local bridge just around the corner to the locks and dams on the nation’s river system, agricultural viability depends heavily on infrastructure. After months of across-the-aisle negotiations, the Senate voted to pass the bipartisan infrastructure package (H.R. 3684) in August.

“This is a very notable move forward. It passed through the Senate with a very bi-partisan vote of 69-30, 19 Republican Senators voted for the legislation. Early on this year, the topic of infrastructure was really expansive. There were a lot of things being discussed that really don’t have a lot to do with what most Americans regard as infrastructure. It has tightened up and we think that is a good thing,” said Mike Steenhoek, executive director of the Soy Transportation Coalition. “We appreciate there are a number of categories within this legislation that, if they come to fruition, would be beneficial to agriculture. There is funding directed at roads and bridges, many in rural areas. There is some funding for our inland waterways and ports. For an industry like soybeans, we rely on robust exports and we have got to have the multi-modal transportation system that can connect our supply with that demand. We think there are some very favorable things in this legislation.”

With Senate passage, attention now shifts to the House on this legislation.

“Very little proceeds on time in Washington, D.C., but it is moving forward. The big question is: does the House adhere to Speaker Pelosi’s stated desire that this bill only gets passed if that $3.5 trillion reconciliation package which involves much more social spending also gets passed? There is still a lot of uncertainty related to this. Clearly there are Democrats and Republicans who support this legislation and it is clearly a priority of the president. It is a big bill. Hopefully it won’t get polluted by some of these more controversial topics.”

If the infrastructure package does get passed, it will hopefully build on existing progress.

“This bill would amplify what is already happening. We have a 5-year Highway Bill that was passed in 2015 and is scheduled to be re-authorized this year,” Steenhoek said. “Last year we had the Water Resources Development Act that paved the way for more funding for the inland waterway system. This is not our only shot for moving the needle on infrastructure. Things are getting done. You could argue that more needs to be done and that is what this bill aspires to do.”

Along with the big picture infrastructure items, there are also some smaller provisions in the legislation that could benefit agriculture, including support for biobased products.

“There is a provision that calls attention to biobased products that have infrastructure implications,” Steenhoek said.“Soy-based asphalt sealants and soy-based concrete sealants that are made largely from soil oil are a sustainable way to elongate the life of roads and bridges and provide another market opportunity for soybeans.”

There is plenty to watch as this continues to move forward.

“This is not a perfect piece of legislation, but we do think when you look at the links in the supply chain that are important to farmers, there are certain investment levels and actions that will improve the supply chain. Overall we look at this legislation favorably,” Steenhoek said. “I think there is a good chance that this does get passed, but as the days progress toward an election year, then the probability of anything getting passed goes down.”

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Big infrastructure’s key to climate mitigation and adaptation---extinction

Reynard Loki 9-8, Senior Writing Fellow and Chief Correspondent for Earth | Food | Life, a Project of the Independent Media Institute, Former Environment, Food and Animal Rights Editor at AlterNet and Reporter for Justmeans/3BL Media, “Extreme Weather Devastating US Raises Calls to Pass Biden’s Infrastructure Bill”, Nation of Change, 9/8/2021, https://www.nationofchange.org/2021/09/08/extreme-weather-devastating-us-raises-calls-to-pass-bidens-infrastructure-bill/

In their latest climate report published in August, the United Nations’ Intergovernmental Panel on Climate Change (IPCC) found that human activity, particularly the combustion of fossil fuels, is the likely driver behind the increase in both the frequency and intensity of hurricanes over the past four decades. “The alarm bells are deafening, and the evidence is irrefutable: greenhouse gas emissions from fossil fuel burning and deforestation are choking our planet and putting billions of people at immediate risk,” UN Secretary-General António Guterres said in a statement on the report. “Global heating is affecting every region on Earth, with many of the changes becoming irreversible.” Linda Mearns, a senior climate scientist at the U.S. National Center for Atmospheric Research and one of the report’s co-authors, meanwhile, offered a stern warning: “It’s just guaranteed that it’s going to get worse,” she said, adding that there is “[n]owhere to run, nowhere to hide.”

Adding to the concern is the fact that the end of hurricane season is still far from over, as meteorologists at the U.S. National Oceanic and Atmospheric Administration (NOAA) monitor Hurricane Larry’s path across the Atlantic Ocean. Moreover, Hurricane Ida is just one of the several extreme weather events that have caused death and destruction across the nation. Massive wildfires, fueled by extreme heat and dry conditions, are ripping through California, where more than 1 million acres have been burned in 2021. These are unprecedented times: Only twice in the history of California have wildfires raged from one side of the Sierra Nevada mountain range to the other, and both of those wildfires took place in August.

The National Interagency Fire Center has reported that more than 5 million acres have been charred this year nationwide as of September 7. Nearly half of the land area of the lower 48 states is currently experiencing drought, with the NOAA warning in August that these extremely dry conditions—with precipitation at below-average levels and temperatures at above-average levels—are likely to “continue at least into late fall,” according to the New York Times. As a whole, the United States experienced its hottest June in the 127 years since temperature records have been maintained, while July was Earth’s hottest month on record.

“Climate scientists were predicting exactly these kinds of things, that there would be an enhanced threat of these types of extreme events brought on by increased warming,” said Jonathan Martin, an atmospheric scientist at the University of Wisconsin-Madison. “It’s very distressing. These are not encouraging signs for our immediate future.”

The increase in both the frequency and intensity of extreme weather events like hurricanes, wildfires, droughts and heat waves is providing a fitting backdrop for amplified calls to pass Biden’s infrastructure bill, which would help mitigate the impacts of the climate crisis by repairing 20,000 miles of aging roads and 10 of the country’s most economically crucial bridges to make them more resilient to extreme weather. The bill also seeks to accelerate the nation’s shift toward clean energy to achieve the Paris climate agreement’s goal of reducing global greenhouse gas emissions in order to limit the planet’s surface temperature increase in this century to 2 degrees Celsius above preindustrial levels. (The agreement’s hope to limit the increase to 1.5 degrees Celsius now seems unlikely, given the findings of the new IPCC climate report.) The bill seeks to utilize a combination of federal spending and tax credits to improve transportation, broadband internet, housing and the electric grid, as well as financial support to advance the nation’s manufacturing capabilities, specifically those industries that the administration believes will help the United States compete economically with China.

The White House issued a fact sheet describing the president’s infrastructure plan, saying that it would “create a generation of good-paying union jobs and economic growth, and position the United States to win the 21st century, including on many of the key technologies needed to combat the climate crisis.” The bill would be the first to earmark spending specifically for climate resilience, including $6.8 billion for the Army Corps of Engineers to address federal flood control and ecosystem restoration projects, with an eye toward environmental justice, and calling for 40 percent of all climate-related investments to happen in disadvantaged communities.

“Mr. Biden’s pledge to tackle climate change is embedded throughout the plan,” reports Jim Tankersley for the New York Times. “Roads, bridges and airports would be made more resilient to the effects of more extreme storms, floods and fires wrought by a warming planet. Spending on research and development could help spur breakthroughs in cutting-edge clean technology, while plans to retrofit and weatherize millions of buildings would make them more energy efficient.”

In August, Schumer said that the bipartisan infrastructure bill and Democrats’ reconciliation spending package would cut the United States’ carbon dioxide emission levels by 45 percent by 2030 compared to 2005 levels. He added, “When you add administrative actions being planned by the Biden administrative and many states—like New York, California, and Hawaii—we will hit our 50 percent target by 2030.” That is the goal that Biden set for the nation after he rejoined the Paris climate accord.

“In order to avoid the worst long-term consequences of the climate crisis, we need to put the U.S. on the path to 100 percent clean energy—otherwise, this summer may just be a preview of the disasters to come,” Brooke Still, senior director of digital strategy at the nonprofit League of Conservation Voters (LCV), told Earth | Food | Life recently in an email. “We know what a transition to clean energy will take: We need to stop using oil and coal and go big on clean energy. It’s clear the public agrees—71 percent of the public supports making the investments in climate, justice, and jobs that President Biden proposed. But climate deniers, fossil fuel interests, and obstructionist members of Congress are slowing things to a crawl.” LCV has launched a public petition urging Congress to “invest in clean energy and… in people and communities who too often have been left behind.”

### 1NC

States CP

#### The 50 state governments and relevant sub-federal territories should rescind the presumption against extraterritoriality because of comity in antitrust cases involving anticompetitive business practices by the private sector in the People’s Republic of China.

#### State action solves, won’t be preempted, and causes federal follow-on

Juan A. Arteaga 21, Partner at Crowell & Moring LLP, Former Senior Official in the Antitrust Division of the US Department of Justice, JD from Columbia Law School, and Jordan Ludwig, Counsel in the Antitrust Group at Crowell & Moring LLP, JD from Loyola Law School, “The Role of US State Antitrust Enforcement”, Private Litigation Guide – Second Edition, Global Competition Review, 1/28/2021, https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement

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.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] 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.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

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.[6] 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.[7] 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.[8]

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.[9] 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.[10] 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.[11] 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’.[12] 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.[13] 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.[14]

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.[15] 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.[16]

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.[17] 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.[18]

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:

* 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.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led 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.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* 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.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* 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.’[27]

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.[28]

### 1NC

T Subsets

#### ‘Antitrust’ applies to the entire economy---targeting single industries isn’t topical

Dr. Babette Boliek 11, Associate Professor of Law at Pepperdine University School of Law, J.D. from the Columbia University School of Law, and Ph.D. in Economics from the University of California, Davis, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011, Lexis

Although the two regimes share a commonality of purpose--to protect consumers and to promote allocative efficiencies in production--the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving [\*1629] as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws "typically aim at similar goals--i.e., low and economically efficient prices, innovation, and efficient production methods"--regulation looks to achieve these goals directly "through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about." The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets--regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures. Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly. In the vast majority [\*1630] of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

#### Vote neg:

#### Limits---they devolve into hundreds of specific subsets like aviation, ag, defense or rail AND allow thousands of cases that deny single mergers OR regulate individual companies like Facebook or Amazon

#### Ground---economy-wide change ensures links to core generics like biz con and politics by forcing the aff to structurally change antitrust AND be big enough to deviate from the background noise of daily enforcement actions

### 1NC

Japan DA

#### Strategic co-op with China triggers Japanese fears of U.S. disengagement and spurs rearm that destabilizes Asia

Emma Chanlett-Avery 10, Master’s in International Security Policy from the Columbia University School of International and Public Affairs, Specialist in Asia Policy at the Congressional Research Service, Japan's Nuclear Future: Policy Debate, Prospects, and U. S. Interests, p. Google Books

Issues for U.S. Policy

U.S. Security Commitment

Perhaps the single most important factor to date in dissuading Tokyo from developing a nuclear arsenal is the U.S. guarantee to protect Japan's security. Since the threat of nuclear attack developed during the Cold War, Japan has been included under the U.S. "nuclear umbrella," although some ambiguity exists about whether the United States is committed to respond with nuclear weapons in the event of a nuclear attack on Japan.25 U.S. officials have hinted that it would: following North Korea's 2006 nuclear test, former Secretary of State Condoleezza Rice, in Tokyo, said, " ... the United States has the will and the capability to meet the full range, and I underscore full range, of its deterrent and security commitments to Japan."26 Most policymakers in Japan continue to emphasize that strengthening the alliance as well as shared conventional capabilities is more sound strategy than pursuing an independent nuclear capability.27

During the Cold War, the threat of mutually assured destruction to the United States and the Soviet Union created a sort of perverse stability in international politics; Japan, as the major Pacific front of the U.S. containment strategy, felt confident in U.S. extended deterrence. Although the United States has reiterated its commitment to defend Japan, the strategic stakes have changed, leading some in Japan to question the American pledge. Some in Japan are nervous that if the United States develops a closer relationship with China, the gap between Tokyo's and Washington's security perspectives will grow and further weaken the U.S. commitment.28 These critics also point to what they perceive as the soft negotiating position on North Korea's denuclearization in the Six-Party Talks as further evidence that the United States does not share Japan's strategic perspective.29 A weakening of the bilateral alliance may strengthen the hand of those that want to explore the possibility of Japan developing its own deterrence.

Despite these concerns, many long-time observers assert that the alliance is fundamentally sound from years of cooperation and strong defense ties throughout even the rocky trade wars of the 1980s. Perhaps more importantly, China's rising stature likely means that the United States will want to keep its military presence in the region in place, and Japan is the major readiness platform for the U.S. military in East Asia. If the United States continues to see the alliance with Japan as a fundamental component of its presence in the Pacific, U.S. leaders may need to continue to not only restate the U.S. commitment to defend Japan, but to engage in high-level consultation with Japanese leaders in order to allay concerns of alliance drift. Disagreement exists over the value of engaging in a joint dialogue on nuclear scenarios given the sensitivity of the issue to the public and the region, with some advocating the need for such formalized discussion and others insisting on the virtue on strategic ambiguity.30

U.S. behavior plays an outsized role in determining Japan's strategic calculations, particularly in any debate on developing nuclear weapons. Security experts concerned about Japan's nuclear option have stressed that U.S. officials or influential commentators should not signal to the Japanese any tacit approval of nuclearization.31 Threatening other countries with the possibility of Japan going nuclear, for example, could be construed as approval by some quarters in Tokyo.

U.S.-Japanese joint development of a theater missile defense system reinforces the U.S. security commitment to Japan, both psychologically and practically. The test-launch of several missiles by North Korea in July 2006 accelerated existing plans to jointly deploy Patriot Advanced Capability 3 (PAC-3) surface-to-air interceptors as well as a sea-based system on Aegis destroyers. If successfully operationalized, confidence in the ability to intercept incoming missiles may help assuage Japan's fear of foreign attacks. This reassurance may discourage any potential consideration of developing a deterrent nuclear force. In addition, the joint effort would more closely intertwine U.S. and Japan security, although obstacles still remain for a seamless integration.32

Potential for Asian Arms Race

To many security experts, the most alarming possible consequence of a Japanese decision to develop nuclear weapons would be the development of a regional arms race.33 The fear is based on the belief that a nuclear-armed Japan could compel South Korea to develop its own program; encourage China to increase and/or improve its relatively small arsenal; and possibly inspire Taiwan to pursue nuclear weapons. This in turn might have spill-over effects on the already nuclear-armed India and Pakistan. The prospect—or even reality—of several nuclear states rising in a region that is already rife with historical grievances and contemporary tension could be deeply destabilizing. The counter-argument, made by some security experts, is that nuclear deterrence was stabilizing during the Cold War, and a similar nuclear balance could be achieved in Asia. However, most observers maintain that the risks outweigh potential stabilizing factors.

U.S.-China Relations

The course of the relationship between Beijing and Washington over the next several years is likely to have a significant impact on the nuclearization debate in Japan. If the relationship chills substantially and a Cold War-type standoff develops, there may be calls from some in the United States to reinforce the U.S. deterrent forces. Some hawkish U.S. commentators have called for Japan to be "unleashed" in order to counter China's strength.34 Depending on the severity of the perceived threat from China, Japanese and U.S. officials could reconsider their views on Japan's non-nuclear status. Geopolitical calculations likely would have to shift considerably for this scenario to gain currency. On the other hand, if U.S.-Sino relations become much closer, Japan may feel that it needs to develop a more independent defense posture. This is particularly true if the United States and China engaged in any bilateral strategic or nuclear consultations.35 Despite improved relations today, distrust between Beijing and Tokyo remains strong, and many in Japan's defense community view China's rapidly modernizing military as their primary threat.

#### That causes fast East Asian prolif.

Economist 21, Citing a litany of authors, "Who’s Next?" The Economist, 01/30/2021, <https://www.economist.com/briefing/2021/01/30/nuclear-proliferation-is-not-fast-but-it-is-frightening>. [Richard Samuels – Ford International Professor of Political Science and director of the Center for International Studies at the Massachusetts Institute of Technology; Eric Heginbotham – Principal research scientist at MIT's Center for International Studies; Mark Fitzpatrick – Associate Fellow and former Executive Director of IISS–Americas; Toby Dalton – Co-director and a senior fellow of the Nuclear Policy Program at the Carnegie Endowment; Ain Han – Asan Fellow at Carnegie; Gaukhar Mukhatzhanova – Director of the International Organizations and Nonproliferation Program of the James Martin Center for Nonproliferation Studies ]

Great-power sabre rattling, a sense that some countries get to bend the rules and a reassessment of America’s role as a steadfast ally during the presidency of Donald Trump may all have provoked interest in proliferation. What is more, though the bomb’s spread has slowed, it has never stopped—and proliferation begets proliferation, whatever speed it unrolls at. Iran’s nuclear programme spooks Saudi Arabia. North Korea’s arsenal casts a darkening shadow over South Korea and Japan.

They could if they wanted to

Despite a dalliance with the idea of following China into the nuclear club in the 1960s, Japan is for obvious reasons generally seen as making a case for nuclear caution. At the same time it is the only non-nuclear-armed state which operates major facilities for enriching uranium and reprocessing plutonium from spent reactor fuel, both potential routes to fissile material for a bomb. And in 2017 North Korea tested some of its nuclear-capable missiles by flying them over the archipelago to splash down in the Pacific beyond.

Such experiences change perspectives. Japanese conversations about nuclear weapons were once “sotto voce” and confined to a small cluster of “very conservative thinkers”, says Richard Samuels of MIT. Now, he writes in an article with his colleague Eric Heginbotham, “What once had been nearly taboo...has a conspicuous presence in Japan’s security discourse.”

The idea is still deeply unpopular. Mark Fitzpatrick, who used to oversee non-proliferation policy at the State Department, reckons that Japanese scientists would only comply with an order to produce nuclear weapons “in the event of a sharp deterioration in Japan’s security situation”. But his examples of such deteriorations are hardly outlandish. “In the imaginings of Japanese policymakers,” he says, “the most likely scenarios would be if South Korea goes nuclear or if the Koreas unify and keep Pyongyang’s existing arsenal.”

South Korea lacks enrichment and reprocessing capabilities, and is thus rather less well-placed than Japan to develop nuclear weapons. But it is closer to North Korea, and more worried. “Politicians are trying to normalise and remove the stigma of discussing nuclear weapons in public discourse,” according to Toby Dalton of the Carnegie Endowment, a think-tank, and Ain Han of Seoul National University.

On a technical level, the country has sought to acquire submarines powered by nuclear reactors, the fuel for which is closer to weapons-grade than that for power stations. And on January 13th it announced tests of a submarine-launched ballistic missile. No other non-nuclear state has ever seen a need for such a capability.

Polls show that a majority supports either the development of nuclear weapons or the return of the American ones stationed there during the cold war. But extending American deterrence is harder today. For America to use nuclear weapons on the Korean peninsula would always have been a momentous decision, but in the past it would not have put millions of Americans on the frontline. Now that North Korean missiles can apparently reach North America, attacking Pyongyang puts New York at risk. Strategic calculations are sensitive to such things, and both South Korea and Japan know it.

Taiwan has similar worries; China’s increased ability to strike half way round the world could affect America’s willingness to come to the island’s aid in extremis. But though the country explored nuclear options as recently as 1988, the fact that, today, such efforts would furnish a much more powerful China with a pretext for pre-emptive strikes and possibly invasion makes rekindling them unappealing.

Mr Biden has not said how he plans to address North Korea’s increasing nuclear prowess and its impacts. He will be keen to avoid doing anything which encourages proliferation elsewhere. American promises, blandishments and threats have often checked nuclear ambitions among its allies. A real sense of what American and international displeasure could mean economically might well change what South Koreans say about nuclear weapons.

But North Korea is not going to give up its nuclear weapons. And any deal with America which legitimised North Korea’s arsenal in an effort to stop its growth would increase South Korea’s incentive for at least keeping the nuclear option available—a posture known in the nuclear trade as hedging. So would a resumption of North Korean missile tests. Jeffrey Lewis and David Schmerler of the Middlebury Institute of International Studies (MIIS) in California recently published evidence that North Korea was preparing to test a new long-range submarine-launched missile.

The fear generated by North Korea’s growing arsenal and the fact that Japan, South Korea and Taiwan could all “produce nuclear weapons in perhaps two years—or less in Japan’s case”, according to Mr Fitzpatrick, makes East Asia a hot spot. But it is not the only one. George Perkovich of the Carnegie Endowment divides potential proliferators into two categories: those with ample means but less ambition, and those with greater ambition but fewer means. The East Asians fall into the first category; for the second, look to the Middle East, where insecurity is more violently manifest than in Asia and neither the fetters of liberal democracy nor the pull of alliances as strong.

According to a recent study by the Centre for Strategic and International Studies, another think-tank, “Personalist authoritarian leaders seem more inclined toward the bomb, [and] their hold on power can in some ways make it easier for them to carry out their plans.” The study notes that Recep Tayyip Erdogan, Turkey’s increasingly autocratic president, has begun to talk like a case in point. In September 2019 he complained to members of his ruling AK party that “some countries have missiles with nuclear warheads...But [we are told] we can’t have them. This, I cannot accept.”

Sinan Ülgen, a former diplomat who leads EDAM, an Istanbul-based think-tank, doubts that Mr Erdogan would act on this rhetoric. “At first the public may like the idea of having nuclear weapons,” he says. “But the cost for an open economy like Turkey would be too big and long-term. No government can sustain it under conditions of democratic elections.”

Not all leaders in the region toil under such constraints. “In discussions in Saudi Arabia, there’s a lot more willingness to talk openly about the possibility of proliferation,” says Gregory Gause of Texas A&M University. The obvious cause is Iran’s nuclear programme. The JCPOA, a deal struck in 2015 between Iran, the five nuclear powers recognised by the NPT, Germany and the EU, saw Iran agree to reduce its uranium stocks and enrichment capability and to have them stringently monitored by the International Atomic Energy Agency (IAEA), the NPT’s watchdog, in return for relief from sanctions. But after Mr Trump pulled America out of the deal in 2018 Iran ceased respecting its constraints. On January 4th it started enriching uranium to 20% purity—nine-tenths of the way to weapons-grade—and nine days later began work on uranium metals, which can be used to fashion the core of a bomb.

Mr Biden says he will rejoin the JCPOA, in which case Iran has said it will return to compliance. Israel and Iran’s Arab rivals oppose such a revival, just as they opposed the deal in the first place. They see it as legitimising Iran’s nuclear infrastructure while placing only temporary limits on what it can do with it. In 2018 Muhammad bin Salman, Saudi Arabia’s crown prince, told CBS, an American broadcaster, that the kingdom “does not want to acquire any nuclear bomb, but without a doubt, if Iran developed a nuclear bomb, we will follow suit as soon as possible”. Mr Fitzpatrick reckons that “Saudi Arabia is the proliferation concern number one around the world.”

Despite its announced intention of building 16 nuclear-power stations, Saudi Arabia’s nuclear technology remains far behind that of Japan or South Korea. That need not, in itself, thwart any nuclear ambitions it has or develops. In the past, Western intelligence officials were concerned that Pakistan—which is thought to have had its bomb programme financed by Saudi Arabia in the 1980s and 1990s—might supply a complete nuclear device or know-how to the kingdom.

Alternatively, Saudi Arabia could rely on less-direct outside help. In a forthcoming paper, Nicholas Miller of Dartmouth College and Tristan Volpe of the Naval Postgraduate School describe the growth of an “autocratic nuclear marketplace”. The “gold standard” for deals in which countries buy civilian nuclear-power plants has been that their enriched fuel has to be imported and the used fuel sent out of the country for disposal, thus providing no domestic route to fissile material. Russia and China do not always abide by this standard; and the authors point out that 19 of the 33 reactors exported since 2000 came from those two countries. Last year the Wall Street Journal reported that China was helping Saudi Arabia build a facility for processing uranium ore. That is not the same as enriching it. But it worries Western officials.

China has also armed the kingdom with ballistic missiles. In 2019 researchers at MIIS discovered that a suspected rocket-engine plant south-west of Riyadh bore a resemblance to a Chinese-built facility. This does not necessarily mean it wants nuclear weapons; their perceived utility as conventional weapons is seeing ever more countries build up ballistic-missile forces. But an already established missile capability is definitely a useful thing for a potential proliferator to have.

Wider-spread ballistic-missile capabilities and laxer deals on nuclear fuel are not the only current developments that could be of help to proliferators. America’s National Nuclear Security Administration warns that technological advances like 3D printing and powerful computer-aided design “may create new and worrisome pathways to nuclear weapons”.

But proliferators face new challenges, too. “The world’s capability to know what somebody is doing is much greater than it was at the time that Saddam Hussein was pursuing weapons and that gives a lot more time to react,” says Tom Countryman, America’s under-secretary of state for non-proliferation from 2011 to 2017. Non-governmental organisations regularly unearth and publicise secret facilities using “open” sources—most notably images taken by satellites like those which researchers at MIIS used to spot North Korea’s looming missile test and Saudi Arabia’s rocket plant.

The IAEA has honed its remote monitoring capabilities in Iran in recent years, using tamper-proof cameras and radiation detectors that send back a steady stream of data. And Mr Volpe points out that ever more manufacturing technology is likely to be monitored from afar by its creators. Such capabilities could be used for more than scheduling maintenance. He envisages an “Internet of Nuclear Things” in which suppliers can scrutinise the tasks for which the machines they sell are used.

This all offers hope that the covert pursuit of nuclear weapons has become harder. But what of overt pursuit? For a country to leave the NPT would undoubtedly provoke a crisis. But India’s experience shows that a country with real heft can weather such disapproval. As Ms Mukhatzhanova puts it, “Countries that are important, economically and politically, might count on being accepted into the system if they break out.” To try to cut a frankly proliferating South Korea out of the world economy in order to bring it back into the NPT stable would be a huge undertaking.

No way back

Most nuclear-curious states, Iran included, are more interested in hedging than in actually building a weapons programme. Yet hedging by several rivals at once produces a situation where cascading proliferation becomes all too easy to imagine. An Israeli military strike on Iran, for instance, might persuade it of the need for a nuclear deterrent, thus triggering a response by Saudi Arabia which might in turn strengthen ambition in Ankara—or Cairo.

Once the world would have hoped that American diplomacy, engagement and suasion would have kept such risks in check, and over the coming few years they might. But America’s centrality is on the wane. As Mr Gause points out, “A pervasive sense...that the United States is leaving the region” underpins Saudi discussion of proliferation. The risks entailed in offering a nuclear umbrella are clearly increasing. And although Mr Biden has always been a staunch advocate of arms control, the same was not true of his predecessor, and may well not be true of his successor. Proliferation has not proceeded anything like as fast as once was feared. But it has not stopped, and it could well accelerate.

#### Prolif causes extinction.

Richard Tanter 17, Senior Research Associate at Nautilus Institute for Security and Sustainability and Director of the Nautilus Institute at the Royal Melbourne Institute of Technology, "Donald Trump’s Japanese and South Korean Nuclear Threat to China: A tipping point in East Asia?", The Asia-Pacific Journal, Vol. 15, Issue 7, 04-01-2017, https://apjjf.org/2017/07/Tanter.html

But in the longer run, apart from the direct risks of such an event for the U.S. itself, its East Asian alliance network, now in its seventh decade, founded on Japanese and Korean acceptance of U.S. nuclear primacy and a U.S. nuclear umbrella, would change dramatically, bringing with it, for better or worse, the end of U.S. hegemony in East and Southeast Asia. Whether occurring on a Gaullist or British model, the foundations of Korean and Japanese relations with the United States would be irrevocably altered. Even leaving aside the obvious questions about the DPRK, in the event of a nuclearized Japan and South Korea, clearly the mathematical risks of nuclear war initiated in East Asia would be very much greater than even the current risks of India-Pakistan nuclear conflict. Regional nuclear security planning would be woven with multiple valences of possible perceived nuclear threats. The calculus of China-U.S. nuclear relations immediately becomes much more complex, with China facing two new potential threats, nominally at least coordinating with the U.S., in addition to the older concerns about India and Russia. For the United States, a nuclear-armed, fully ‘normalized’ Japan would never be the undoubted loyal lapdog of by then likely post-United Kingdom Little England. And the calculations of a nuclear-armed South Korea and Japan about each other would start and finish in historically-conditioned suspicion.

At a global level, the U.S. opening the door to Japanese and Korean nuclear weapons could not fail to encourage a cascade of regional races to nuclear weapons, not only in the Western Pacific but in the Middle East, in Latin America, and quite possibly in Africa. The risks of regional nuclear war, with all its now thoroughly documented catastrophic environmental and climate consequences, would be both manifold and far higher than at present.

For Australia, the ever compliant ally of the United States, there has never been a more stark choice: Is the Turnbull government willing to sit on its hands as its dominant ally not only allows but actually encourages Japan and South Korea to build their own nuclear bombs? Does Foreign Minister Julie Bishop imagine that Trumpian brinkmanship increases Australian security? Does she somehow think that the already-gathering band of advocates of Australian nuclear weapons will not become more influential? And does she think that none of this will encourage now still fringe Indonesian figures who may long for a reprise of Soekarnoist dreams of a nuclear Nusantara? It is critical that Australia see the Tillerson threat as a wake-up call to the complete failure of its own nuclear disarmament policy, and seize the chance to initiate a more independent foreign policy.

All of this is happening at the same time as the United Nations commences an historically unprecedented attempt to create a ‘legally binding instrument to prohibit nuclear weapons, leading towards their total elimination’. The global nuclear ban treaty initiative, led by the non-nuclear weapons states (Austria, Brazil, Ireland, Mexico, Nigeria, and South Africa) and global civil society organisations no longer willing to wait for the nuclear weapons states to fulfil their long dishonoured Non-Proliferation Treaty pledge to negotiate nuclear disarmament in good faith, aims above all to stigmatize all aspects of nuclear weapons and through a process of delegitimizing policies — supported by the nuclear weapons states and their allies alike — and challenge the discursive hegemony of the fiction of nuclear deterrence.

After instructing its NATO allies to boycott the nuclear ban treaty negotiations, the United States has reportedly placed extraordinary pressure on a divided Japanese Cabinet to ensure that it falls into line. Australia, the most complacent of U.S. allies, required no such pressure. Remarkably, every country in South East Asia and every Pacific island country is participating in the talks and supporting the proposal, leaving US allies Japan, Korea and Australia in isolation.

Meanwhile, the rest of the world is held hostage doubly to both the adventurism of the Trump administration and to the threat to planetary survival from the nine nuclear-armed states. As Tim Wright of the International Campaign to Abolish Nuclear Weapons wrote in the Bulletin of Atomic Scientists,

‘Recent threats of a new nuclear arms race and ongoing programs to replace old nuclear warheads with ever-deadlier ones cause much damage to the NPT, as does the ill-considered boycott of the forthcoming UN negotiations.’

The Trump-Tillerson threat of a nuclear-armed Japan and South Korea is the clearest possible message that the U.S. is abandoning even the fig leaf of non-proliferation policy, and that the road to nuclear abolition, hard and long as it may be, is the only viable path.

## Relations Advantage

### Relations ADV---1NC

#### No US-China war.

Charles C. Krulak & Alex Friedman 21, former President of Birmingham-Southern College, former Commandant of the US Marine Corps, M.S. from George Washington University; former Chief Financial Officer of the Bill & Melinda Gates Foundation, J.D. from Columbia University, “The US and China Are Not Destined for War,” Project Syndicate, 08-17-2021, https://www.project-syndicate.org/commentary/us-china-not-destined-for-war-by-charles-c-krulak-and-alex-friedman-1-2021-08

True, throughout history, when a rising power has challenged a ruling one, war has often been the result. But there are notable exceptions. A war between the US and China today is no more inevitable than was war between the rising US and the declining United Kingdom a century ago. And in today’s context, there are four compelling reasons to believe that war between the US and China can be avoided.

First and foremost, any military conflict between the two would quickly turn nuclear. The US thus finds itself in the same situation that it was in vis-à-vis the Soviet Union. Taiwan could easily become this century’s tripwire, just as the “Fulda Gap” in Germany was during the Cold War. But the same dynamic of “mutual assured destruction” that limited US-Soviet conflict applies to the US and China. And the international community would do everything in its power to ensure that a potential nuclear conflict did not materialize, given that the consequences would be fundamentally transnational and – unlike climate change – immediate.

A US-China conflict would almost certainly take the form of a proxy war, rather than a major-power confrontation. Each superpower might take a different side in a domestic conflict in a country such as Pakistan, Venezuela, Iran, or North Korea, and deploy some combination of economic, cyber, and diplomatic instruments. We have seen this type of conflict many times before: from Vietnam to Bosnia, the US faced surrogates rather than its principal foe.

Second, it is important to remember that, historically, China plays a long game. Although Chinese military power has grown dramatically, it still lags behind the US on almost every measure that matters. And while China is investing heavily in asymmetric equalizers (long-range anti-ship and hypersonic missiles, military applications of cyber, and more), it will not match the US in conventional means such as aircraft and large ships for decades, if ever.

A head-to-head conflict with the US would thus be too dangerous for China to countenance at its current stage of development. If such a conflict did occur, China would have few options but to let the nuclear genie out of the bottle. In thinking about baseline scenarios, therefore, we should give less weight to any scenario in which the Chinese consciously precipitate a military confrontation with America. The US military, however, tends to plan for worst-case scenarios and is currently focused on a potential direct conflict with China – a fixation with overtones of the US-Soviet dynamic.

This raises the risk of being blindsided by other threats. Time and again since the Korean War, asymmetric threats have proven the most problematic to national security. Building a force that can handle the worst-case scenario does not guarantee success across the spectrum of warfare.

The third reason to think that a Sino-American conflict can be avoided is that China is already chalking up victories in the global soft-power war. Notwithstanding accusations that COVID-19 escaped from a virology lab in Wuhan, China has emerged from the pandemic looking much better than the US. And with its Belt and Road Initiative to finance infrastructure development around the world, it has aggressively stepped into the void left by US retrenchment during Donald Trump’s four-year presidency. China’s leaders may very well look at the current status quo and conclude that they are on the right strategic path.

Finally, China and the US are deeply intertwined economically. Despite Trump’s trade war, Sino-American bilateral trade in 2020 was around $650 billion, and China was America’s largest trade partner. The two countries’ supply-chain linkages are vast, and China holds more than $1 trillion in US Treasuries, most of which it cannot easily unload, lest it reduce their value and incur massive losses.

To be sure, logic can be undermined by a single act and its unintended consequences. Something as simple as a miscommunication can escalate a proxy war into an interstate conflagration. And as the situations in Afghanistan and Iraq show, America’s track record in war-torn countries is not encouraging. China, meanwhile, has dramatically stepped up its foreign interventions. Between its expansionist mentality, its growing foreign-aid program, and rising nationalism at home, China could all too easily launch a foreign intervention that might threaten US interests.

Cyber mischief, in particular, could undercut conventional military command-and-control systems, forcing leaders into bad decisions if more traditional options are no longer on the table. And Sino-American economic ties may come to matter less than they used to, especially as China moves from an export-led growth model to one based on domestic consumption, and as two-way investment flows decline amid escalating bilateral tensions.

A “mistake” on the part of either country is always possible. That is why diplomacy is essential. Each country needs to determine its vital national interests vis-à-vis the other, and both need to consider the same question from the other’s perspective. For example, it may be hard to accept (and unpopular to say), but civil rights within China might not be a vital US national interest. By the same token, China should understand that the US does indeed have vital interests in Taiwan.

The US and China are destined to clash in many ways. But a direct, interstate war need not be one of them.

## Competition Advantage

### Competition ADV---1NC

#### No Chinese 5G dominance---their claims are military lies, hyped for funding

SCMP 19 – South China Morning Post, citing a variety of experts, “China Experts: US Still Out Front In Tech Race Despite Pentagon Claim”, 11/3/2019, https://www.abacusnews.com/tech/china-experts-us-still-out-front-tech-race-despite-pentagon-claim/article/3036161

Chinese experts have rejected the claim by a senior Pentagon official that the US is lagging behind China in some key dual-use technologies.

Michael Brown, director of the US Department of Defence’s innovation unit, said at a seminar earlier this week that China was either competitive or catching up in the areas of hypersonics, artificial intelligence, quantum sciences, 5G mobile networks, genetic engineering, and space.

With the exception of hypersonics, these technologies had not only military applications but were also critical for long-term economic prosperity, making them important to the future of US-China competition, he said.

“I believe that national security and economic security are inextricably linked,” Brown told the think tank Centre for Strategic and International Studies in Washington.

China prepares to send its own astronauts to the moon 50 years after Apollo 11

But Chinese experts said China’s progress had been exaggerated and many of its achievements were only partial successes so far.

Hong Kong-based military commentator Song Zhongping said the US had been “unarguably more successful and experienced, far ahead of anyone” in space technology. “Look at Project Apollo and the Space Shuttle programme – decades later no other country has ever matched those achievements,” he said.

Despite breakthroughs in certain fields like 5G, there was more generally a clear gap between China’s digital information and electronics technologies and the world’s technological leaders, according to Beijing-based naval expert Li Jie.

In the field of hypersonics, China may have achieved milestones in glider vehicles, but in another important technology – ramjet engines – there was no evidence of any major breakthroughs, and the US was still far more experienced in the field, said Zhao Tong, senior fellow at the Carnegie-Tsinghua Centre for Global Policy.

China exhibited hypersonic missiles and drones at last month’s National Day parade, and has just launched a commercial 5G – fifth generation mobile network – service on Friday, which is the biggest in the world.

Huawei, China’s telecommunication giant has won contracts to construct the 5G infrastructures for many countries, despite the US campaign to ban Huawei equipment over security concerns.

Brown said China was “already ahead of the US in quantum sciences” – citing the Chinese launch in 2016 of Micius, the world’s first quantum communications satellite. China had also made more launches into space than the US in 2018 as it speeded up its space programme, he said.

Brown added the US had used Chinese equipment for genome sequencing, which meant China had more data on the genetic sequencing of the US population than the US itself, he said, and the US was also playing “a catch up game” with China in AI-based facial recognition.

5G is available now in China for just US$18

For the past 50 to 80 years, the US had led the way and set the standards in almost all important technologies and industries, he said. In doing so, the US had been able to build and shape a global ecosystem and enjoy its advantages since the end of World War II.

But, Brown warned, for China to set the pace for these technologies would be “game-changing”.

“Imagine what the world would look like if China was setting standards,” he said. “Over time, that means we have fewer levers to shape what the US wants to do, both from a global technology standpoint and also what are the values that are highlighted around the world as ones to be looked up to.”

Ni Lexiong, a Shanghai-based military commentator, said Brown had his own agenda in making his comments.

“The US military wants more budget, more new equipment, more new R&D projects. And the theory of a China threat is, of course, a handy excuse,” Ni said.

#### Widespread rollout is years away

Dr. Mohanbir Sawhney 19, McCormick Tribune Professor of Technology at the Kellogg School of Management, “Perspectives: Don't Hold Your Breath For 5G. Most Of Us Won't Be Using It Until 2025”, CNN, 12/10/2019, https://www.cnn.com/2019/12/10/perspectives/5g-technology-t-mobile-att-verizon/index.html

But for now, 5G in 2020 is mostly a hype fest. Slowly, 5G networks in the next few years will expand coverage, as a wider range of affordable 5G smartphones hit the market. Only then will the consumer adoption of 5G start to take off, which could take until 2025 as service gradually expands. Back when 4G was the new frontier, there were still pockets of 3G even though carriers were promoting "nationwide" coverage.

#### No readiness impact---other factors check rogue states.

John Mueller 21, Adjunct Professor of Political Science and Senior Research Scientist at the Mershon Center for International Security Studies, "Proliferation, Terrorism, Humanitarian Intervention, and Other Problems," in The Stupidity of War: American Foreign Policy and the Case for Complacency, Chapter 7, 02/17/2021, pg. 183-184.

Over the course of the last several decades, alarmists have often focused on potential dangers presented by rogue states, as they came to be called in the 1990s. These were led by such devils du jour as Nasser, Sukarno, Castro, Gaddafi, Khomeini, Kim Il-sung, Saddam Hussein, Milosˇevic´, and Ahmadinijad, all of whom have since faded into history’s dustbin.66 Today the alarm has been directed at Iran as discussed in Chapter 6 and also at North Korea as discussed in this one. However, neither country really threatens to commit major direct military aggression. Iran, in fact, has eschewed the practice for several centuries.

Nonetheless, it might make some sense to maintain a capacity to institute containment and deterrence efforts carried out in formal or informal coalition with concerned neighboring countries – and there are quite a few of these in each case. However, the military requirements for effective containment by their neighbors, by the United States, and by the broader world community are far from monumental and do not necessarily require the United States to maintain large forces-in-being for the remote eventuality.

This is suggested by the experience with the Gulf War of 1991 when military force was successfully applied to deal with a rogue venture – the conquest by Saddam Hussein’s Iraq of neighboring Kuwait. As noted earlier, Iraq’s invasion was rare to the point of being unique: it was the only case since World War II in which one United Nations country has invaded another with the intention of incorporating it into its own territory. It scarcely appears, as laid out in Chapter 3, that Iraq’s pathetic forces required a large force to be thrown at them to decide to withdraw: over a period of half a year, they did not erect anything resembling an effective defensive system and, when the chips were down, they proved to lack not only defenses, but strategy, tactics, leadership, and morale as well.

Countries opposed to provocative rogue behavior do not need to have a large force-in-being because there would be plenty of time to build one up (should it come to that) if other measures such as economic sanctions and diplomatic forays (including appeasement) fail to persuade.

#### No Taiwan war---China has pledged to unify since Mao but has zero incentive to actually go to war.

Bush et al. 21, Richard Bush, former Senior Fellow and Director of the Center for East Asia Policy Studies at the Brookings Institution; Bonnie Glaser, Director of the China Power Project at the Center for Strategic and International Studies; Ryan Haas, served on the National Security Council in the Obama administration, Senior Fellow at the Brookings Institution, “Opinion: Don't Help China By Hyping Risk Of War Over Taiwan,” NPR, 04-08-2021, https://www.npr.org/2021/04/08/984524521/opinion-dont-help-china-by-hyping-risk-of-war-over-taiwan

A growing chorus of officials and experts in the United States has been raising alarm about the risk of a Chinese attack against Taiwan. Adm. Philip S. Davidson, the United States Indo-Pacific commander, recently handicapped the threat of a Chinese assault on Taiwan as "manifest during this decade, in fact, in the next six years." China is preparing to invade and unify Taiwan by force, the thinking goes, as soon as it gains the capabilities to do so. Such doomsday predictions deserve interrogation.

China's actions no doubt have earned scrutiny. In recent years, Beijing has grown impatiently aggressive in pursuit of its ambitions. China has drawn blood along the contested Indian border, threatened Vietnam, expanded its military presence in the South China Sea, increased the tempo of its operations near the Senkaku Islands and trampled Hong Kong's autonomy — to say nothing of the atrocities it is perpetrating against its own citizens in Xinjiang and elsewhere.

Beijing also is investing considerably in military capabilities that could be employed in a Taiwan contingency. China has gone on a naval shipbuilding surge in recent years, surpassing the U.S. Navy by a count of hulls. Robert S. Ross of Boston College estimates that the Chinese Navy already has more than 300 ships, while the U.S. Navy has around 280.

China is marshaling its full range of capabilities to intensify pressure on Taiwan below the threshold of conflict. People's Liberation Army forces now operate all around Taiwan. They also have been conducting highly publicized amphibious assault exercises and air penetrations of Taiwan's air defense identification zone at the highest frequency in nearly 25 years.

Contributing to Beijing's unfriendly treatment of Taiwan was its perception that the Trump administration showed stronger support for the island's government, thus reducing any incentive that Taipei had to submit to its demands. Trump officials took initiatives mainly in the diplomatic and security realms, and they did buoy Taiwan's confidence. The Biden administration has shown broad continuity in support for Taiwan during its first months.

As troubling as the trend-lines of Chinese behavior are, it would be a mistake to infer that they represent a prelude to an unalterable catastrophe. China's top priority now and in the foreseeable future is to deter Taiwan independence rather than compel unification. Beijing remains confident in its capacity to achieve this near-term objective, even as it sets the groundwork for its long-term goal of unification. Indeed, based on polling on attitudes regarding defense, we believe the people of Taiwan already are sober to the risks of pursuing independence.

China's leaders also have employed sharp rhetoric, though some of it has been exaggerated. Too much is made of President Xi Jinping's declaration not to pass down cross-strait divisions to future generations. Every Chinese leader since Mao Zedong has projected determination to unify Taiwan with the mainland. Xi is no different. And Xi, now 67, will not likely be around to see if Taiwan is unified with the mainland by the putative deadline, the 100-year anniversary of the founding of the People's Republic of China in 2049.

While it is true that some in China have concluded that time is no longer on China's side and Beijing should use force to compel unification, Xi has resisted such pressure. In the latest five-year plan, launched this year, Beijing reaffirmed the policy guideline of pursuing "peaceful development of cross-strait relations," continuing a line tracing back to the era of Hu Jintao, China's president from 2003 to 2013.

Beijing has its own incentives to avoid war. Foremost among them is that any attempt to take Taiwan by force would very likely invite a military conflict with the United States. Such a conflict would be difficult to limit from escalating or spreading beyond the Taiwan Strait.

Under such circumstances, Beijing could not be assured of absolute victory, and anything short of quick and absolute unification would risk undermining Chinese Communist Party legitimacy at home. China's use of force against Taiwan also would poison China's image in the region and the world, alert neighboring countries to the threat China poses to stability and lead to diversion of resources and focus from Xi's pressing domestic priorities.

Given the unattractiveness of these options, it is little surprise that China has chosen a different path. In recent years, Beijing has unveiled a broad range of tools to deter Taiwan's independence and gradually weaken the will of the people of Taiwan to resist integration with the mainland.

China has targeted Taiwan economically, sought to induce a brain drain of Taiwan's top engineers to the mainland, isolated Taiwan on the world stage, fomented social divisions inside Taiwan, launched cyberattacks and undertaken displays of military force.

Beijing's goal is to constantly remind Taiwan's people of its growing power, induce pessimism about Taiwan's future, deepen splits within the island's political system and show that outside powers are impotent to counter its flexes.

Its approach is guided by the Chinese aphorism, "Once ripe, the melon will drop from its stem." This strategy may require more time than war, but it would come at less cost and risk to Beijing.

Coercion without violence is not just a threat; it's an everyday reality. China does pose a kinetic threat to Taiwan, and Taiwan and the United States must strengthen their capacity to deter war. But the proximate threat is not just military, it's also psychological.

Hyping the threat that China poses to Taiwan does Beijing's work for it. Taiwan's people need reasons for confidence in their own future, not just reminders of their vulnerabilities.

## Comity Advantage

### Comity ADV---1NC

#### No security assistance impact---states won’t risk war, isolation, AND are already stagnant.

John Mueller 21, Adjunct Professor of Political Science and Senior Research Scientist at the Mershon Center for International Security Studies, "The Rise of China, the Assertiveness of Russia, and the Antics of Iran," in The Stupidity of War: American Foreign Policy and the Case for Complacency, Chapter 6, 02/17/2021, pg. 163-167.

Complacency, Appeasement, Self-destruction, and the New Cold War

It could be argued that the policies proposed here to deal with the international problems, whether real or imagined, presented by China, Russia, and Iran constitute exercises not only in complacency, but also in appeasement. That argument would be correct. As discussed in the Prologue to this book, appeasement can work to avoid military conflict as can be seen in the case of the Cuban missile crisis of 1962. As also discussed there, appeasement has been given a bad name by the experience with Hitler in 1938.

Hitlers are very rare, but there are some resonances today in Russia’s Vladimir Putin and China’s Xi Jinping. Both are shrewd, determined, authoritarian, and seem to be quite intelligent, and both are fully in charge, are surrounded by sychophants, and appear to have essentially unlimited tenure in office. Moreover, both, like Hitler in the 1930s, are appreciated domestically for maintaining a stable political and economic environment. However, unlike Hitler, both run trading states and need a stable and essentially congenial international environment to flourish.128 Most importantly, except for China’s claim to Taiwan, neither seems to harbor Hitler-like dreams of extensive expansion by military means. Both are leading their countries in an illiberal direction which will hamper economic growth while maintaining a kleptocratic system. But this may be acceptable to populations enjoying historically high living standards and fearful of less stable alternatives. Both do seem to want to overcome what they view as past humiliations – ones going back to the opium war of 1839 in the case of China and to the collapse of the Soviet empire and then of the Soviet Union in 1989–91 in the case of Russia. Primarily, both seem to want to be treated with respect and deference. Unlike Hitler’s Germany, however, both seem to be entirely appeasable. That scarcely seems to present or represent a threat. The United States, after all, continually declares itself to be the indispensable nation. If the United States is allowed to wallow in such self-important, childish, essentially meaningless, and decidedly fatuous proclamations, why should other nations be denied the opportunity to emit similar inconsequential rattlings? If that constitutes appeasement, so be it. If the two countries want to be able to say they now preside over a “sphere of influence,” it scarcely seems worth risking world war to somehow keep them from doing so – and if the United States were substantially disarmed, it would not have the capacity to even try.

If China and Russia get off on self-absorbed pretensions about being big players, that should be of little concern – and their success rate is unlikely to be any better than that of the United States. Charap and Colton observe that “The Kremlin’s idee fixe that Russia needs to be the leader of a pack of post-Soviet states in order to be taken seriously as a global power broker is more of a feel-good mantra than a fact-based strategy, and it irks even the closest of allies.” And they further suggest that

The towel should also be thrown in on the geo-ideational shadow-boxing over the Russian assertion of a sphere of influence in post-Soviet Eurasia and the Western opposition to it. Would either side be able to specify what precisely they mean by a regional sphere of influence? How would it differ from, say, US relations with the western-hemisphere states or from Germany’s with its EU neighbors?129

Applying the Gingrich gospel, then, it certainly seems that, although China, Russia, and Iran may present some “challenges” to US policy, there is little or nothing to suggest a need to maintain a large US military force-in-being to keep these countries in line. Indeed, all three monsters seem to be in some stage of self-destruction or descent into stagnation – not, perhaps, unlike the Communist “threat” during the Cold War. Complacency thus seems to be a viable policy.

However, it may be useful to look specifically at a couple of worst-case scenarios: an invasion of Taiwan by China (after it builds up its navy more) and an invasion of the Baltic states of Estonia, Lithuania, and Latvia by Russia. It is wildly unlikely that China or Russia would carry out such economically self-destructive acts: the economic lessons from Putin’s comparatively minor Ukraine gambit are clear, and these are unlikely to be lost on the Chinese. Moreover, the analyses of Michael Beckley certainly suggest that Taiwan has the conventional military capacity to concentrate the mind of, if not necessarily fully to deter, any Chinese attackers. It has “spent decades preparing for this exact contingency,” has an advanced early warning system, can call into action massed forces to defend “fortified positions on home soil with precision-guided munitions,” and has supply dumps, booby traps, an wide array of mobile missile launchers, artillery, and minelayers. In addition, there are only 14 locations that can support amphibious landing and these are, not surprisingly, well-fortified by the defenders.130

The United States may not necessarily be able to deter or stop military attacks on Taiwan or on the Baltics under its current force levels.131 And if it cannot credibly do so with military forces currently in being, it would not be able to do so, obviously, if its forces were much reduced. However, the most likely response in either eventuality would be for the United States to wage a campaign of economic and military (including naval) harassment and to support local – or partisan – resistance as it did in Afghanistan after the Soviet invasion there in 1979. 132 Such a response does not require the United States to have, and perpetually to maintain, huge forces in place and at the ready to deal with such improbable eventualities.

The current wariness about, and hostility toward, Russia and China is sometimes said to constitute “a new Cold War.”133 There are, of course, considerable differences. In particular, during the Cold War, the Soviet Union – indeed the whole international Communist movement – was under the sway of a Marxist theory that explicitly and determinedly advocated the destruction of capitalism and probably of democracy, and by violence to the degree required. Neither Russia nor China today sports such cosmic goals or is enamored of such destructive methods. However, as discussed in Chapters 1 and 2, the United States was strongly inclined during the Cold War massively to inflate the threat that it imagined the Communist adversary to present. The current “new Cold War” is thus in an important respect quite a bit like the old one: it is an expensive, substantially militarized, and often hysterical campaign to deal with threats that do not exist or are likely to selfdestruct.134

It may also be useful to evaluate terms that are often bandied about in considerations within foreign policy circles about the rise of China, the assertiveness of Russia, and the antics of Iran. High among these is “hegemony.” Sorting through various definitions, Simon Reich and Richard Ned Lebow array several that seem to capture the essence of the concept: domination, controlling leadership, or the ability to shape international rules according to the hegemon’s own interests. Hegemony, then, is an extreme word suggesting supremacy, mastery, preponderant influence, and full control. Hegemons force others to bend to their will whether they like it or not. Reich and Lebow also include a mellower designation applied by John Ikenberry and Charles Kupchan in which a hegemon is defined as an entity that has the ability to establish a set of norms that others willingly embrace.135 But this really seems to constitute an extreme watering-down of the word and suggests opinion leadership or entrepreneurship and success at persuasion, not hegemony.

Moreover, insofar as they carry meaning, the militarized application of American primacy and hegemony to order the world has often been a fiasco.136 Indeed, it is impressive that the hegemon, endowed by definition by what Reich and Lebow aptly call a grossly disproportionate military capacity, has had such a miserable record of military achievement since 1945 – an issue discussed frequently in this book.137 Reich and Lebow argue that it is incumbent on IR scholars to cut themselves loose from the concept of hegemony.138 It seems even more important for the foreign policy establishment to do so.

There is also absurdity in getting up tight over something as vacuous as the venerable “sphere of influence” concept (or conceit). The notion that world affairs are a process in which countries scamper around the world seeking to establish spheres of influence is at best decidedly unhelpful and at worst utterly misguided. But the concept continues to be embraced in some quarters as if it had some palpable meaning. For example, in early 2017, the august National Intelligence Council opined that “Geopolitical competition is on the rise as China and Russia seek to exert more sway over their neighboring regions and promote an order in which US influence does not dominate.”139 Setting aside the issue of the degree to which American “influence” could be said to “dominate” anywhere (we still wait, for example, for dominated Mexico supinely to pay for a wall to seal off its self-infatuated neighbor’s southern border), it doesn’t bloody well matter whether China or Russia has, or seems to have, a “sphere of influence” someplace or other.

More importantly, the whole notion is vapid and essentially meaningless. Except perhaps in Gilbert and Sullivan’s Iolanthe. When members of the House of Lords fail to pay sufficient respect to a group of women they take to be members of a ladies’ seminary who are actually fairies, their queen, outraged at the Lords’ collected effrontery, steps forward, proclaims that she happens to be an “influential fairy,” and then, with a few passes of her wand, brushes past the Lords’ pleas (“no!” “mercy!” “spare us!” and “horror!”), and summarily issues several edicts: a young man of her acquaintance shall be inducted into their House, every bill that gratifies his pleasure shall be passed, members shall be required to sit through the grouse and salmon season, and high office shall be obtainable by competitive examination. Now, that’s influence. In contrast, on December 21, 2017, when the United States sought to alter the status of Jerusalem, the United Nations General Assembly voted to repudiate the US stand in a nearly unanimous vote that included many US allies. Now, that’s not influence.

In fact, to push this point perhaps to an extreme, if we are entering an era in which economic motivations became paramount and in which military force is not deemed a sensible method for pursuing wealth, the idea of “influence” would become obsolete because, in principle, pure economic actors do not care much about influence. They care about getting rich. (As Japan and Germany have found, however, influence, status, and prestige tend to accompany the accumulation of wealth, but this is just an ancillary effect.) Suppose the president of a company could choose between two stories to tell the stockholders. One message would be, “We enjoy great influence in the industry. When we talk everybody listens. Our profits are nil.” The other would be, “No one in the industry pays the slightest attention to us or ever asks our advice. We are, in fact, the butt of jokes in the trade. We are making money hand over fist.” There is no doubt about which story would most thoroughly warm the stockholders’ hearts.

# 2NC

## T Expansion

### AT: We Meet---2NC

#### The plan increases action within the scope, but doesn’t expand it

W. W. Haralson 94, Judge on the Alabama Court of Criminal Appeals, “Goodloe v. Memphis & C. R. Co.”, Supreme Court of Alabama, 107 Ala. 233, 238, 18 So. 166, 166, 1894 Ala. LEXIS 35, 11/1/1894, Lexis

Counsel: JACKSON & SAWTELLE and J. H. NATHAN for the appellant.--The relation of carrier and passenger begins, when, a contract of carriage having been made, or the passenger having been accepted as such by the carrier, or, having the bona fide intention of taking passage by a particular train, he has come, within a reasonable time, before the expected arrival of the train, upon the carrier's premises; and that relation continues, until his journey is completed. To him, then, the premises of the carrier, with its buildings and approaches, grounds, modes of ingress and egress to its grounds and stations and trains should be a place of [\*\*\*3] security from injury; in some instances coming even from strangers; in all cases coming from the carrier's own agents and servants. 2 Am. & Eng. Ency. Law, pp. 744-5; Batton v. S. & N. R. R. Co., 77 Ala. 593; 2. Rorer on Railroads, 951; A. G. S. R. R. Co. v. Arnold, 80 Ala. 607. Appellant being a passenger, and, when injured, still within the circle of protection, the duty of the carrier to him required of it the exercise of the highest degree of care for his safety.--Christie v. Griggs, 2 Camp. 79; Sharp v. Gray, 9 Bing. 457; F. & St. L. R. R. Co. v. Horst, 93 U.S. 291; M. & M. R. R. Co. v. Blakely, 59 Ala. 477; Penn. R. R. Co. v. Roy, 102 U.S. 451; Tanner v. L. & N. R. R. Co., 60 Ala. 621; B. & O. R. R. Co. v. Worthington, 21 Md. 275. While he was such passenger, he was injured by the servant of the carrier, and the appellee is liable in this action.--Snow v. Pittsburg Railroad Co., 136 Mass. 552; Ramsden v. Boston Railroad Co., 104 Mass. 117; L. & N. R. R. Co. v. Kelley, 13 Am. & Eng. R. R. cases, 1; Hutch. on Carr. (2d Ed.) § 595, et seq.; Goddard v. Railway Co., 57 Me. 202; Hanson v. Railway Co., 62 Me. 84. Under the facts of this case the appellant claims that, as to him, the [\*\*\*4] servant was in the course or scope of his duty, and that it can make no difference, if the act of the servant was unauthorized by the carrier, or even contrary to its orders. It is insisted by counsel for appellee, that "scope of duty" means the limits of exact and correct performance by the servant or agent of his employment; but it is manifest that, if such were the construction of it, there could never be any liability of the master for the negligence or misconduct of his servant. Webster defines "scope" as the ultimate design, aim, or purpose; intention; drift; object. If one is engaged in carrying out the purpose, or object, for which he was employed, he is acting within the scope, the area, of his duty. The better form of expression often used, as fixing the limits of the liability of the master for the action of the servant is, "course of employment." In that sense it is used in many cases, and in those most approved.--Mulligan v. N. Y. & R. B. R. R. Co., 129, N. Y. 512.

#### Increasing enforcement of existing law doesn’t not ‘expand’ its ‘scope’

Anne K. McKeig 20, Judge on the Minnesota Supreme Court, “Aim Dev. (USA), LLC v. City of Sartell”, 946 N.W.2d 330, 338-340, 2020 Minn. LEXIS 350, 7/15/2020, Lexis

We determined that the landowner could upgrade his equipment so long as the new equipment was "merely an improvement over the previous method and did not constitute a change in the nature and purpose of the original use." Id. at 866-67. Our holding recognized that landowners are not confined to exercising their nonconforming use rights with outdated or inefficient equipment if it is possible to make improvements that are consistent with the original use [\*\*15] of their land.

We also considered whether increasing the size of the gravel pit violated the city's ordinance. We acknowledged that "[i]f the [property owner] [were] to be limited to the area of land actually excavated at the time of the adoption of the ordinance, the restriction, in effect, [would] prohibit[] any further use of the land as a gravel pit." Id. at 865. Accordingly, we concluded [\*339] that "by the very nature of that business [the landowner] had to expand the area of its operation or be deprived of all value." Hawkinson, 231 N.W.2d at 282 (discussing Hawkins).

Other jurisdictions share similar concerns regarding the nonconforming rights of certain special use properties (such as quarries, gravel pits, and landfills), and have adopted a more flexible approach that takes the nature of nonconforming operations into account. See Bauer, 662 A.2d at 1192; Eddins v. City of Lewiston, 150 Idaho 30, 244 P.3d 174, 178 (Idaho 2010) (using a "flexible approach that focuses on the character of the alleged enlargement or expansion on a case-by-case basis"); Jones v. Town of Carroll, 15 N.Y.3d 139, 931 N.E.2d 535, 537-38, 905 N.Y.S.2d 551 (N.Y. 2010) (noting that "the use of property as a landfill, like a mine, is unique because it necessarily envisions that the land itself is a resource that will be consumed over time"); Chartiers Twp. v. William H. Martin, Inc., 518 Pa. 181, 542 A.2d 985, 989 (Pa. 1988) (upholding the right of the owner of a nonconforming landfill to increase the daily intake [\*\*16] of solid waste); see also Point San Pedro Rd. Coal. v. Cty. of Marin, 33 Cal. App. 5th 1074, 245 Cal. Rptr. 3d 580, 584 (Cal. Ct. App. 2019); but see Twp. of Fairfield v. Likanchuk's, Inc., 274 N.J. Super. 320, 644 A.2d 120, 124 (N.J. Super. Ct. App. Div. 1994) (explaining that "simply because the nature of the use involves a diminishing asset does not necessarily justify its expansion"); Huckleberry Assocs., Inc. v. S. Whitehall Twp. Zoning Hearing Bd., 120 A.3d 1110, 1115 (Pa. Commw. Ct. 2015) (limiting the scope of a landowner's nonconforming use right to operate a surface mine and quarry to the "natural expansion" of that use).

Here, nonindustrial, non-toxic waste is required for the existing operation of a nonconforming waste facility. AIM Development's proposal, with respect to the source of waste, seeks to replace a depleted source with viable waste streams. In this instance, denying AIM Development's request to replace the sources of waste would truncate the landowner's vested right to continue to operate an industrial waste facility.

Our holding today is consistent with the reasoning in Hawkinson and Claussen. In Hawkinson, a multi-lot resort owner wished to expand his unzoned lakeshore property for recreational-commercial purposes when the area was zoned for residential use. 231 N.W.2d at 280. We assessed the landowner's actual use of property, lot by lot, without regard for his comprehensive, but unrealized, design. Id. at 282. Ultimately, we upheld the application of zoning restrictions. Id. We noted, "[w]hile it is true that [\*\*17] [the landowner's] long-range plans have been frustrated, he is not prevented from carrying on at the same level [that was] obtained before the zoning ordinance was adopted." Id. When the same reasoning is applied here, it is clear that precluding AIM Development from replacing its waste stream would do more than "frustrate" its long-term plans. Without new sources of waste, the landowner would be prevented from carrying on altogether.

In Claussen, the landowner wished to enclose his nonconforming, open-air business. 203 N.W.2d at 324. The landowner asserted that the shelter would likely make the nonconformity less disruptive to [\*340] the surrounding area. See id. While that might have been true, we noted that the sheltered workspace would also have unreasonably prolonged the lifespan of the nonconformity and made it more difficult to convert the land to a different use when the nonconformity was eliminated. Id. In addition, a sheltered workspace would change the nature of the operations by allowing the landowner to conduct business during the harsh winter months that could not be completed outside. See id. We held that "construction of a building where none existed before constitutes an expansion of a nonconforming [\*\*18] use in the same manner as an addition to an existing building." Id. Ultimately, because a sheltered workspace was not required for the landowner to continue his nonconforming business, his proposal was denied. See id. at 327.

HN13 Similarly, we have long recognized that the reasonable substitution of equipment used in the operation of a nonconforming business is not an expansion as long as the nature and purpose of the original use remains unchanged. See Hawkins, 80 N.W.2d at 866-67. We choose to treat the reasonable substitution of materials the same. See Eddins, 244 P.3d at 179 (allowing the reasonable substitution of materials and equipment).

#### The only relevant issue is the legal question of authority---ancillary additions to the expression of antitrust law are not ‘expansion’

Loren E. Murphy 47, Chief Justice of the Illinois Supreme Court, Federal Electric Co. v. Zoning Bd. of Appeals, 398 Ill. 142, 145-146, 75 N.E.2d 359, 361-362, 1947 Ill. LEXIS 467, \*6-7 (Ill. September 18, 1947), 9/18/1947, Lexis

The question is squarely presented as to whether the placing of the neon signs on the towers expanded the use to which the property had been previously devoted. The restrictive part of the ordinance which prohibits expansion refers to the nonconforming [\*\*362] use of the property. Literally, it provides that the use may be continued but it cannot be [\*146] expanded. Webster's International Unabridged Dictionary defines the word "expand," to extend, to enlarge. The application of such definition to the word "expanded" as contained in section 10 would mean that the use that was being conducted on the premises at the time of the adoption of the ordinance could not be extended or enlarged. The placing of the neon signs on the towers did not expand or enlarge the use to which the property was devoted. [\*\*\*7] It may have been installed for advertising purposes, hoping that it would result in a gain of its business, but there is nothing in the record which indicates that such advertising would be followed by any expansion or enlargement of the laboratory experiments that were being conducted on the property. Zenith had the right to continue its nonconforming use and the right to advertise that use and the products it was handling, so long as it did not expand the use to which the property was devoted when the ordinance was adopted.

### AT: C/I---2NC

#### The requirement to expand the reach of law by changing what counts is the one and only ‘core, must-have’ feature of the topic AND the basis for all preseason research

Jeff Buntin 21, Coach at NU and Primary Author of the Topic Paper, et al., “Antitrust Controversy Area Proposal”, <http://www.cedadebate.org/forum/index.php/topic,7654.0.html> [bolding in original]

Resolution Wordings

I. Introduction

As stated in the executive summary, we believe that the resolution should require the affirmative to expand the reach of antitrust law so that business conduct/practices not currently restrained by antitrust statutes are brought within its purview. The first concern that many coaches and debaters have when considering a topic area is, “how will the resolution limit the topic and prevent the rush to small affs that don’t change anything about the status quo?” We believe there are a few layers of responses to this (entirely legitimate) query.

First, regardless of the resolution’s precise wording, the affirmative will be required to defend regulating a certain practice **as an antitrust violation**. Yes, this is a version of a ‘functional limits’ argument, but we believe it’s a strong one on this topic: the necessity to produce solvency evidence that defends regulating a certain practice within antitrust law, **as opposed to simply regulating the practice**, makes the bar for a small affirmative fairly difficult to overcome.

Second, the affirmative should be required to **extend the reach** of antitrust law to cover conduct that prevailing interpretations of the relevant laws do not currently consider anticompetitive. The “consumer welfare” standard for finding monopolistic practices has been the dominant approach to monopoly power antitrust cases for decades, and moving away from it would be a substantial departure from the status quo, even if the affirmative plan seemed to be on-face fairly small.

Third, when extending the reach of antitrust law, the affirmative should be required to couch its expanded interpretation of antitrust law within the **core antitrust statutes**: the Sherman Act, Clayton Act, and the FTC Act. This further constrains the field of viable affirmatives by requiring the aff to produce solvency evidence establishing the necessity of connecting the plan to one or more of these statutes, as opposed to any of the myriad other ways that firm conduct could be regulated.

II. Resolution Format

We believe that the ideal construction for an antitrust resolution would allow the affirmative space to topically specify the details surrounding its proposed extension of antitrust law. One of the central areas in which this becomes relevant is the question of **remedies for violations**. If the affirmative were limited to exclusively expanding what counts as a violation of antitrust law but had to rely on ‘normal means’ or ‘likely results’ of the plan to determine the remedies ordered for violations, it would needlessly undercut the affirmative’s ability to solve. For example, the “platform utilities” affirmative would declare that online platforms with over $25 billion in revenue are in violation of antitrust law, and as a result would require that businesses such as AmazonBasics be spun off from Amazon’s marketplace platform. We think it would be nonsensical to deny the affirmative the ability to topically mandate this particular remedy. **Importantly**, we also believe that affirmatives should not be **forced** to identify remedies, as several affirmative cases would likely be fine with taking an agnostic or “normal means” stance on the remedy. The larger legislative reform case and the consumer welfare standard case detailed above would likely not need to specify remedies in order to solve.

Therefore, we recommend the topic committee consider a floor/ceiling-style construction for the resolution, which requires the aff to substantially reform or alter antitrust policy, including expanding the reach of antitrust law to regulate business practices currently not regarded as grounds for an antitrust suit.

If it is the sense of the topic committee that an affirmative could topically specify remedies for violations without an explicit floor/ceiling structure to the resolution, we would strongly support including such options on the wording ballot as well.

III. Suggested Resolutions

The resolutions in this section are intended as starting points for the topic committee’s deliberations in the event that the antitrust controversy is selected. We do not wish to unduly constrain the committee’s options in advance, but as stated above we think the core, must-have feature of the resolution is the expansion of antitrust law to business practices not currently considered anticompetitive. We would also hope that if this controversy is selected, the time before the topic meeting could be used to further refine our understanding of the relevant terms to best inform wording choices.

**IMPORTANTLY**: the word in these proposed resolutions that we are by far the least committed to is “interpretation.” The word is intended here mostly as a placeholder to describe the way in which the government categorizes conduct that rises to the level of constituting an antitrust violation. The intent behind these resolutions is to say that the affirmative should expand the way in which the government conceives of anticompetitive conduct. That could be accomplished through a word like “interpretation,” or it could be done via a more precise phrasing decided on through additional research. We want to be quite clear in not constraining the topic committee with this precise wording choice, but also want to reassure potential voters that the intent of the paper’s authors is to center the topic around expanding *what counts* **as an antitrust violation**.

## T Subsets

## Reg Neg CP

## Japan DA

### Dropped It---2NC

#### Even moving towards a nuke goes global and turns case.

Emma Chanlett-Avery 9, CRS Asian affairs specialist, “Japan’s Nuclear Future: Policy Debate, Prospects, and U.S. Interests,” Congressional Research Service, http://www.fas.org/sgp/crs/nuke/RL34487.pdf

Any reconsideration of Japan’s policy of nuclear weapons abstention would have significant implications for U.S. policy in East Asia. Globally, Japan’s withdrawal from the Nuclear NonProliferation Treaty (NPT) could damage the most durable international non-proliferation regime. Regionally, Japan “going nuclear” could set off a nuclear arms race with China, South Korea, and Taiwan and, in turn, India, and Pakistan may feel compelled to further strengthen their own nuclear weapons capability. Bilaterally, assuming that Japan made the decision without U.S. support, the move could indicate Tokyo’s lack of trust in the American commitment to defend Japan. An erosion in the U.S.-Japan alliance could upset the geopolitical balance in East Asia, a shift that could indicate a further strengthening of China’s position as an emerging hegemonic power. These ramifications would likely be deeply destabilizing for the security of the Asia Pacific region and beyond.

## Relations ADV

## Competition ADV

## Comity ADV

# 1NR

## Regulation CP

### Solvency---2NC

#### Antitrust is developed by adjudication---that creates an ineffective, unpredictable, and unenforceable patchwork

Rohit Chopra 20, Commissioner of the Federal Trade Commission, and Lina M. Khan, Academic Fellow at Columbia Law School, Counsel to the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary and Former Legal Fellow at the Federal Trade Commission, “The Case for "Unfair Methods of Competition" Rulemaking”, University of Chicago Law Review, 87 U. Chi. L. Rev. 357, March 2020, Lexis

I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

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

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms [\*360] into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

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

### AT: Signal

#### Antitrust ‘signaling’ is fake

David J. Gerber 12, Distinguished Professor of Law at Chicago-Kent College of Law, B.A. from Trinity College, M.A. from Yale University, and J.D. from the University of Chicago, Awarded the Degree of Honorary Doctor of Laws by the University of Zurich, Former Visiting Professor at the Law Schools of the University of Pennsylvania, Northwestern University, and Washington University, Global Competition: Law, Markets, and Globalization, p. 150

f. International implications

These fundamental changes in the aims, methods and dynamics of US antitrust have important transnational implications. One set of implications involves foreign perceptions of US antitrust law. As we have seen, the changes are easily overlooked or misunderstood. They have not been signaled by a new statute or by new institutions or procedures. They are buried in the language of cases and in the actual operations of the legal system. As a result, observers often simply do not perceive the changes or recognize their implications. For example, non-US supporters of an economics-based system have often claimed that it would reduce uncertainty, simplify antitrust law and reduce costs. At a conceptual level it does. In practice, however, the picture has been more complicated.

### AT: PDCP

#### Regs don’t create competition, they replicate its results---blurring the decision ruins precision

Spencer Weber Waller 98, Associate Dean for Academic Affairs and Professor at the Brooklyn Law School, JD from Northwestern University School of Law, Fellow at the Institute of Public Policy Studies, BA in Economics and Political Science from the University of Michigan, “Prosecution by Regulation: The Changing Nature of Antitrust Enforcement”, Oregon Law Review, 77 Or. L. Rev. 1383, Winter 1998, Lexis

The conventional wisdom is that the antitrust laws are the antithesis of pervasive regulation of the economy. Under this view, the antitrust laws seek to perfect market systems by imposing important constraints on anticompetitive behavior, but do not attempt to dictate the terms under which firms enter the market, price their product, or select their customers. Thus, while the antitrust laws may affect a firm's behavior and penalize violations of the rules, they are supposed to operate quite differently from traditional regulation, where all aspects of competition are under the control of an administrative agency and the firms surrender substantial freedom in return for a regulated fair rate of return.

The numerous champions of this point of view come from a wide cross-section of backgrounds and ideological stripes. As then Professor Stephen Breyer noted in Regulation and its Reform:

In principle the antitrust laws differ from classical regulation both in their aims and in their methods. The antitrust laws seek to create or maintain the conditions of a competitive marketplace rather than replicate the results of competition or [\*1384] correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions prohibiting certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do … Only rarely do the antitrust enforcement agencies create the de tailed web of affirmative legal obligations that characterizes classical regulation.

Economists and public policy scholars are even more inclined to draw a sharp distinction between the goals of antitrust and those of traditional regulation. So too, officials of the Antitrust Division and the Federal Trade Commission (FTC) routinely de scribe their mission as "law enforcement" and deny that they are acting as regulators. For all the changes wrought by the Chicago [\*1385] school of antitrust, the law and economic scholars also cling to a model of antitrust that is distinct from regulation.

#### The difference is fundamental

James B. Speta 6, Elizabeth Froehling Horner Professor of Law Senior Associate Dean for International Initiatives at the Northwestern University School of Law, JD and AB at the University of Michigan, Consultant at Eimer Stahl Klevorn & Solberg, LLP, “The Antitrust Enterprise: Principle and Execution: Resale Requirements and the Intersection of Antitrust and Regulated Industries”, Iowa Journal of Corporate Law, 31 Iowa J. Corp. L. 307, Winter 2006, Lexis

I. Introduction

In his forthcoming book, The Antitrust Enterprise, Professor Hovenkamp makes clear that antitrust is simply one of a menu of market-regulating choices available and pursues the interactions among antitrust, intellectual property, and sector-specific regulation. "The antitrust laws are only one among many legal regulators of competition and innovation. Intellectual property laws and market-specific regulations for markets such as telecommunications or electric power also pursue the same ends." 1 This fundamental point, which was too often lost during the height of regulated industries law, is particularly salient as many of the traditional utility markets - including especially telecommunications and electricity - move through a transition to more competitive market structures. The Antitrust Enterprise traces the great transformations of antitrust industries law, 2 and pays particular attention to the challenges for antitrust of changing market structures, increasingly rapid innovation, and improved economic tools.

### ADV CP

### AT: Comity Plank Fails

### AT: Compeition ADV

### AT: PDB

### AT: LTNB

### AT: Condo

### AT: Theory

## Spillover DA

### Impact---2NC

#### It causes terrorism, civil wars, and diversion that go global---nothing checks

Dr. Qian Liu 18, PhD in Economics from Uppsala University, Former Visiting Researcher at the University of California, Berkeley, Managing Director for Greater China at The Economist Group, Guest Lecturer at New York University, Tsinghua University, the Chinese Academy of Social Sciences and Fudan University, “The Next Economic Crisis Could Cause A Global Conflict. Here's Why”, World Economic Forum, 11/13/2018, https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

#### Turns every impact

Geoffrey Kemp 10, Director of Regional Strategic Programs at The Nixon Center, Served in the White House Under Ronald Reagan, Special Assistant to the President for National Security Affairs and Senior Director for Near East and South Asian Affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-234

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

### AT: Plan = Chinese Economy

#### 3. CHILLING---antitrust applies to all industries, so there’s no way to limit the plan’s scope AND firms and lawyers are risk-averse and think this is true---the result is fear of liability that scales back investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### Abrupt expansion of antitrust common-law generates major uncertainty that disrupts business planning

Alden F. Abbott 21, Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### It’s perception-based---the possibility that precedent could be applied crumbles confidence and spirals into global decline

Mohamed A. El-Erian 17, Chief Economic Adviser at Allianz, Chairman of US President Barack Obama’s Global Development Council, Former CEO of the Harvard Management Company and Deputy Director at the International Monetary Fund, “America’s Confidence Economy”, Project Syndicate, 3/20/2017, https://www.project-syndicate.org/commentary/trump-market-optimism-economic-growth-by-mohamed-a--el-erian-2017-03

The surge in business and consumer sentiment reflects an assumption that is deeply rooted in the American psyche: that deregulation and tax cuts always unleash transformative pro-growth entrepreneurship. (To some outside the US, it is an assumption that sometimes looks a lot like blind faith.)

Of course, sentiment can go in both directions. Just as a “pro-business” stance like Trump’s can boost confidence, perhaps even excessively, the perception that a leader is “anti-business” can cause confidence to fall. Because sentiment can influence actual behavior, these shifts can have far-reaching impacts.

In his groundbreaking General Theory of Employment, Interest, and Money, John Maynard Keynes referred to “animal spirits” as “the characteristic of human nature that a large proportion of our positive activities depend on spontaneous optimism, rather than mathematical expectations, whether moral or hedonistic or economic.” Jack Welch, who led General Electric for 20 years, is a case in point: he once stated that many of his own major business decisions had come “straight from the gut,” rather than from analytical models or detailed business forecasts.

But sentiment is not always an accurate gauge of actual economic developments and prospects. As the Nobel laureate Robert J. Shiller has shown, optimism can evolve into “irrational exuberance,” whereby investors take asset valuations to levels that are divorced from economic fundamentals. They may be able to keep those valuations inflated for quite a while, but there is only so far that sentiment can take companies and economies.

So far, the exuberant reaction of markets to Trump’s victory – all US stock indices have reached multiple record highs – has not been reflected in “hard data.” Moreover, economic forecasters have made only modest upward revisions to their growth projections.

It is not surprising that equity investors have responded to the surge in animal spirits by attempting to run ahead of a possible uptick in economic performance. After all, they are in the business of anticipating developments in the real economy and the corporate sector. In any case, they believe that they can quickly reverse their portfolio positions should their expectations change.

That is not the case for companies investing in new plants and equipment, which are less likely to change their behavior until announcements begin to be translated into real policies. But the longer they wait, the weaker the stimulus to economic activity and income, and the more consumers must rely on dissaving to translate their positive sentiment into actual purchases of goods and services.

It is in this context that the economy awaits a solid timeline for policy announcements to evolve into detailed design and durable implementation. While there is often some delay when political negotiations and trade-offs are involved, in this case, the sense of uncertainty may be heightened by policy-sequencing decisions. By deciding to begin with health-care reform – an inherently complicated and highly divisive issue in US politics – the Trump administration risks losing some of the political goodwill that could be needed to carry out the kinds of fiscal reform that markets are expecting.

Even if a bump in the economic data does arrive, it may not last, unless the Trump administration advances policies that enhance longer-term productivity, through, for example, education reform, apprenticeship programs, skills training, and labor retooling. The Trump administration would also have to refrain from pursuing protectionist trade measures that would disrupt the “spaghetti bowl” of cross-border value chains for both producers and consumers.

If improved confidence in the US economy does not translate into stronger hard data, unmet expectations for economic growth and corporate earnings could cause financial-market sentiment to slump, fueling market volatility and driving down asset prices. In such a scenario, the US engine could sputter, causing the entire global economy to suffer, especially if these economic challenges prompt the Trump administration to implement protectionist measures.

#### 4. LITIGATION---broadening antitrust creates fear of strategic litigation---that decks business growth, even if meritless

Patrick J. Medeo 18, Judicial Law Clerk at the New Jersey Superior Court, Appellate Division, JD from Rutgers Law School, BS in Business Administration and Legal Studies from Drexel University, “Potential Negative Impacts of Antitrust Litigation on Businesses”, Rutgers Law School Center for Corporate Law and Governance, 4/6/2018, https://cclg.rutgers.edu/blog/potential-negative-impacts-of-antitrust-litigation-on-businesses-by-patrick-j-medeo/

In the United States, antitrust litigation is not solely a matter of government concern. In fact, antitrust enforcement is a tool strategically used by private parties as part of business operations in the United States. By increasing litigation costs, potential damages, risk of suit, and regulatory oversight costs, antitrust litigation can be an impediment on businesses. Further, fear of litigation and associated costs stifles new product development and production in the United States by creating a high barrier to entry in the form of regulatory costs and significant risk of liability. With the number of antitrust cases rising annually, the negative impact on businesses should be of concern for enforcers especially as the number of private claims grows. Properly applied antitrust laws allow both government and private parties the ability to stop or hinder abuses of market power by participants seeking anticompetitive advantages.

A meritorious use of antitrust law by private parties may entail a situation where a cartel of competitors in an industry work together to fix prices, control supplies, and divide market share. In doing so the cartel blocks access to necessary resources for new entrants to the market; through strategic distribution, wholesale, and manufacturing contracts the cartel is able to raise barriers to entry so high that a new entrant would be unable to enter the market or would be unable to effectively compete upon entry. Proper application of antitrust laws by a private party would allow for recourse against the cartel participants and would promote competition in the industry by lowering barriers to entry for new market participants. However, due to the staggering effects that antitrust litigation can have, private parties may also abuse the laws in order to subvert competition.

According to an article published by the International Bar Association in 2009, it was noted how “broad procedural and substantive rules providing incentives to litigation produce economic harm” to companies and employees, specifically emphasizing the role played by antitrust cases. The liability is of such a drastic nature that liability policy premiums “increase (s) of 300 or more percent are not uncommon for [European] companies with a US [stock] listing.” In 2016 alone, there were 853 antitrust cases heard in federal courts, a majority of which were brought by private actors. This is an increase of 10.9 percent from 2015 and a 21 percent increase from 2012, where 702 antitrust cases were filed in federal court alone. [1] As of 2007, the average duration of an antitrust case, from filing to completion, was 24.6 months.[2] Such prolonged cases prove expensive for defendants and can create a disincentive to enter the United States Market as the frequency of them increases.

A poignant example of prolonged litigation is the LIBOR-Based Financial Instruments Antitrust Litigation. With lawsuits dating back to 2007, the private litigation against numerous banks is still in the process of closing, over a decade later. Collectively, the defendant organizations have paid hundreds of millions and potentially billions of dollars to end litigation, with firms like Citigroup paying individual settlements with private litigants upwards of $100 million.[3] The use of private antitrust litigation may be abused by private litigant as a strategic and anti-competitive tool.

Although Antitrust laws are meant to be used to uphold the competitive integrity of US Markets, the laws may also be used by private litigants for anti-competitive ends. This specifically comes into play where non-dominant firms in competitive markets utilize antitrust laws to sue dominant firms. According to a United State Department of Justice paper on the procompetitive and anticompetitive nature of private antitrust litigation, antitrust suits brought by non-dominant firms in competitive markets are more likely to constitute abuses of the law rather than true claims of anticompetitive activity.[4] Further, the use of private antitrust litigation can be highly profitable for nefarious plaintiffs; for instance, not only is the risk of long, complex, and the costly litigation a major deterrent for defendants but it may often lead to profitable settlements for the plaintiffs. In addition to profitable settlements, plaintiffs in private antitrust actions may also be rewarded with easier competition due to fear by defendants of copy-cat lawsuits, this is especially true after a successful government claims. Overall, even where claims may have merit private parties may be less likely to use antitrust laws to impede anticompetitive behavior than use it for their own profit.

Antitrust lawsuits are not only costly because of settlements, litigation costs, and other directly monetary outputs; instead, antitrust may also take a toll on opportunity and operational costs ultimately stifling innovation and go-to-market strategies. A prime example is the strategic use of antitrust laws by Digital Equipment Corp. against Intel in 1997. As illustrated in the Department of Justice’s article “The Strategic Abuse of the Antitrust Laws”, a well-timed antitrust allegation can be effective and profitable for the aggressing party. Although suit was never brought, the prospect of a large scale antitrust battle led to a $700 million settlement deal between Digital and Intel, ending months of patent litigation.[5] The settlement came just after a press release by Digital claiming that Intel was bolstering a monopoly in high power micro processing chips, at the same time the FTC began questioning Intel’s dominance in the chip and semi-conductor market.

In a highly competitive market Digital was able to nearly stop Intel in its tracks by threatening antitrust litigation and utilizing a Public Relations campaign to draw attention to the company’s market power, founded upon verifiable anticompetitive activity or not. The benefits of this strategy for Digital were not limited to a cash settlement, although the settlement was highly profitable more significant gains were made. In the settlement agreement it was stipulated that Digital would be guaranteed discounts on Intel Pentium chips (used in Digital’s computer products instead of its own competing chips), and continued access to the same Intel Pentium chips. Digital’s personal computers, which incorporated Intel chips, represented nearly 25% of its total revenues. By strategically threatening antitrust litigation Digital was able to slow Intel’s growing and usurping dominance in the high-power chip market, where both parties were competing. In doing so Digital added to its cash reserves while forcing Intel to acquire its chip technology. [6] Ultimately the FTC investigation lead to the finding that Intel had withheld information in the patent litigation process, but Digital’s threat antitrust suit forced a settlement exclusive to them and not benefitting other patent litigants against Intel.

Although private parties may, and often do, have a vested interest in utilizing antitrust law to stop anticompetitive behavior strategic uses such as Digital’s are viewed more as abuses. This is because they ultimately do not better competition in the market as a whole, and instead are highly profitable for only the aggressing party. Strategic uses of antitrust such as this appear problematic for businesses. Although they strong arm parties into dealing together, they also hinder development of new products and allow intelligent abusers to systematically restrain their competitors that may otherwise be outperforming other market participants. This may be done regardless of the veracity of their claim. Ultimately, it is the consumer that pays in the form of higher prices, slowed product development and potentially inferior products.

### AT: Biden + China Thumper

#### AND there’s no significant antitrust enforcement

Joseph Charles Folio 21 III, Lawyer at Morrison Forrester, and Lisa M. Phelan Co-chair Global Antitrust Law Practice Group at Morrison Forrester, Jeff Jaeckel, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, and Alexander Paul Okuliar, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, “Antitrust Update: Up and Down the Avenue”, 3/22/2021, https://www.mofo.com/resources/insights/210322-atr-update.html

Are the stars aligning for antitrust reform? President Biden is filling key positions in the White House (Timothy Wu, National Economic Council) and at the FTC (Lina Khan, nominee for commissioner) with lawyers who have advocated for increased antitrust enforcement, especially against “big tech.” In Congress, the House antitrust subcommittee concluded a year-long investigation in October 2020 and found bipartisan agreement on discrete areas for reform. With Democrats now in control of both houses of Congress, antitrust legislation seems close. But not so fast.

The House and Senate antitrust subcommittees have held four hearings since February 25, 2021, but it is crucial to view these recent developments in their proper context. Even when politicians and enforcers appear to agree on a goal, it can still be a long and winding road to actual policy reform.

Two to go

Although antitrust reform advocates cheered President Biden’s initial appointments, two of the most consequential antitrust positions—the assistant attorney general (AAG) for antitrust and the FTC chair—remain open. Both the AAG and FTC chair wield tremendous authority; they approve cases, guide investigations, and will decide how to proceed with ongoing litigation. It is unlikely that the Biden administration will make any significant decisions, or support any particular legislation, before its key personnel are firmly in place. And that can take time. Former AAG Makan Delrahim was nominated in March 2017 but not confirmed until September 2017.

Interestingly, the pressure to nominate like-minded antitrust reformers for these two positions is coming from multiple angles. One public interest group recently sent a letter to White House chief of staff Ron Klain and, after “highly commend[ing]” the nomination of Ms. Khan to be an FTC commissioner, warned against the influence of certain White House and DOJ officials over the AAG and FTC chair nominations because of their links to “big tech” companies.[1] Additionally, many in the press have been critical of the level of tech enforcement activity during the Obama administration and want to avoid a replay of those years.[2]

### AT: Resilience

#### Growth is fragile AND economic spending cuts social services, sparking instability

Tyler Beckelman 21, Director of International Partnerships at the U.S. Institute of Peace, Master’s Degree in Conflict Resolution from Georgetown University, BA in Political Science, International Studies, and Economics from Macalester College, and Amanda Long, Senior International Partnerships Assistant at the U.S. Institute of Peace, BA in International Relations and Global Studies from the University of Texas at Austin, “A New U.S. Approach to Help Fragile States Amid COVID-Driven Economic Crisis”, United States Institute of Peace, 3/5/2021, https://www.usip.org/publications/2021/03/new-us-approach-help-fragile-states-amid-covid-driven-economic-crisis

Without a financial lifeboat, a prolonged economic and fiscal crisis will make fragile states even more fragile.

The ability of governments to spend their way to recovery is considerably strained; highly indebted regimes must confront the difficult choice of servicing debt payments or scaling up spending on social services like health care, infrastructure, and education, with most nations forced to reduce investments in services just as they’re needed most. Diminished spending on services results in widening inequality, declining trust in government, and further erosion of the social contract. With more than three-quarters of the population classified as “extremely poor” in fragile states, the potential for new waves of civil resistance, insecurity—and repression—is considerable.

#### Monetary buffers are exhausted

Irina Fan 20, Master Degree in Quantitative Analysis for Business from the City University of Hong Kong, Head of Insurance Market Analysis at the Swiss Re Institute, Jerome Jean Haegeli, Group Chief Economist at the Swiss Re Institute, and Patrick Saner, Head Macro Strategy at the Swiss Re Institute, “Global Resilience Has Taken A Hit – These Countries Will Bear The Brunt”, 8/26/2020, https://www.swissre.com/risk-knowledge/building-societal-resilience/global-resilience-taken-a-hit.html

The global economy has suffered its biggest shock since the Second World War. When coronavirus hit, we battened down the hatches and it’s driven us into deep recession.

As countries begin to emerge, they face a different landscape. Massive stimulus packages rolled out by hard-hit economies have created a seismic shift. They may have softened the impact, but they have left us more exposed to future economic shocks than before.

According to initial figures from the Swiss Re Institute's Resilience Index 2020, we estimate global resilience has dropped by a fifth in 2020 compared to 2019 levels.

This is a comparable fall to that seen during the 2008 Global Financial Crisis. But this time, the impacts have been far more rapid: during the GFC, the same scale of decline took three years to materialise. In addition, we went into this recession less resilient than in 2007 ahead of the GFC. And despite major bailouts and fiscal stimuli, lockdowns continue to hamper economic activity.

In an uncertain global economy, resilience is key to building economic stability. Identifying weak spots at a macro and micro level will put us in a stronger position to manage risk. Alongside their resilience status prior to the pandemic, fiscal policies are likely to be key in shaping the economic resilience of each country post-pandemic.

But, even for some at the top half of the resilience index, monetary policy buffers are all but exhausted. Many levers have already been pulled. This reduced space to manoeuvre means our preliminary 2020 rankings have seen some major shifts from 2019.

#### Even slow growth breaks down global co-op and goes nuclear

Jonathan Landay 17, National Security Correspondent at Reuters, Degree from George Washington University, “U.S. Intelligence Study Warns of Growing Conflict Risk”, Reuters, 1/9/2017, <https://www.reuters.com/article/us-usa-intelligence-future-idUSKBN14T1J4>

The risk of conflicts between and within nations will increase over the next five years to levels not seen since the Cold War as global growth slows, the post-World War Two order erodes and anti-globalization fuels nationalism, said a U.S. intelligence report released on Monday.

“These trends will converge at an unprecedented pace to make governing and cooperation harder and to change the nature of power – fundamentally altering the global landscape,” said “Global Trends: Paradox of Progress,” the sixth in a series of quadrennial studies by the U.S. National Intelligence Council.

The findings, published less than two weeks before U.S. President-elect Donald Trump takes office on Jan. 20, outlined factors shaping a “dark and difficult near future,” including a more assertive Russia and China, regional conflicts, terrorism, rising income inequality, climate change and sluggish economic growth.

Global Trends reports deliberately avoid analyzing U.S. policies or choices, but the latest study underscored the complex difficulties Trump must address in order to fulfill his vows to improve relations with Russia, level the economic playing field with China, return jobs to the United States and defeat terrorism.

The National Intelligence Council comprises the senior U.S. regional and subject-matter intelligence analysts. It oversees the drafting of National Intelligence Estimates, which often synthesize work by all 17 intelligence agencies and are the most comprehensive analytic products of U.S intelligence.

The study, which included interviews with academic experts as well as financial and political leaders worldwide, examined political, social, economic and technological trends that the authors project will shape the world from the present to 2035, and their potential impact.

‘INWARD-LOOKING WEST’

It said the threat of terrorism would grow in coming decades as small groups and individuals harnessed “new technologies, ideas and relationships.”

Uncertainty about the United States, coupled with an “inward-looking West” and the weakening of international human rights and conflict prevention standards, will encourage China and Russia to challenge American influence, the study added.

Those challenges “will stay below the threshold of hot war but bring profound risks of miscalculation,” the study warned. “Overconfidence that material strength can manage escalation will increase the risks of interstate conflict to levels not seen since the Cold War.”

While “hot war” may be avoided, differences in values and interests among states and drives for regional dominance “are leading to a spheres of influence world,” it said,

The latest Global Trends, the subject of a Washington conference, added that the situation also offered opportunities to governments, societies, groups and individuals to make choices that could bring “more hopeful, secure futures.”

“As the paradox of progress implies, the same trends generating near-term risks also can create opportunities for better outcomes over the long term,” the study said.

THE HOME FRONT

The report also said that while globalization and technological advances had “enriched the richest” and raised billions from poverty, they had also “hollowed out” Western middle classes and ignited backlashes against globalization. Those trends have been compounded by the largest migrant flows in seven decades, which are stoking “nativist, anti-elite impulses.”

“Slow growth plus technology-induced disruptions in job markets will threaten poverty reduction and drive tensions within countries in the years to come, fueling the very nationalism that contributes to tension between counties,” it said.

The trends shaping the future include contractions in the working-age populations of wealthy countries and expansions in the same group in poorer nations, especially in Africa and South Asia, increasing economic, employment, urbanization and welfare pressures, the study said.

The world will also continue to experience weak near-term growth as governments, institutions and businesses struggle to overcome fallout from the Great Recession, the study said.

“Major economies will confront shrinking workforces and diminishing productivity gains while recovering from the 2008-09 financial crisis with high debt, weak demand, and doubts about globalization,” said the study.

“China will attempt to shift to a consumer-driven economy from its longstanding export and investment focus. Lower growth will threaten poverty reduction in developing counties.”

Governance will become more difficult as issues, including global climate change, environmental degradation and health threats demand collective action, the study added, while such cooperation becomes harder.

### AT: No War

#### Defense doesn’t assume the post-COVID landscape---the globe’s a tinderbox, primed for conflict

Elise Labott 21, Adjunct Professor at American University’s School of International Service, Columnist at Foreign Policy, MA in Media Studies, New School for Social Research, BA in International Relations from the University of Wisconsin-Madison, “Get Ready for a Spike in Global Unrest”, Foreign Policy, 7/22/2021, https://foreignpolicy.com/2021/07/22/covid-global-unrest-political-upheaval/

To call 2021 the summer of discontent would be a severe understatement. From Cuba to South Africa to Colombia to Haiti, often violent protests are sweeping every corner of the globe as angry citizens are taking to the streets.

Each country has different histories and realities on the ground, particularly in Haiti, where years of violence and government corruption culminated two weeks ago in the assassination of President Jovenel Moïse. But they all faced a perfect storm of preexisting social, economic, and political hardships, which fallout from the COVID-19 pandemic only inflamed further. And they are merely a foreshadowing of the post-coronavirus global tinderbox that’s looming as existing tensions in countries across the world morph into broader civil unrest and uprisings against economic hardships and inequality deepened by the pandemic.

The coronavirus pandemic was a once-in-a-century crisis that not only shocked countries’ existing health systems but also demanded a response that impacted—and was itself shaped by—economic, political, and security considerations. The efforts to contain it may have curbed fatalities in the short term but have inadvertently deepened vulnerabilities that laid the groundwork for longer-term violence, conflict, and political upheaval and should serve as a danger sign to world leaders as countries reopen—including in the United States.

History is full of examples of pandemics being incubators of social unrest, from the Black Death to the Spanish flu to the great cholera outbreak in Paris, immortalized in Victor Hugo’s Les Miserables. Underlying it all this time around is a pervasive inequality. COVID-19 has ripped open economic divides and made life harder for already vulnerable groups, including women and girls and minority communities.

It has also exposed weaknesses in food security and dramatically increased the number of people affected by chronic hunger. The United Nations estimates around one-tenth of the global population—between 720 million people and 811 million—were undernourished last year. The impacts of climate change and environmental degradation have only compounded the despair.

Take the Sahel, where, due to a toxic cocktail of conflict, COVID-19 lockdowns, and climate change, the scale and severity of food insecurity continues to rise. Countries such as Ethiopia and Sudan are among the world’s worst humanitarian crises, with catastrophic levels of hunger. Droughts and locusts are coming at a critical time for farmers ready to plant crops and are stopping herders in their tracks from driving their livestock to greener pastures.

The global vaccine shortage is fueling the instability. A majority of Africa is lagging far behind the world in vaccinations, meaning COVID-19 will continue to constrain national economies and, in turn, become a source of potential political instability. The same is true for much of Latin America and Asia, where countries don’t have enough vaccines to protect their populations and simmering sources of protest—such as rising living costs and deepening inequalities—are more likely to boil over.

The global risk firm Verisk Maplecroft has warned that as many as 37 countries could face large protest movements for up to three years. A new study by Mercy Corps examining the intersection of COVID-19 and conflict found concerning trends that warn of potential for new conflict, deepening existing conflict, and worsening insecurity and instability shaped by the pandemic response.

The group found a collapse of public confidence in governments and institutions was a key driver of instability. People in fragile states, already suffering from diminished trust in their government, have felt further abandoned as they face disruptions in public services, rising food prices, and massive economic hardships, such as unemployment and reduced wages. Supply chains disrupted during the pandemic have seen food prices skyrocket, while in the global recession humanitarian aid budgets are being slashed, bringing many countries to the brink of famine. For the first time in 22 years, extreme poverty—people living on less than $1.90 a day—was on the rise last year. Oxfam International estimates that “it could take more than a decade for the world’s poorest to recover from the economic impacts of the pandemic.”

The shocks caused by the pandemic have also eroded social cohesion, further fraying relations between communities and deepening polarization. That is especially true in the United States, where social and political pressures both deepened the health crisis and were themselves worsened by it. All of this should serve as a clarion call to countries that they can’t prepare for, or respond to, future health crises in a vacuum—but must anticipate an economic, political, and social crisis. This is true for any severe shock, which brings the potential for a breakdown in public order.

#### Decline causes civil wars---those draw-in major powers and cause World War III

David Kampf 20, Senior PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University, BA in Political Science from Bates College, “How COVID-19 Could Increase the Risk of War”, World Politics Review, 6/16/2020, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war

But that overlooked the ways in which the risk of interstate war was already rising before COVID-19 began to spread. Civil wars were becoming more numerous, lasting longer and attracting more outside involvement, with dangerous consequences for stability in many regions of the world. And the global dynamics most commonly cited to explain the falling incidence of interstate war—democracy, economic prosperity, international cooperation and others—were being upended.

If the spread of democracy kept the peace, then its global decline is unnerving. If globalization and economic interdependence kept the peace, then a looming global depression and the rise of nationalism and protectionism are disconcerting. If regional and global institutions kept the peace, then their degradation is unsettling. If the balance of nuclear weapons kept the peace, then growing risks of proliferation are disquieting. And if America’s preeminent power kept the peace, then its relative decline is troubling.

Now, the pandemic, or more specifically the world’s reaction to it, is revealing the extent to which the factors holding major wars in check are withering. The idea that war between nations is a relic of the past no longer seems so convincing.

The Pessimists Strike Back

More than any other individual, it was cognitive scientist Steven Pinker who popularized the idea that we are living in the most peaceful moment in human history. Starting with his 2011 bestseller, “The Better Angels of Our Nature: Why Violence Has Declined,” Pinker argued that the frequency, duration and lethality of wars between great powers have all decreased. In his 2019 book, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress,” he wrote that war “between the uniformed armies of two nation-states appears to be obsolescent. There have been no more than three in any year since 1945, none in most years since 1989, and none since the American-led invasion of Iraq in 2003.”

Optimists like Pinker held that, rather than the world falling apart, as a quick glance at headline news might suggest, the opposite was true: Humanity was flourishing. More regions are characterized by peace; fewer mass killings are occurring; governance and the rule of law are improving; and people are richer, healthier, better educated and happier than ever before.

In their book, “Clear and Present Safety: The World Has Never Been Better and Why That Matters to Americans,” Michael A. Cohen and Micah Zenko argued that the evidence is so overwhelming that it is difficult to argue against the idea that wars between great powers, and all other interstate wars, are becoming vanishingly rare. Even when wars do break out, they tend to be shorter and less deadly than they were in the past. John Mueller, a senior fellow at the Cato Institute, also reasoned that the idea of war, like slavery and dueling before it, was in terminal decline, while Joshua Goldstein, an international relations researcher at American University, credited the United Nations and the rise of peacekeeping operations for helping win the “war on war.”

But in recent years, a range of critics have begun to poke holes in these arguments. Tanisha M. Fazal, an international relations professor at the University of Minnesota, contends that the decline in war is overstated. Major advances in medicine, speedier evacuations of wounded soldiers from the field of battle and better armor have made war less fatal—but not necessarily less frequent. Fazal and Paul Poast, who is at the University of Chicago, further assert that the notion of war between great powers as a thing of the past is based on the assumption that all such conflicts resemble World War I and II—both are historical anomalies—and overlooks the actual wars fought between great powers since 1945, from the Korean War and the Vietnam War to proxy wars from Afghanistan to Ukraine. Meanwhile, Bear F. Braumoeller, an Ohio State political science professor, analyzed the same historical data on conflicts used by Pinker, Mueller and Goldstein, and found no general downward trend in either the initiation or deadliness of warfare over the past two centuries. What’s more, Braumoeller contends that the so-called “long peace”—the 75 years that have passed without systemic war since World War II—is far from invulnerable, and that wars are just as likely to escalate now as they used to be. Just because a major interstate war hasn’t happened for a long time, doesn’t mean it never will again. In all probability, it will.

And by focusing solely on interstate wars, the optimists miss half the story, at least. Wars between states have declined, but civil wars never disappeared—and these internal conflicts could easily escalate into regional or global wars.

The number of conflicts in the world reached its highest point since World War II in 2016, with 53 state-based armed conflicts in 37 countries. All but two of these conflicts were considered civil wars. To make matters worse, new studies have shown that civil wars are becoming longer, deadlier and harder to conclusively end, and that these internal conflicts are not really internal. Civil wars harm the economies and stability of neighboring countries, since armed groups, refugees, illicit goods and diseases all spill over borders. Some 10 million refugees have fled to other countries since 2012. The countries that now host them are more likely to experience war, which means states with huge refugee populations like Lebanon, Jordan and Turkey face legitimate security challenges. Even after the threat of violence has diminished in refugees’ countries of origin, return migration can reignite conflicts, repeating the brutal cycle.

A Yugoslav Federal Army tank.

Perhaps most importantly, recent research indicates that civil wars increase the risk of interstate war, in large part because they are attracting more and more outside involvement. In a 2008 paper, researchers Kristian Skrede Gleditsch, Idean Salehyan and Kenneth Schultz explained that, in addition to the spillover effects, two other factors in civil wars increase international tensions and could possibly provoke wider interstate wars: external interventions in support of rebel groups and regime attacks on insurgents across international borders.

Immediately after the Cold War, none of the ongoing civil wars around the world were internationalized. According to the Uppsala Conflict Data Program, there were 12 full-fledged civil wars in 1991—in Afghanistan, Iraq, Peru, Sri Lanka, Sudan, and elsewhere—and foreign militaries were not active on the ground in any of them. Last year, by contrast, every single full-fledged civil war involved external military participants. This is due, in part, to the huge growth in U.S. military interventions abroad into civil conflicts, but it’s not only the Americans. All of today’s major wars are in essence proxy wars, pitting external rivals against one another. Conflicts in Syria, Yemen and Libya are best understood not as civil wars, but as international warzones, attracting meddlers including the United States, Russia, Saudi Arabia, Turkey, Iran, France and many others, which often intervene not to build peace, but to resolve conflicts in a way that is favorable to their own interests. These internationalized wars are more lethal, harder to resolve and possibly more likely to recur than civil wars that remain localized. It is not that difficult to imagine how these conflicts could spark wider international conflagrations. Wars, after all, can quickly spiral out of control.

As Risks Increase, Deterrents Decline

To make matters worse, most of the global trends that explained why interstate war had decreased in recent decades are now reversing. The theories that democracy, prosperity, cooperation and other factors kept the peace have been much debated—but if there was any truth to them, their reversals are likely to increase the chance of war, irrespective of how long the coronavirus pandemic lasts.

Democracy is often considered a prophylactic for war. Fully democratic countries are less likely to experience civil war and rarely, if ever, go to war with other democracies—though, of course, they do still go to war against non-democracies. While this would be great news if democracy and pluralism were spreading, there have now been 14 consecutive years of global democratic decline, and there have been signs of additional authoritarian power grabs in countries like Hungary and Serbia during the pandemic. If democracy backslides far enough, internal conflicts and foreign aggression will become more likely.

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.