Business Law & Investing Society Law Review

Volume 1 Spring 2021

Articles

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The BLIS Law Review allows undergraduate students to develop their passion for legal scholarship at the University of California, Los Angeles. The objective of the BLIS Law Review is to foster critical thought about topics including but not limited to business law, commercial organizations, and capital markets. Our articles are published annually by passionate pre-law students who aspire to create meaningful change in the legal industry.

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Foreword

As the sole founder of the Business Law & Investing Society, I am truly honored to present Volume 1 of the BLIS Law Review. The editorial board and I tirelessly worked together to select truly excellent writers. This volume reflects their exemplary talent, dedication, and work ethic.

I am very proud to have had the opportunity to help these writers further explore and analyze their topics. Our nine articles cover diverse topics ranging from intellectual property, acquisitions, and free speech. I truly believe our writers' well-researched work will further inspire critical thought and discussion among the UCLA student community.

I would like to personally thank all of our writers and editors for their hard work that made our first volume a success. Their efforts to intellectually challenge themselves outside of the classroom have allowed the BLIS Law Review to become one of the leading undergraduate law reviews at UCLA.

I am extremely grateful for the opportunity to develop my interest in legal scholarship and lead this year's cohort in producing our first volume. I am confident that this volume will serve as the foundation for future BLIS publications that continue to impress and inspire critical thought about legal issues.

Sam Poursafar

President

BLIS Law Review

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Isaac Wang

A City at the Crossroad: Assessing Hong Kong's Legal and Financial Advantages Under the National Security Law

Abstract. Hong Kong acts as a unique international financial center that combines the best of the two worlds. It inherits the common law system and a capitalist market economy under British rule, and serves as a doorstep to Mainland China, the world's second-largest economy at this moment. What are the designs and advantages offered by the city's common law tradition as well as its financial regulatory regime that make the city's thriving financial market possible? How should we navigate through the uncertainty brought by the city's 2019-2020 political turmoil and the enactment of the Hong Kong national security law? This Article explores Hong Kong's systemic advantages in its legal system and the financial regulatory regime. By conducting a case study of the city's financial regulatory sanctions against Goldman Sachs (Asia) L.L.C. in its involvement in the 1MDB corruption and money-laundering scandal, this Article showcases the firm commitment by Hong Kong's financial regulators to uphold the city's sound financial regulatory regime. The Article also extends beyond the case study and examines the role of financial regulations in preserving Hong Kong's financial center status. Despite demonstrating Hong Kong's systemic advantages, this Article analyzes the legal implications of the Hong Kong national security law. By adopting an alternative approach in evaluating the impact of the national security law, the Article proposes cautious optimism towards the city's future as an international financial center.

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INTRODUCTION

Hong Kong's intense political turmoil in 2019-2020 has brought the city to global attention. It only took months for the financial hub, which was once prized for its high degree of the rule of law, to deteriorate into a hotbed of violent and lawless activities. The subsequent imposition of the Hong Kong national security law in June 2020 by the central government without prior consultation with the city's mass constituents has raised additional concerns about the judicial independence of the region and the future of Hong Kong as an international financial center.

Stepping back from these critical yet unsettled questions, until the recent protests that are bound to redefine Hong Kong's future, the city has been widely recognized as a highly autonomous region under China's "One Country, Two Systems." It is the only region within the People's Republic of China (PRC) that upholds the capitalist economic system and the common law jurisdiction previously developed under British rule.[1] Such common law traditions championed by the former British colony have contributed to Hong Kong's persistent commitment to the rule of law and judicial independence. The combination of the capitalist system and the common law principles, in turn, constitutes Hong Kong's robust corporate and financial law regime, which is perceived by investors to be stronger than China's.[2] Overall, its healthy capitalist economy, robust financial regulatory system, coupled with the established common law principles, have consolidated Hong Kong's status over the years as one of the three key international financial centers in the world, alongside New York and London.

This Article seeks to offer cautiously optimistic answers to the unsettled questions mentioned above. Despite pervasive concerns and growing uncertainty raised by the imposition of the Hong Kong national security law, its vague legal texts, and the central government's increasing political influence

[1] Horace Yeung & Flora Huang, *"One Country Two Systems" as Bedrock of Hong Kong's Continued Success: Fiction or Reality?,* 38 B.C. Int'l & Comp. L. Rev. 191, 198 (2015), http://lawdigitalcommons.bc.edu/iclr/vol38/iss2/2.
[2] *Id*. at 199-201.

over the region, this Article contends that Hong Kong's systemic advantages over the Mainland remain in place, and the city's unique legal and financial systems distinct from China's will continue to fulfill its mission to maintain an attractive destination for investments that aim for the Greater China market.

To this end, the Article will be divided into four parts. Part I begins by offering a brief introduction to Hong Kong's existing legal system and the financial regulatory regime under China's "One Country, Two Systems." Part II conducts a case study of the regulatory sanctions by the Hong Kong Securities and Futures Commission (SFC) against Goldman Sachs (Asia) L.L.C. in its involvement in the 1MDB corruption and money-laundering scandal. Part III extends beyond the case study by examining the role of financial regulations in maintaining Hong Kong's financial center status, and the impact of the recent enactment of the Hong Kong national security law on such a status. By offering an alternative approach in assessing the national security law, this section seeks to demonstrate Hong Kong's systemic advantages over the Mainland, and offer cautious optimism towards Hong Kong's future as an international financial center. Finally, Part IV offers policy suggestions to all stakeholders in Hong Kong in such a redefining era in the city's history while concluding with the reaffirmation of the cautiously optimistic interpretation.

I. HONG KONG'S UNIQUE STATUS: AN INTERNATIONAL FINANCIAL CENTER UNDER CHINA'S "ONE COUNTRY, TWO SYSTEMS"

A. AN OVERVIEW OF HONG KONG'S COMMON LAW SYSTEM UNDER "ONE COUNTRY, TWO SYSTEMS"

To claim Hong Kong as a city where East meets West extends far beyond the scope of cultural interaction. Besides the mixture of colonial cultural influences by the British and traditional Chinese cultural heritage, the city stands at the forefront of the interaction between the two worlds as it becomes

an international financial center under China's "One Country, Two Systems." It obtains such a unique status with strategic importance because it offers investors not only a doorstep to the Greater China market, but more critically, the full-fledged financial and common law systems commonly adopted by the West, and specifically, the US and the UK To demonstrate Hong Kong's systemic advantages as a financial center, this section aims to offer a brief introduction to Hong Kong's existing legal system and the financial regulatory regime under China's "One Country, Two Systems."

The Sino-British Joint Declaration in 1984 marked a defining moment for Hong Kong. On December 19, 1984, both British and Chinese officials formally declared the return of sovereignty over Hong Kong from the United Kingdom to the People's Republic of China (PRC) starting from July 1, 1997. According to the sovereign and administrative arrangement stipulated by the Declaration, after the handover, Hong Kong would become a Special Administrative Region (SAR) under the PRC, and the territory would "enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People's Government"[3]. To accommodate the systematic differences between the Hong Kong SAR and the Mainland and to ensure the SAR's autonomy, the idea of "One Country, Two Systems" was endorsed by China's then-paramount leader Deng Xiaoping and formally reflected in the Joint Declaration and the Basic Law of Hong Kong. What has been known as the "mini-constitution" of the SAR explicitly states that Hong Kong would not practice the socialist system and policies in China and the long-established capitalist system would remain unchanged for 50 years after the handover.[4]

The arrangement of "One Country, Two Systems" enshrined in the Basic Law thus confirmed Hong Kong's legal system and its financial regulatory regime distinct from that of Mainland China. In regard to the legal system, Article 8 of the Basic Law stipulates that:

[3] *Id*. at 198.
[4] *Id*.

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.[5]

This is aligned with the English-originated common law system – with its emphasis on legal precedents established by the courts – that have been practiced in Hong Kong under British rule as well as other Commonwealth territories such as Australia, New Zealand, Canada, Singapore, and India. As Hong Kong continues to practice the common law system, judges in the SAR jurisdiction possess the ability to not only interpret but also formulate laws in the form of judicial opinions published in settled legal cases, which establish binding legal precedents. In comparison, courts in Mainland China follow a civil law system similar to that of continental Europe, where pre-written, codified statutes are expected to take precedence over legal precedents when evaluating cases. Given the difference between the legal system, it is unsurprising that the principle of judicial independence, the rule of law, and upholding the common law tradition deserve special mention by the Basic Law and have become areas of controversy in the years following the handover.

B. Brief Introduction to Hong Kong's Financial Regulatory Regime

A robust legal system protective of investors' business interests provides necessary assurance to investors as they expand the business and financial activities in the jurisdiction. This calls for the development of a sound and transparent financial regulatory regime in Hong Kong in accordance with its business-friendly common law system. Throughout decades of development of both corporate laws and securities laws, Hong Kong's regulatory frameworks closely mirror the United Kingdom's common law

[5] *Id.*

system of investor protection and market efficiency assurance. On the one hand, the corporate law frameworks in Hong Kong date back to the *Companies Ordinance (CO) of 1865*, which followed the *English Companies Act of 1862*. After subsequent revisions of the CO over the decades, all of which followed their counterparts in the British legal system, the contemporary version of the *Companies Ordinance* (CO) in Hong Kong was entered into force in March 2014, which aims to modernize the corporate laws in Hong Kong to better regulate corporate governance.[6] Regulations of companies' activities also include the Listing Rules of the Hong Kong Exchanges and Clearing Limited (HKEx), which is now the world's largest exchange by market capitalization of listed companies.[7] Under the Listing Rules, certain duties are imposed on companies and underwriters, such as mandatory disclosures for listed companies, due diligence performed by disinterested third-party underwriters, as well as standards of acceptable characteristics and behaviors of the listed companies.[8]

On the other hand, securities regulation constitutes another key aspect of Hong Kong's financial regulatory regime. The securities regulation in the city dates back to the *Securities Ordinance* and the *Protection of Investors Ordinance* in 1974 when Hong Kong experienced a market crash that necessitated formal securities regulation. Another market crash in 1987 further motivated Hong Kong's legislators to set up a single powerful financial regulator, which was established by the *Securities and Futures Commission Ordinance* in 1989. The latest version of the *Securities and Futures Ordinance* (SFO) eventually entered into force in 2003. Today, the Securities and Futures Commission (SFC) functions under the SFO as an autonomous market regulator in charge of the securities and futures markets in Hong Kong.[9] In practice, in addition to the Listing Rules of the HKEx mentioned above, the SFC monitors and

[6] *Id*. at 200.
[7] Zhang Shidong, *Hong Kong Exchanges and Clearing Soars to Become World's Largest Exchange Operator by Market Cap,* South China Morning Post (Jul. 21, 2020), https://www.scmp.com/business/markets/article/3094007/hong-kong-stocks-head-biggest-gain-two-weeks-global-rally-and-ant.
[8] Horace Yeung & Flora Huang, *"One Country Two Systems" as Bedrock of Hong Kong's Continued Success: Fiction or Reality?,* 38 B.C. Int'l & Comp. L. Rev. 191, 202-203 (2015), http://lawdigitalcommons.bc.edu/iclr/vol38/iss2/2.
[9] *Id*. at 200-201.

regulates standardized market requirements stipulated under the SFO. For example, the SFC possesses the discretionary power to authorize, reject, or request more information of the listings from the companies before it proceeds with transferring the case to the HKEx for further actions.[10]

Altogether, a sophisticated web of corporate laws and securities laws enforced by statutory regulatory bodies, such as the HKEx and the SFC, has contributed to Hong Kong's full-fledged and transparent financial regulatory regime. Such a regime constantly provides global investors with the confidence to enter the Hong Kong financial market thanks to its high level of corporate governance standards, information disclosure requirements, investor protection, and market efficiency. In consequence, a well-established financial regulatory regime, coupled with a business-friendly common law system practiced in courts, has powerfully boosted Hong Kong's status as an attractive destination for global investments and a powerful contender for the international financial center over the years.

II. HONG KONG'S ROBUST FINANCIAL REGULATIONS: A CASE STUDY OF THE REGULATORY SANCTIONS AGAINST FINANCIAL INSTITUTIONS

A well-designed financial regulatory regime without proper enforcement would not serve as a credible one. To this end, Hong Kong's regulators certainly share a strong commitment to uphold such legal and regulatory frameworks and maintain a rules-based, transparent financial market in Hong Kong. This section cites a recent case of regulatory sanctions by the Hong Kong Securities and Futures Commission (SFC) against Goldman Sachs (Asia) L.L.C. in its involvement in the 1MDB corruption scandal. By conducting the case study, this section showcases the firm commitment by Hong Kong's financial regulators to anti-money laundering compliance.

[10] *Id*. at 204.

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A. Goldman Sachs (Asia) L.L.C.'s Involvement in the 1MDB Corruption Scandal

In 2020, Goldman Sachs Group Inc. – a well-recognized American multinational investment bank and financial services company – raised eyebrows among investors and regulators across the financial world as the investment bank was investigated by financial regulators in at least 14 countries for its involvement in the 1MDB corruption scandal. The 1Malaysia Development Berhad (1MDB), ostensibly registered as a government-run fund for economic development projects, was launched in 2009 by Malaysia's then-Prime Minister Najib Razak. The Malaysian state fund, which raised billions of dollars in bonds between 2009 and 2013, became a massive political and financial scandal in 2015 when Najib Razak, with his ties with Malaysian financier Jho Low, was accused of siphoning off $4.5 billion, according to Malaysian and US authorities, from the 1MDB fund to his personal account for purchasing luxury assets and real estate.[11]

In the 1MDB scandal, the involvement of Goldman Sachs Group Inc. became the most prominent headline among global investors and regulators. Since the UK-based Goldman Sachs International arranged and underwrote 1MDB's three bond offering transactions, which raised $6.5 billion in total, both the company itself and multiple senior members of the deal teams across various jurisdictions were under intense regulatory scrutiny. They were later found legally liable by regulators from different jurisdictions for their regulatory failures that led to the misappropriation of the funds. For example, on October 22, 2020, the United States Securities and Exchange Commission (SEC) charged Goldman Sachs for violations of the Foreign Corrupt Practices Act (FCPA) in the 1MDB bond transactions. In addition to

[11] Rozanna Latiff, *Understanding Goldman Sachs' Role in Malaysia's 1MDB Mega Scandal,* Reuters (Oct. 22, 2020), https://www.reuters.com/article/us-goldman-sachs-1mdb-settlement-explain/understanding-goldman-sachs-role-in-malaysias-1mdb-mega-scandal-idUSKBN2772HC.

regulatory actions, Malaysia even raised criminal charges against both Goldman Sachs and 17 current and former directors of the company under the Malaysian Capital Markets and Services Act.[12]

Because Goldman Sachs (Asia), the company's control hub for the region, is based in Hong Kong, the company's involvement in the 1MDB scandal unavoidably falls under the jurisdiction of the Hong Kong SAR, thus being subject to scrutiny by the city's financial regulators. The involvement of the company's Asian headquarter was also not a negligible one. According to Reuters, Goldman Sachs Asia had significant involvement in 1MDB's three bond offerings, as it had earned $210 million from the transactions, which accounts for 37% of the company's total revenue – the largest share among all Goldman Sachs entities involved.[13] In consequence, both the revenue earned by Goldman Sachs (Asia) out of the bond deals and the substantial role played by senior investment bankers within the bank's Asia control hub are under regulatory scrutiny by Hong Kong's market regulators. Their assessment and regulatory sanctions will be further discussed in the next section.

B. Hong Kong Securities and Futures Commission's Regulatory Sanctions against Goldman Sachs (Asia) L.L.C.

As a statutory body under Hong Kong's existing legal frameworks, the Securities and Futures Commission (SFC) is granted regulatory powers and responsibilities by the *Securities and Futures Ordinance* (SFO). Among multiple obligations vested in the SFC, ranging from licensing, supervision, to enforcement, the overarching ones involve maintaining and promoting the "fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry."[14] Correspondingly,

[12] *Hong Kong SFC Reprimands and Fines Goldman Sachs US$350 Million,* Charltons Newsletter (Oct. 30, 2020), https://www.charltonslaw.com/hong-kong-sfc-reprimands-and-fines-goldman-sachs-us350-million/.
[13] Alun John, *Hong Kong Fines Goldman Sachs Record $350 Million over 1MDB Failings,* Reuters (Oct. 22, 2020), https://www.reuters.com/article/goldman-sachs-1mdb-hong-kong/hong-kong-fines-goldman-sachs-record-350-million-over-1mdb-failings-idUSKBN27717P.
[14] Securities and Futures Ordinance, No. 571, (2003) O.H.K. § 4(a).

the SFC has established legal and regulatory standards by which intermediaries (defined by the SFC as "licensed corporations") should operate in the financial market. These legal and regulatory frameworks include making rules in the form of subsidiary legislation[15] and issuing codes and guidelines that are non-statutory in nature.[16]

Among various rules, codes, and guidelines, the most relevant ones in relation to the regulatory case against Goldman Sachs (Asia) are the *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission* ("*Code of Conduct*") and the *Anti-Money Laundering and Counter-Terrorist Financing Ordinance* ("*AMLO*"). These two legal texts serve as the principal sources in SFC's assessment of Goldman Sachs (Asia)'s involvement in the 1MDB scandal and the company's potential misconduct in breach of the local financial regulations.[17] The *Code of Conduct* sets out general principles and standards ordinarily expected for the intermediaries to comply in the securities and futures market,[18] whereas the *AMLO* imposes specific requirements on financial institutions to deal with anti-money laundering compliance in the form of customer due diligence and record-keeping.[19]

The SFC's assessment of Goldman Sachs (Asia)'s "management supervisory, risk, compliance and anti-money laundering (AML) control failures"[20] began with evaluating the actions performed by Tim Leissner, who was a Participating Managing Director in the Investment Banking Division of Goldman Sachs at the time of the 1MDB scandal. Leissner conspired with Malaysian financier Jho Low, who had ties with then-Malaysian Prime Minister Najib Razak, and others to pay bribes and kickbacks to the Malaysian and Abu Dhabi government in return for retaining the 1MDB bond businesses for Goldman Sachs. As a result, Leissner and other investment bankers involved in the 1MDB bond businesses had

[15] *Id*. § 397.
[16] *Id*. § 399.
[17] *Statement of Disciplinary Action,* Securities and Futures Commission of Hong Kong (Oct. 22, 2020), https://apps.sfc.hk/edistributionWeb/api/news/openAppendix?lang=EN&refNo=20PR103&appendix=0.
[18] *Regulatory Framework for Intermediaries,* Securities and Futures Commission of Hong Kong (Jun., 2020), https://www.sfc.hk/-/media/SFC/doc/EN/aboutsfc/Regulatoryframework.pdf.
[19] Anti-Money Laundering and Counter-Terrorist Financing Ordinance, No. 615, (2011) O.H.K. § 5-7.
[20] *Statement of Disciplinary Action,* Securities and Futures Commission of Hong Kong (Oct. 22, 2020), https://apps.sfc.hk/edistributionWeb/api/news/openAppendix?lang=EN&refNo=20PR103&appendix=0.

earned substantial fees through the three 1MDB bond transactions. Leissner and others involving financiers even diverted the funds raised through the bonds to their personal accounts and laundered the money through the financial systems."[21] After demonstrating the misconduct committed by individual financiers, the SFC made subsequent attribution of the wrongdoing to Goldman Sachs (Asia) as a corporate entity. According to the SFC's findings, Goldman Sachs (Asia)'s involvement in the 1MDB scandal centered on two aspects. First, the majority of the senior bankers in the Investment Banking Division "who had a substantial role in the origination, structuring and execution of the Bond Transactions were licensed persons accredited to Goldman Sachs (Asia)." Additionally, Goldman Sachs (Asia)'s Business Intelligence Group under the Legal Department was legally responsible for conducting regulatory due diligence to detect anti-money laundering and corruption issues, which it had failed to do.[22]

Taken into account the investment bank's failure to detect misconduct of Leissner and co-conspirators, despite numerous red flags that should have called for the Business Intelligence Group's attention, the SFC concluded that "there were serious lapses and deficiencies in Goldman Sachs (Asia)'s risk, compliance and anti-money laundering controls and management oversight,"[23] which made the corruption and money laundering through the 1MDB bond transactions possible. The conclusion thus suggested Goldman Sachs (Asia)'s regulatory breaches specifically regarding the *Code of Conduct* and the *AMLO*. In regard to the general lapses and deficiencies in Goldman Sachs (Asia)'s management oversight, the SFC asserted that Goldman Sachs (Asia) failed to comply with the General Principle 2 of the *Code of Conduct*, which demands due diligence and careful treatment in a licensed corporation's actions in the best interests of both its clients and the financial market. Besides the general breach of the General Principle 2, the failure by Goldman Sachs (Asia)'s Business Intelligence Group under the Legal Department to conduct regulatory due diligence and detect anti-money laundering issues constituted a

[21] *Id*.
[22] *Id*.
[23] *Id*.

particular breach of paragraph 4.2 and 4.3 of the *Code of Conduct*, both of which specifically stipulate adequate supervisory resources, due diligence, internal control procedures, and financial and operational capabilities to be ensured and deployed by a licensed corporation. Goldman Sachs (Asia)'s failure to prevent its senior bankers' misconduct in money laundering made the corporation further liable to the breach of section 23(b) of Schedule 2 of the *AMLO*, which requires financial institutions to utilize all reasonable resources to mitigate money laundering risks.[24] In consequence, after conducting a thorough assessment of the case, on October 22, 2020, the SFC announced that it "had reprimanded and fined Goldman Sachs (Asia) US$350 million (HK$2.71 billion) for serious regulatory failures that led to the misappropriation of US$2.6 billion in connection with three bond offering transactions for 1Malaysia Development Berhad (1MDB), a Malaysian state-owned and controlled strategic investment and development company, in 2012 and 2013."[25]

III. THE ROLE OF FINANCIAL REGULATIONS & THE IMPACT OF THE NATIONAL SECURITY LAW: A CAUTIOUSLY OPTIMISTIC INTERPRETATION

By extending beyond the case study, this section examines the role of financial regulations in maintaining Hong Kong's financial center status, and navigates through the uncertainty brought by the recent enactment of the Hong Kong national security law. By offering an alternative perspective of China's "rule by law" tradition in assessing the national security law, this section seeks to demonstrate Hong Kong's systemic advantages over the Mainland, and offer cautious optimism towards Hong Kong's future as an international financial center.

[24] *Id*.
[25] *Hong Kong SFC Reprimands and Fines Goldman Sachs US$350 Million,* Charltons Newsletter (Oct. 30, 2020), https://www.charltonslaw.com/hong-kong-sfc-reprimands-and-fines-goldman-sachs-us350-million/.

A. The Role of Financial Regulations in Hong Kong's Commitment to Its Financial Center Status

The significance of the SFC's sanctions against Goldman Sachs (Asia) extends far beyond punishing a single financial institution. It is a major indication of the firm commitment by the city's regulators to uphold the sound financial regulatory regime amidst skepticism about the recent enactment of the Hong Kong national security law. As the SFC's mission statement indicates, as a financial regulator in an international financial center, it "strives to strengthen and protect the integrity and soundness of Hong Kong's securities and futures markets for the benefit of investors and the industry."[26]

The concept of market integrity is of paramount importance to a financial center. It is the primary source of credibility that the city enjoys, which continues to attract global investments. The financial world functions by maintaining the credibility and predictability of the markets, in which investors constantly demand transparent information flow and fair competition for them to make informed investment decisions, where financial returns are expected in the future. Without financial regulators' firm commitment to uphold such a market environment in Hong Kong, the cornerstone of the financial market, credibility, would inevitably be undermined, as investors no longer expect a stable environment expected for producing future financial returns, nor do they have full faith in the guaranteed protection of their private assets immune to confiscation by the authorities.

Therefore, a sound financial regulatory regime, coupled with a well-maintained legal system immune to political influence, proves to be more vital to maintaining Hong Kong's status as a financial center than, for example, the political mechanisms within the city. It comes as no surprise that Hong Kong has been able to fulfill its role as an international financial center and serve global investors without fully democratizing its domestic political system and achieving universal suffrage – a hotly debated issue within the city – for decades both under British rule and as a SAR of China. However, the city's political

[26] *Our Role,* Securities and Futures Commission of Hong Kong, https://www.sfc.hk/en/About-the-SFC/Our-role.

turmoil in 2019 and the recent enactment of the Hong Kong national security law in 2020 raised not only eyebrows but also concerns among investors regarding the city's credibility as a financial hub. The violent protest movement and the controversial national security law have posed significant challenges to interpreting the current state of the very premises that render Hong Kong's thriving financial market possible over the years, which will be further discussed in the next section.

B. Navigate Through the Uncertainty: The Enactment of the Hong Kong National Security Law

The intense violence on the streets during the 2019-2020 protests certainly undermined the city's stable and predictable environment, which are critical factors for investors' assessment and selection of a financial market. Nevertheless, every political movement would reach an end and society would return to its normal order. Hong Kong's political turmoil proves to be no exception. In retrospect, it is the approach by the authorities to quell the unrest that poses even greater challenges to the cornerstone of the credibility of Hong Kong's financial market, that is, the rule of law immune to political influence in the form of an independent judiciary. To establish investors' faith in pouring capital into the market in expectation of future returns, a clearly-defined financial regulatory regime needs to be functioning, which guarantees market predictability, and the rule of law immune to political influence needs to be maintained, which boosts investors' confidence in their private property protection after investing in the market. The imposition of the Hong Kong national security law by the central government without prior consultation with the city's mass constituents, coupled with the ambiguity regarding "national security" in this law, presents significant challenges to the exact cornerstones mentioned above.

Passed unanimously by the Standing Committee of the National People's Congress (NPCSC), an elite decision body within China's rubber-stamp legislature, the Hong Kong national security law, officially named *The Law of the People's Republic of China on Safeguarding National Security in the*

Hong Kong Special Administrative Region (HKSAR), was enacted in the Hong Kong SAR on July, 1, 2020 in response to the 2019-2020 political turmoil. The implementation of the law bypassed the city's own legislature and granted Beijing multiple new avenues to intervene in the legal system in Hong Kong. This generates increasing uncertainty and concerns about the city's long-held rule of law and judicial autonomy. Most prominently, the law criminalizes acts of "secession, subversion, terrorism and collusion with foreign forces"[27] by a maximum sentence of life in prison while reserving for Beijing, rather than Hong Kong's judicial body, the ultimate discretion over the interpretation of the legal texts. Such discretion over legal interpretation manifests in yet another intrusive form in the law, in which Hong Kong's Chief Executive could appoint specific judges to hear national security cases. These two unprecedented principles ensure that, if the new national security law is ever in conflict with Hong Kong's existing laws, the former would take precedence. In addition to the broadly-defined texts and the vague discretionary powers granted to Beijing and Hong Kong's Chief Executive, this law also establishes Beijing's new national security office in Hong Kong. This office would not operate under Hong Kong's local jurisdiction and would hire its own enforcement personnel to send some cases to Mainland China for trials.[28]

In response to the rapidly-changing circumstances in Hong Kong's legal practices, the sense of pessimism permeates the city more than ever. A significant proportion of the city's constituents seem to reach a consensus that the law has undermined the long-cherished rule of law and judicial independence in Hong Kong, and the cornerstone of the city's credibility as a well-established financial center, which provides a fair and transparent financial market as well as proper protection of investors' private property, has vanished. Even more pessimistic is a public outcry over the end of "One Country, Two Systems" and even the end of Hong Kong, which frequently makes newspaper headlines. However, facing the new reality, an alternative approach towards interpreting the law is urgently needed, and cautious optimism

[27] *Hong Kong Security Law: What Is It and Is It Worrying?,* BBC News (Jun. 30, 2020), https://www.bbc.com/news/world-asia-china-52765838.
[28] *Id*.

towards the city's financial center status could be derived if such an approach is appreciated. This new approach bears further discussion in the next section.

C. Cautious Optimism: China's "Rule By Law" & Hong Kong's Common Law Advantages

To better comprehend the sweeping mechanisms established by the new law, a purely legalistic approach, for example, evaluating the legal texts, assessing the explicit definition of the crimes, discussing the executive branch intervening in the courts, etc., would not serve the purpose. Because the designer of this new law, Beijing, never adopts a purely legalistic approach, neither should market watchers of the Hong Kong situation do. What is instead embraced by Beijing in designing and implementing the national security law is the long-held tradition of "rule by law" in Mainland China. This tradition differs from the Western sense of the "rule of law" principle. To illustrate, the traditional "rule of law" stipulates that all members of a society are equally constrained by a set of laws that are recognized as legitimate by all parties. Such a principle, widely adopted by the West, emphasizes the legal constraints placed on the governments to prevent the authorities from wielding excessive and arbitrary power on ordinary citizens. In contrast, China's "rule by law" combines the Marxist-Leninist ideology and traditional Chinese Confucianism. It inherits the orthodox Marxist-Leninist distrust of the rule of law that "bourgeoisie law is a tool of the ruling classes used against the people," and it is now the Communist Party, who represents and protects the interests of the masses that controls the "socialist law."[29] On the other hand, Confucianism's call for the government's "benevolent rule" has been rooted in Chinese political culture for centuries. Unlike the Western philosophy that assumes the worst actions by the rulers, thus designing laws to constrain them, the Chinese political culture demands the best from the authorities. Correspondingly, the Chinese public constantly calls for a well-designed political system, not to place

[29] Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region,* 30 Cornell Int'l L.J. 335, 338 (1997).

constraints, but to empower "the ruling government having the virtue of benevolence and governing based on love and care for the people."[30]

The consequence of incorporating the Marxist-Leninist ideology and Confucianism into the "rule by law" tradition has established a case for the Chinese government to assume a patriarchal role in society, design laws at its discretion to determine what is deemed proper and good behaviors for the general welfare, and execute laws to "rightfully" deter and punish individuals considered harming the collective interests of the general public. The same logic applies in the design and execution of the Hong Kong national security law. Assessing this new law through the lens of the "rule by law" tradition, one would recognize that Beijing has the tendency to draw blurred lines between political orders and the laws in the Western sense. And it is reasonable to speculate that Beijing intends the national security law to serve not as an intrusive law undermining Hong Kong's judicial process per se, but as a political and administrative instrument to deter and punish. The focus of assessing the impact of this law should therefore lie in Beijing's intention, rather than a purely legalistic approach that analyzes the legal texts themselves. In this regard, multiple indications have shown that Beijing fully intends to utilize the law to quickly dismantle the protests in 2019-2020 and deter any future actions against its power grip on Hong Kong. The understanding of Beijing's urgent quest for social stability and order is also shared across the political spectrum in Hong Kong regardless of the support for the law itself. Instead, what is often overlooked in the political debates is the recognition of Beijing's rational calculation that, so long as the national security law ensures its rule over Hong Kong remains unchallengeable, it is also in China's vital interest to preserve the rest of Hong Kong's existing legal and financial system as much as possible. Such a calculation is due to Hong Kong's legal system advantages as a financial center over Mainland China, which will be further illustrated below.

[30] Jo Kim, *Exploring China's New Narrative on Democracy,* The Diplomat (Dec. 6, 2019), https://thediplomat.com/2019/12/exploring-chinas-new-narrative-on-democracy/.

As the previous section introduces the differences between Hong Kong's common law system and Mainland China's civil law system, such differences produce divergent views among global investors and influence the development of the financial industry within different jurisdictions. The ability of judges in a common law jurisdiction to make up-to-date legal interpretations and establish new legal precedents according to ever-changing market environments and technological innovations "means that any issues arising from rapidly evolving financial markets can be dealt with more efficiently."[31] Related research provides additional grounds that common law countries are more protective of shareholder interests and more responsive to investors' demands.[32] Correspondingly, international investors have shared a conventional consensus that a common law system is, by design, more beneficial and thus more appealing to businesses and investments than a civil law one. It therefore comes as no surprise that New York and London – both common law jurisdictions – stand as two of the most prominent financial centers in the world. In the case of Hong Kong, the same logic applies and investors consider Hong Kong's common law system to be much stronger than Mainland China's civil law one, which holds a competitive edge over Mainland China for financial market development and international business activity.[33] As Hong Kong remains the only Chinese city that operates under the common law system and the only two Special Administrative Regions that fully embrace the capitalist system, it is ultimately in China's interests to preserve most of Hong Kong's existing legal and financial systems and ensure Hong Kong maintains its international financial center status. In the foreseeable future, with the exception of national security cases and intense, polarized local politics, one should hold cautious optimism that not only Hong

[31] Horace Yeung & Flora Huang, *Why Hong Kong Will Remain an International Financial Centre, despite New Security Law,* The Conversation (Jul. 6, 2020), https://theconversation.com/why-hong-kong-will-remain-an-international-financial-centre-despite-new-security-law-140603.
[32] John Armour, et al., *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis,* 6 Journal of Empirical Legal Studies 343 (2009).
[33] Horace Yeung & Flora Huang, *Why Hong Kong Will Remain an International Financial Centre, despite New Security Law,* The Conversation (Jul. 6, 2020), https://theconversation.com/why-hong-kong-will-remain-an-international-financial-centre-despite-new-security-law-140603.

Kong's stakeholders but the central government would possess the willingness to preserve Hong Kong's status quo specifically in regard to the financial industry and business practices.

IV. SUGGESTIONS AND CONCLUSION

In the foreseeable future, Hong Kong would continue to stand at the forefront of interaction between China and the West. Under China's "One Country, Two Systems," the city has been granted the special status as the only Chinese city that upholds the common law system and the only two Special Administrative Regions (SARs) operating under a capitalist economy. For decades, such a unique status has become the cornerstone of Hong Kong's thriving financial market, as the well-established common law tradition marked by the rule of law and judicial independence, coupled with a sound and robust financial regulatory regime, offers Hong Kong systemic advantages over Mainland China. To maintain Hong Kong's strategic importance as an international financial center, Hong Kong's financial regulators are fully committed to preserving the city's systemic advantages by enforcing regulatory standards and ensuring a rules-based, transparent financial market in Hong Kong. The regulatory sanctions in October 2020 by Hong Kong Securities and Futures Commission (SFC) against Goldman Sachs (Asia) L.L.C. in its involvement in the 1MDB corruption and money-laundering scandal provide powerful examples for their commitment as well as the well-functioning of the city's financial regulatory regime. Nevertheless, the 2019-2020 political turmoil in the city and the enactment of the national security law have created much uncertainty about the city's social stability, market predictability, the rule of law, and judicial importance, all of which are too critical to be undermined if Hong Kong wants to maintain its financial center status. Despite growing pessimism among the city's constituents after the introduction of the national security law, an alternative approach to assessing the new reality proves to be beneficial and cautious optimism should be appreciated. It is more applicable to understand the impact of the new law by understanding China's "rule by law" intention rather than being confined to the pure legalistic analysis.

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This Article speculates that Beijing shares the commitment to preserve Hong Kong's systemic advantages as much as possible, with the critical exception of national security and radical, polarized local politics.

The Article proposes cautious optimism regarding Hong Kong's systemic advantages over Mainland China and the city's future as an international financial center, yet a prudent approach towards the application of the Hong Kong national security law should be adopted by policy-makers and judges. Legal interpretations of the scope of this law should be more clearly defined and legal precedents should be established and adhered to. Only by treating this law with wisdom and a great amount of care could Hong Kong regain the confidence of investors regarding the city's well-established rule of law and judicial independence, and ultimately, its credibility as an international financial center.

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Bessie Li

The Analysis of Intellectual Property Rights in the China-US Trade War

Abstract. Intellectual property (IP) is one of the major disputes in the trade relations between the United States and China in the past 30 years. The rapid economic growth in China has resulted in a conflict of interests between the two countries., and their intellectual property relations are becoming increasingly intense. It is one of the core issues behind the recent trade war friction between the two countries. Recently, intellectual property rights are the key dispute of the agreement in the China-US trade war which began in 2018. US President Donald Trump has accused China of unfair trading practices and intellectual property theft.

The current US administration has tried to erect trade barriers against China by launching a series of investigations on the grounds of protecting intellectual property rights. Investigations are a common mechanism used by US companies to block the most direct competitive relationships between foreign companies. China is the country that suffered the most from the "337 investigations" of the United States on intellectual property trade barriers. Shen Guo bing (2010) has demonstrated that as China-US relations develop, these investigations are likely to decrease; the intellectual property agreements have a more positive impact. [34]

Although China believes that America is trying to prevent itself from rising to global economic power, the two countries signed a "phase one" deal that partially ended the trade war. The US comprised tariffs on $160bn in Chinese goods. This article provides an overview of the IP debates, analyzes the outcomes of the trade war, explores the role and the impact of IP, and examines the benefits and disadvantages of the trade war in general.

[34] Awokuse, T. O., Yin, H. (2010). Intellectual property rights protection and the surge in FDI in China. Journal of Comparative Economics, 38(2), 217–224.

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INTRODUCTION

The serious trade deficit between China and the United States has directly led to the outbreak of a trade war between the two sides because China has been running a trade surplus with the United States, and the surplus is getting bigger and bigger, which has caused panic in the United States.

One of the reasons is related to IP issues. President Donald Trump said China has attempted to steal American intellectual property. The US Trade Representative pointed out that there was "harm caused by China's unreasonable technology transfer policies." These technology transfers stem from China's foreign ownership restrictions, which require foreign companies to set up joint ventures with domestic companies to sell their products in China. These risks often include some type of technology transfer that exposes foreign enterprises to theft.

On August 18, 2017, Trade Representative Robert Lighthizer formally announced the opening of a Section 301 investigation into China's trade practices with the United States at the request of US President Donald Trump. The Section 301 investigation report clearly placed China on the priority watch list because of long-standing and emerging intellectual property issues that deserve follow-up attention. Online piracy and counterfeiting, the theft of trade secrets, mandatory technology transfer requirements, and the export of counterfeit products to global markets are widespread in China, the report said, and the Chinese government lacks an enforcement system for intellectual property infringement and punitive measures for commercial infringement. These actions and policies are detrimental to the protection of intellectual property rights and the development of trade in the United States. On March 22, 2018, the Trump administration declared $50 billion in tariffs on Chinese goods that violate intellectual property rights and investment restrictions.

However, China was robustly opposed. In response to the US accusation, Chinese Ambassador Zhang Xiangchen said to the WTO that these technology transfers are "based on mutually agreed terms." In 2018-2020, additional tariffs on imported goods were collected for three rounds between China and the

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US On January 15, 2020, phase one of the Economic and Trade Agreement between the United States and China was signed. The agreement aims to strengthen economic and trade relations between the two countries by promoting compliance with international norms that contribute to the harmonious development of world trade.

The agreement details a series of commitments that the United States and China have made together that, if implemented, will benefit both countries' economies. Under the agreement, China agreed to overhaul its intellectual property protection program involving trade secrets, trademarks, counterfeiting, and piracy. In addition, China plans several major reforms to trial procedures to simplify the admission of evidence and to bring its system more in line with existing US laws and procedures.

The Agreement consists of nine chapters, including the preface, intellectual property rights, and technology transfer. Specifically, the two sides will strengthen the protection of intellectual property rights in the following several aspects to reach a consensus, including trade secrets protection, and drug-related intellectual property rights, patent extension is, geographical indications, the e-commerce platform of piracy and counterfeiting, piracy and counterfeiting of the production and export, hit the malicious registration of trademarks, and strengthen intellectual property judicial enforcement and procedures.

1. Technology transfer: The two countries agreed to make their administrative and licensing requirements and procedures transparent to ensure that technology transfer is not required as a prerequisite for licensing or for acquisition, joint venture, or investment activities in the region. Chapter Two of the agreement provides that any transfer or licensing of technology between the United States and China shall be “without any force or pressure” and “based on market terms that are voluntary and reflect the mutual agreement.”

2. The protection of trade secrets: The agreement stresses that anyone in any country may be held responsible for the misappropriation of trade secrets. Under the agreement, China carried out a comprehensive reform of judicial procedures concerning specific matters involving trade secrets. China commits to enumerate several specific acts that constitute illegal theft of trade secrets, including electronic intrusion, breach or inducement breach of an obligation not to disclose certain information, and unauthorized disclosure or use of trade secrets. By defining these acts as illegal theft of trade secrets, China's trade secret protection will be more in line with the Uniform Trade Secrets Act and the Defense of Trade Secrets Act already in place in the United States. The agreement also provides for civil remedies and criminal penalties to deter theft and infringement of intellectual property rights. These changes will enable US patent holders to enforce intellectual property rights in China more effectively and easily.

3. Drug patents: In order to implement "effective mechanism[s] for early resolution of patent disputes," as per Article 1.11 of the agreement, China agreed to adopt pharmaceutical pre-market enforcement procedures that were similar to those in place under the US Hatch-Waxman Act. The Chinese patent law will further follow the example of the US patent law by providing for the extension of the patent term due to unreasonable delays, not attributable to the applicant including delays in the Patent Office and any delay in the marketing approval process.

IP protection has become an essential part of innovation-driven development, a standard component of international trade, and an important aspect of fostering a sound business environment. The new Chinese intellectual property laws with those already in place in the United States will more likely give American patentees easier access to the Chinese market. Along with China's increased efforts to prevent the theft of trade secrets, the new technology transfer rules should give American companies

more comfort that their intellectual property will be protected and that they can negotiate and invest in China with good faith.

I. BACKGROUND

Intellectual property is the right derived from creative accomplishments and marks made by industry and business according to the law. Protecting intellectual property shows a critical link between creation and innovation. In January 1979, the United States proposed intellectual property rights to China for the first time after the establishment of China–US High-Energy Physics Cooperation. The US defined the copyright protection obligation as the main clause of both countries. However, with the rapid growth of China's economy, there is a major conflict of national interests between China and the United States, as well as the tension of intellectual property relations. Recently, “the Section 301” investigation focused on intellectual property rights which became the debate on the trade war between China and the US. It is considered that March 23, 2018 was the formal date when the trade war began with Trump signing the “Presidential Memorandum Targeting China's Economic Aggression” and introducing tariffs on steel and aluminum.” The investigation found that China's failure to follow its commitments to protect intellectual property rights after its join to the World Trade Organization caused particular harm to the United States.

Trump's policy of confrontation is reflected in the National Security Strategy adopted in December 2017. It limited Chinese investment in American technology, strengthened export controls and the list of dual-use products that cannot be shipped to China was expanded. An entity list American companies are barred from doing business with public companies, including ZTE Corp, which is accused of violating US sanctions against Iran.

In terms of intellectual property protection, there has been a significant increase in the number of patent applications from China, whether within the country or through the PCT or the Paris Agreement. In

2015, for the first time, Chinese inventors filed more than 1 million patent applications in a single year. China is trying to transform itself from "made in China" to "created in China."

The Beijing government places great emphasis on innovation and invention. Many of the new policies are designed to encourage innovation, technology transfer, and empowerment. Therefore, in reaction to the investigation, China's proposed IP law amendments aimed to increase the severity of punishments for intellectual property infringement. It will also make use of the government's increasingly advanced technological resources in the detection and prosecution of such crimes. In December, the two countries reached an agreement in principle on "Phase One" of a new trade agreement.

So much changed in the 14 months that followed. The catastrophic effects of COVID-19 on human life and the global economy made it impossible to assess the benefits of tariff relief or IP reform, China failed to reach its 2020 import goals, with some analysts concluding that the Phase One target was unrealistic. Beijing had drafted detailed guidelines to secure pharmaceutical patents, trade secrets, and copyrights, but it was unclear how well they were being enforced. Furthermore, according to a January 2021 study by the United States Patent and Trademark Office (USPTO), Chinese policies that provided subsidies for some trademark and patent applications were ineffective.

A. THE ROLE OF INTELLECTUAL PROPERTY RIGHTS

Enhanced intellectual property rights protection has boosted China's imports. Intellectual property rights have received increasing attention, and the share of knowledge-intensive or high-tech products in international trade has increased.

As Brander (2007) describes, intellectual property protection can be considered as a "strategic trade policy;" intellectual property rights can affect international trade flows once protected goods cross

borders.[35] Gould and Gruben(1996) proposed that intellectual property protection is the decisive factor of economic growth through the study of transnational data related to patent protection, trade system, and national characteristics.[36] Thompson and Racine (1999) draw a conclusion through empirical research that intensive intellectual property protection accelerates economic growth in a country with a GDP per capita of $3,400 or higher.[37]

Liang Hongying and Yu Jinsong (2010) discussed the influence of intellectual property protection on China's export. Their research results show that the strengthening of intellectual property protection has a significant positive impact on the total export volume and export structure.[38] Using the statistical data from 1993 to 2006, Yu Daoxian and Liu Haiyun (2008) empirically verify that the number of patents authorized locally and abroad has different influences on China's export trade. This result also shows that foreign technological innovation has a strong role in promoting the development of China's export trade.[39]

Based on the overall and subdivision of China's import data from 1991 to 2005, Yu Changlin (2011) believes that the strengthening of intellectual property protection will affect a country's import trade through the two reverse effects of market expansion and market power.[40] On the other hand, the net effect of enhanced intellectual property protection depends on the trade-off between market expansion and market power. The surveys discussed above show that enhanced intellectual property protection can boost a country's import and export trade through a variety of mechanisms.

[35] Brander, J. A. (2007). Intellectual property protection as strategic trade policy. Asia-Pacific Journal of Accounting and Economics, 14(3), 195–217.
[36] Gould, D., Gruben, W. C. (1996). The role of intellectual property rights in economic growth. Journal of Development Economics, 48(2), 323–350.
[37] Thompson, M. A. R., ushing, F. W. (1999). An empirical analysis of the impact of patent protection on economic growth: An extension. Journal of Economic Development, 24(1), 67–76.
[38] Hongying, L., Jinsong, Y. (2010). An empirical study about the effect of intellectual property right protection on export. Finance and Trade Research, 21(3), 60–65.
[39] Daoxian, Y., Haiyun, L. (2008). Research on the impact of independent innovation capability upon export trade in China—Based on positive analysis of patent applications certified. Journal of International Trade, 3, 28–33.
[40] Changlin, Y. (2011). Between the protection of intellectual property rights and the growth of China's import trade: An empirical analysis based on the model of the expansion of the trade gravitation. Management World, 6, 11–23.

Guo and Wu (2014) made an empirical analysis using the panel data of the export of creative products in the United States from 2006 to 2010. They theoretically analyzed the impact of intellectual property protection on the export of creative products. They conclude that intellectual property protection is beneficial to the export of creative products in importing countries.[41]

B. CHINA-US INTELLECTUAL PROPERTY RELATIONSHIP

The US is paying more attention to issues such as the trade deficit with China, intellectual property rights protection, and the RMB exchange rate. The United States wants to protect its latest technologies and innovations. In the past three years, due to intellectual property theft issues, the US economy lost $1.2 trillion. China is the principal IP infringer, importing 87% of counterfeit goods into the US market (IP Commission, 2017).

China has been focused on the fulfillment of its WTO obligations, US export control over China, Chinese enterprises' investment in the US, and the abuse of US trade remedy measures (Chinese Ministry of Commerce, 2017).

After the establishment of the WTO, China believes that the WTO can be the means to resolve disputes between the two countries instead of using unilateral measures. China is very stringent in some areas of intellectual property rights. Beijing allows all companies to help protect trade secrets and other intellectual property properties. two new laws were passed expressly to address bad-faith trademark applications, in addition to the other new laws. Zhengrui (2017) claimed that the interdependence between America and China is not symmetric. Because China depends on America more, America gains greater “power” in China–US trade.[42]

[41] Guo, X., Wu, Z. (2014). Creative goods exports, imitation threat and intellectual property rights protection. China Economics Quarterly, 13(3), 1239–1260.

[42] Zhengrui, J. (2017). Cooperation and friction: A study on the development of China-US trade relations[D]. Jilin university.

C. TRADE WAR OUTCOME:

China has agreed to carry out a comprehensive reform of intellectual property protection plans involving trade secrets, trademarks, counterfeiting, and piracy.

First, the United States is committed to investigating other ways to combat the sale of counterfeit and pirated goods, and to working with China to combat the production of counterfeit products that harm public health and safety around the world. The United States committed to strengthening communication with China on biotechnology regulation, including the launch of a biennial cooperation work plan between the State Intellectual Property Office of China and the United States Patent and Trademark Office.

The agreement also contains key provisions that limit the common practice in China of requiring foreign companies to transfer or license proprietary information or intellectual property to Chinese entities as a precondition for doing business.

II. AN ANALYSIS OF COURT PRECEDENTS REGARDING TARIFFS AND INTELLECTUAL PROPERTY

US business investment is frozen, and the manufacturing transportation sectors have hit lows. Many farmers went bankrupt and companies didn't hire as many people as before. For the United States, trade protection and restrictions on China's trade will reduce the number of high-quality and inexpensive Chinese products, thus increasing the cost of living and society in the United States.

For example， there were thousands of companies suing the US over China tariffs. Considerable amounts of lawsuits underline the pain caused by the trade war with China. These lawsuits also challenge whether the Trump administration has properly followed the law to impose new customs duties. For instance, lawsuits have been filed by carmakers in the New York-based Court of International Trade.

About 3,500 US companies, including Tesla Inc TSLA.O, Ford Motor Co F.N, Target Corp TGT.N, Walgreen Co WBA.O, and Home Depot HD.N have sued the Trump administration over the imposition of tariffs on more than $300 billion in Chinese-made goods.(Shepardson, 2020).

The suits, filed in the US Court of International Trade, appointed US Trade Representative Robert Lighthizer and the Customs and Border Protection Agency. They challenged what they called the United States' illegal escalation of its trade war with China by imposing third and fourth rounds of tariffs. A number of companies alleged that the Trump administration failed to impose the tariffs within the 12-month deadline and failed to follow administrative procedures. For instance, auto parts manufacturer Dana Corp. Dan.N. claimed the companies were challenging the government's "unbounded and unlimited trade war impacting billions of dollars in goods imported from the People's Republic of China by importers in the United States." Another lawsuit stated that the government could not extend the tariffs to other Chinese imports for reasons unrelated to the unfair intellectual property policies and practices it initially investigated. Tesla said the levies were “arbitrary, capricious, and an abuse of discretion.”

On Sept. 15, the World Trade Organization found that the United States violated global trade rules by imposing billions of dollars in tariffs in Trump's trade war with China. The Trump administration rebutted that the tariffs on Chinese goods were justified because China stole intellectual property and forced American companies to transfer technology to gain access to the Chinese market.

An escalation of the trade war is not in the best interests of the US, and it is a lose-lose situation. Since tariffs are taxes paid directly by US businesses, broad tariffs are not an effective way to change China's unfair trade practices. However, strengthening IP rights protection is the common goal of China and the United States, and the consensus reached by the two sides in the Agreement protects the interests of both sides and is in line with China's reform direction of strengthening IP rights protection.

China's intellectual property system has been gradually improved and developed, which also reflects the content of intellectual property protection proposed in the Agreement. The implementation of the relevant details will help to strengthen the protection of intellectual property rights, improve the

business environment, expanding market access, and better maintenance of all kinds enterprise in China, including foreign enterprises' legitimate rights and interests, but also to protect Chinese enterprises the lawful rights and interests in economic and trade activities to the US.

Intellectual property is the exclusive legal right of a private intellectual effort under the World Intellectual Property Organization (WIPO) and the US intellectual property law system. In a mature market economy system, the visible hand of the government should not interfere in the affairs of private rights, because it will seriously affect the fairness of the market economy. In accordance with the normal logic of the market economy, people on both sides of the intellectual property disputes between companies should be ruled directly by the judicial system of China and the United States and the intellectual property legal system.

Intellectual property rights disputes between China and the United States government can be solved through the world trade organization. However, the current situation is that the United States does not handle its intellectual property disputes with China under the WTO settlement mechanism. Instead, the United States directly adopts unilateral sanctions and uses domestic legal systems such as Article 301 of the US. Trade Law to handle its intellectual property disputes with the United States. This is because the current US authorities believe that China has not fully complied with and fulfilled its WTO commitments. Therefore, the US side does not believe that under the WTO framework, disputes can be fairly and justly adjudicated according to their will.

III. THE EFFECTS OF INTELLECTUAL PROPERTY DISPUTES BETWEEN US AND CHINA

Trade wars have no winners at all. Neither China wins nor the US wins. As the economy becomes more globalized, history proves that unfair policy and tariffs on foreign countries will let both sides suffer losses. In its long history, the US won negotiations on resolving trade deficits and pushing other countries

to compromise. As a result of the trade war, China was willing to reduce the imbalance to USD 200 billion and liberalize its market for US companies.

The original intention of a trade war is to serve the interests of US companies. From the beginning of the trade war, the United States believed that forcing China to enforce intellectual property protection and creating more chances for American companies. In other words, trade tariff enforcement actions are in efforts to force China to implement more fair laws and procedures for US entities operating within China's borders and to reduce improper actions by China individuals or entities within the US borders. The US believed that the short-term losses would be offset by the longer-term gains.

As a result, strengthening IP protection can smoothly solve the crisis and promote the development of the world economy in a peaceful environment. The agreement helped to ensure fair, adequate, and effective protection and enforcement of intellectual property rights for both counties. China is committed to improving forced technology transfer, intellectual property protection, and currency.

Although the increased tariff and restricted investments in the technology industries will have a negative consequence on China's "Made in China 2025" plan, it can further force China to upgrade its industry, attach importance to and expand domestic demand, further develop independent scientific and technological innovation and enhance independent intellectual property strength.

Enhancing Chinese intellectual property protection is beneficial to China's improvement in enterprise innovation's ability to increase corporate exports. Yin Zhifeng et al. (2013) concluded that enhancing intellectual property protection can elevate the enterprise innovation output of the host country.[43]

[43] Zhifeng, Y., Jingyi, Y., Yanghua, H., Xuezheng, Q. (2013). Intellectual property protection and enterprise innovation: Transmission mechanism and empirical test. The Journal of World Economy, 12, 111–129.

In addition, Li Chuntao et al. (2015) claimed that intellectual property protection can accelerate corporate investments in innovation. US companies will have more intellectual property protection when accessing the Chinese market. [44]

The trade war aims to reduce China's high-tech capacity. The United States is not satisfied with China's requirements for establishing technology transfer joint ventures. However, starting a trade war may not be a viable solution to IP protection. First, consumers and producers in China and the United States decreased. The growth rate of China's GDP next year could drop. The impact on the United States economy is projected to be severe. Second, when Trump was trying to "make America great again," he led the US to a violation of international law and his policy has already been against multilateral agreements. He only considered his national interests, without global interests at all.

For the United States, establishing barriers to trade in intellectual property is indeed a way to protect territory and become a super power of the world. The current global leadership of the United States dictates that they need to exert certain oppression on other countries in certain areas to be the global leadership. However, there are maybe better options to address the White House's concerns regarding intellectual property. Countires, like China should improve their legislative protection and enforcement of intellectual property rights. The US also should consider the intellectual property relationship between the two countries and its negative impact on China-US relations. While erecting IPR trade barriers, trade should be given reasonable consideration to achieve common development and mutual benefit.

[44] Chuntao, L., Peipei, G., Xuan, Z. (2015). Intellectual property protection, source of financing and corporate innovation: Evidence from cross-country micro-data. Economic Review, 1, 77–91.

CONCLUSION

As China intends to make its governance internationally, it causes concerns from other countries. Therefore, that's why the former US President Obama commented "we can rewrite the rules of trade…if we don't… China…will step in to fill that void" (The White House, 2015) in order to explain why the US should participate in the Trans-Pacific Partnership. [45]

The true fact is that becuase China heavily relies on international trade and does business in other countries,China will be more likely to adopt the rule of IP law. China today also accounts for about appormately one-fifth of the world's GDP- $23 trillion (CIA, 2019). Therefore, China should positively participate in the international rule setting. China's efforts in following intellectual property law not only will boost the US economy but it will also be good for China. There will be more investment in China if there is better intellectual property protection. China ought to use laws as a tool to fight against challengers and respond to the blame from the US. As President Xi noted, the Chinese Communist Party must strengthen its leadership over the law. He mentioned that it will never follow the road leading to judiciary independence "We want to be the participant, initiator, and leader of global governance reform and development" (Mai, 2019). [46]

[45] The White House. 2015. Writing the rules to support American jobs. *The White House*. Accessed July 12, 2019, from https://obamawhitehouse.archives.gov/issues/economy/trade.

[46] Mai, Y. 2019. Xi Jinping: Never take the road of independent legal system, be a leader of international rules, *CFI, Feb 17.* Accessed February 28, 2019, from http://cn.rfi.fr/中国/20190217-习近平决不走司法独立的路-要当国际规则引领者.

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Daibik Chakraborty

Increasing Social Media Accountability to Uphold Free Speech Principles

Abstract. Holding social media accountable for their actions is often an ignored idea in the legal realm. The presence of Section 230 has made digital communication platforms nearly invincible to legal ramifications, rather lack thereof. The struggle to ensure the platform users are allowed to speak their minds freely, reasonably based on protected speech statutes, is facing a populist outcry as many find themselves punished by corporations for expressing their contrarian viewpoints. This article will investigate the importance of social media in a democracy and its implications for communication in an increasingly digitized age. Analysis will center around whether or not social media companies should be considered public goods, and if not, how free market principles can be utilized to keep social media companies in check. Monopolies are dangerous to a free market system, and as many social media companies operate with broad authority in controlling various channels of communication, antitrust enforcement through statutes under laws such as the Sherman Antitrust Act of 1890 will be crucial to keep large digital powers in check.

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INTRODUCTION

Over the course of the last decade, social media platforms have undergone a transformation from being mere personal blogs where pictures of picnics are shared to professional outlets where important information regarding current affairs is transmitted. As platforms such as Facebook and Twitter have amassed monopolistic power to the point where a single message has the power to instigate hundreds of thousands, if not millions, of people, the phrasing and word choice of certain media posts have come under intense scrutiny. Public pressure along with plenary discretion of social media company boards have led to the removal of voice and opinions of people expressing their right to the First Amendment[47].

The First Amendment finds itself in an awkward position in this context. On one hand, every person has the inalienable right to express their grievances about the status of current events, and do so in any manner as long as it is done peaceably. On the other hand, the very social media platforms which grant easy access for the layman to express themself is not a legislative, executive, or judicial body. The concepts of shadow-banning, account suspension or total deplatformation have left many unsuspecting social media users feeling disenfranchised. Social media company representatives routinely state that their intent in silencing or banning accounts lies in ensuring that harmful and deceptive statements do not gain traction. But the question not only lies whether or not suspending the right to use social media violates First Amendment privileges, but also if the monopolistic powers of social media companies have left them unchecked in their decisions to inequitably determine the harmful scope of speech[48].

I assert that the First Amendment principles must apply to social media companies, given their massive importance in today's political culture, and that antitrust laws need to be enforced in order to ensure a competitive social media market that will lead to a more equitable access to media presence. In

[47] Illing, Sean. "The First Amendment Has a Facebook Problem." *Vox*, Vox, 20 Apr. 2021, www.vox.com/policy-and-politics/22356339/free-speech-facebook-twitter-big-tech-first-amendment.
[48] Rodriguez, Salvador. "Facebook Is a Social Network Monopoly That Buys, Copies or Kills Competitors, Antitrust Committee Finds." *CNBC*, CNBC, 7 Oct. 2020, www.cnbc.com/2020/10/06/house-antitrust-committee-facebook-monopoly-buys-kills-competitors.html.

Part I, I will broadly examine the shifting role of social media and how it plays into an increasingly politically involved society. This part will also explain the important statutes of the First Amendment and applicable antitrust laws. In Part II, I will examine major cases that have established precedents of free speech and antitrust liabilities that have been applied to communication platforms, or lack thereof. Lastly, in Part III, I will offer my counsel on how certain laws or regulations should apply to social media companies to ensure platforms do not abuse their discretion in interpreting harmful speech. I maintain that social media companies should respect diverse views of expression and be kept in check by free market forces for the decisions they make in determining when to punish users for their content.

I. SOCIAL MEDIA'S ROLE IN FREE SPEECH AND ITS CHECKS AND BALANCES

A. UNDERSTANDING PROTECTED AND UNPROTECTED SPEECH

The protections granted under each amendment were drafted with the intent to restrict the government's power over its citizens. However, through various court proceedings, the protections granted under various amendments have been declared to not be absolute. The First Amendment falls under this category. While the First Amendment has various clauses regarding the people's right to express themselves, the clause that will be exclusively analyzed today is the free speech clause, or "Congress shall make no law...abridging the freedom of speech[49]." Over time, however, legal precedents of free speech have evolved to account for protected and unprotected speech[50]. A difficult issue that social media executives have to face is whether or not speech on their platform is harmful in any manner, whether it be through the nature of falsehoods or malicious intent.

[49]U.S. Const. amend I

[50] "Protected Speech and Unprotected Speech – What Are My Rights?" *Civil Rights Litigation Group*, 20 Mar. 2020, www.rightslitigation.com/2016/11/26/protected-speech-and-unprotected-speech-rights/.

Island Trees Union Free School District v Pico by Pico helped set a reasonable precedent on false speech that is protected under first amendment rights. While the case applied to controversial school library books, the case exemplified that only because the host or platform where media is dispersed disagrees with a content does not allow for it to remove the content. As stated by Justice Brennan, books cannot be removed to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." What many describe as hate or false speech may not necessarily be opined as the same by others. Discretionary act of removing speech due to a difference in agreement cannot constitute justified removal of said speech[51].

However, court cases such as *Schenck v United States* are routinely cited as examples of speech that cannot be allowed in the public sphere. This mainly refers to speech that can invoke “imminent lawless action” such as immediate acts of sedition or political or economic violence. During times of war or political unrest, inflammatory speeches are very commonplace. Anything medium of speech that can incite violence is justified, under court precedent, to be banned[52].

The discretionary rules of prohibited speech instituted by social media platforms often come in conflict with court precedents. While social media is not a branch of the government, the increasing importance of transmitting vital information across unfiltered channels is slowly becoming a foundation for the survival and continuity of democracy. This role will be explored later in this section.

B. ANTITRUST PRINCIPLES APPLICABLE TO SOCIAL MEDIA COMPANIES

The four most actively used social media platforms as of January 2021 are 1). Facebook 2). YouTube 3). WhatsApp 4). Instagram. Three of the listed platforms are operated under a parent company,

[51] “Island Trees School District v. Pico (1982).” *Bill of Rights Institute*, billofrightsinstitute.org/e-lessons/island-trees-school-district-v-pico-1982.
[52] Asp, David. *Schenck v. United States*, www.mtsu.edu/first-amendment/article/193/schenck-v-united-states.

one of them being Facebook. The free market entrusts private interests to govern themselves and operate under a competitive nature that promotes advanced and equitable consumerism. However, a free market left completely unregulated can become abusive and large interests can easily overshadow smaller ones, creating what we know as monopolies. This issue exists in the media sphere, as social media industry titans remove potential competition in the marketplace by merging and acquiring startups. Without competition, media platforms are often left unchecked in their decisions to punish users and leave suspending users with very little alternative platforms to seek out.

The Sherman Antitrust Act of 1890 is a landmark law passed by the US Congress to prevent the formation of large, economically abusive conglomerates and consequently prevent unjust pricing in any given market. The Sherman Antitrust Act is organized into three sections: section 1 of the act bans activities that promote anticompetitiveness, section 2 defines anticompetitive results, section 3 extends the law to apply to D.C. and US territories. Collaboration to reduce trade, fix prices, or split markets are outlawed by the Sherman Antitrust Act. The law intends to create an atmosphere of competition and more importantly, regulate interstate commerce. Interstate commerce is considered the transmissions of goods and services across state boundaries. Social media services are available in all 50 states, D.C., and US territories. Therefore, its services can be classified as interstate commerce, and furthermore, liable to follow antitrust laws.[53]

The Federal Trade Commission (FTC) has taken Facebook to court - in the ongoing class action case *Federal Trade Commission v. Facebook* - to prevent its horizontal integration in the social media market. The FTC alleges that Facebook's years-long predatory behavior of purchasing competitors such as Instagram and Whatsapp have led to anticompetitiveness between different social media platforms[54]. The end result of this case would seek to split Facebook apart from its subsidiaries in order for social

[53] 15 U.S.C. §§ 1-38
[54] "FTC Sues Facebook for Illegal Monopolization." *Federal Trade Commission*, 18 Mar. 2021, www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

media users to gain from what potential competition could offer, a factor the FTC alleges that consumers cannot experience currently. Antitrust lawsuits such as these help to expose corrupt business practices that potentially prohibit Americans from exercising their freedom to express themselves.

C. EVOLVING ROLE OF SOCIAL MEDIA AND WHY IT IS IMPORTANT

The timeframe in which social media has gone from a platform to catch up with friends to crucial outlets where paramount information is presented to be consumed. In the span of two decades, the existence of social media has changed the dynamics by which people inform themselves to make important decisions that impact broader society.

Early platforms such as Prodigy and MySpace were developed for the clear intent to connect individuals in the new established internet landscape. Users could use these websites free of cost to digitally communicate with their peers or establish connections. In the early 2000s, the competition between platforms was clearly present. Friendster and MySpace were released for public use just one year apart, and were known for being rivals in the media landscape. Both were overshadowed by Facebook, first released in 2004, a platform created to engage college students and eventually any user that wanted to join. Twitter, YouTube, and Tumblr also became staples of the 2000s social media flurry aimed to share content and promote connections between family and friends[55].

Social media democratized communication. Users did not have to pay fees or monthly bills to send messages or communicate in voice chats. Such democratization bolstered media populism, as consumers began taking control as content creators to express their worldviews. The early 2010s began seeing a massive shift in the role of social media in becoming a tool essential to engaging citizenry in current affairs. The Arab Spring was born on Facebook as Egyptians coalesced to overthrow President

[55] "The Evolution of Social Media: How Did It Begin and Where Could It Go Next?" *Maryville Online*, 3 Mar. 2021, online.maryville.edu/blog/evolution-social-media/.

Mubarak. This event became a landmark example of how digital platforms can be optimally used to drive change[56].

Since then, grassroots campaigns for social causes have found their start in social media. Geopolitical events such as election campaigns, referendums, conflicts and social movements are bolstered by the commenting, liking, and sharing of social media posts. Democracy's reliance on the transmission of information has expanded to such a high degree that the debate of considering social media as a public utility is heavily promoted. Benjamin Barber of *The Nation* states that "For new media to be potential equalizers, they must be treated as public utilities, recognizing that spectrum abundance (the excuse for privatization) does not prevent monopoly ownership of hardware and software platforms and hence cannot guarantee equal civic, educational and cultural access to citizens."[57] Civic participation and democratic foundations are now deeply rooted in the access to use social media.

Considering social media as a public utility would make it more liable to First Amendment principles. In addition, doing so would make access to social media a right, not a privilege. Media platforms do not fall liable to checks and balances for their decisions to suspend or remove content and users. This principle ignores the effect digital media has in propagating information to the masses. A system of balances needs to be instituted to match the power social media has in shaping social causes and fomenting civic processes.

II. ANTITRUST AND FREE SPEECH LIABILITIES OF COMMUNICATION PLATFORMS

[56] Samur, Alexandra. "The History of Social Media: 29+ Key Moments." *Social Media Marketing & Management Dashboard*, 27 Nov. 2018, blog.hootsuite.com/history-social-media/.
[57] Barber, Benjamin R. "Calling All Liberals: It's Time to Fight." *The Nation*, 29 June 2015, www.thenation.com/article/archive/calling-all-liberals-its-time-fight/.

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A. SOCIAL MEDIA AND FIRST AMENDMENT INFRINGEMENTS

Under US common law, can social media companies be held responsible for infringing on freedom of speech by banning members from using their platforms due to arbitrary causes or disagreement with content?

In the status quo, the United States common law dictates that private platforms cannot be held responsible for censorship of speech or the banning of certain individuals because private companies are not associated with the government through any means. This precedent has been fomented by the landmark supreme court case *Manhattan Community Access Corp. v. Halleck*. Lower court proceedings were contentious has the United States District Court for the Southern District of New York dismissed the case stating that even though the Manhattan Community Access Corporation (MCAC) banned Halleck and Melendez from using their platform due to internal disagreements, this did not constitute a violation of freedom of speech as the platform was not a state actor[58]. This decision was appealed to the Second Circuit, which determined that MCAC's public access channel that was required by the state government of New York constituted the platform as a state actor, thereby making it liable to constitutional infringement. The decision was appealed to the Supreme Court, which held in a 5-4 decision that private corporations are immune from obligations to the constitution regarding First Amendment principles. The majority opinion stated that just because a platform to transmit speech exists does not necessarily make it an extension of the state. The legal precedent set by this case has been cited in cases that have come after it, such as *PragerU v. Youtube*, in which the plaintiff argued that YouTube's unchecked discretion in censoring selected content violated their right to express themselves. The case was dismissed, as once again, the actions of a private interest were being disputed, not a branch of state government.[59]

[58]See Manhattan Cmty. Access Corp. v. Halleck - 139 S. Ct. 1921 (2019)
[59] See Prager University v. YouTube, LLC, No. 18-15712 (9th Cir. Feb. 26, 2020)

As in the case *Manhattan Community Access Corp. v. Halleck*, media conglomerates such as Facebook or Twitter are immune to legal repercussions of censorship and deplatformation. Section 230 of the Communications Decency Act of 1996 shields media platforms in the decisions they make regarding what content is transmitted on their platforms. Unless the state invests in a controlling interest in any given platform, said platform cannot be adjudicated the same as a government office or branch would. Based on these paradigms, users that choose to participate on social media platforms via their own discretion are subject to the platform's term of use policies. The social media platform holds the right to censor or remove users as they see fit. Most common causes of censorship or removal are derived from the company's own determination and opinion of unprotected speech. Such forms of speech often include, but are not limited to, prejudice based on identity groups, call to violence, or ties to dangerous extremist groups.

Therefore, any individual member, group, or organization that chooses to bring a First Amendment violation suit against a social media platform to civil court will most likely be ruled against, unless they can prove that the state has invested interest into the company. Plaintiffs that bring such launch lawsuits for this cause must understand the immunity social media has under Section 230 which allows for subjective determinations on violations of terms of service agreements.

B. ANTITRUST PRECEDENT FOR ABUSIVE SOCIAL MEDIA MONOPOLIES

Under US common law, are social media companies such as Facebook violating antitrust laws by choosing what users are allowed to publish on their platforms and prohibiting other users from gaining access? US common law dictates that a publisher of media cannot arbitrarily restrict membership to a platform to applicants who are viewed as competition or do not abide by the publisher's view on certain subject matters. This precedent was established in *Associated Press v. United States*[60] in which the

[60]See Associated Press v. United States, 326 U.S. 1 (1945)

Supreme Court of the United States upheld a lawsuit filed against the Associated Press that the organization engaged in a discriminatory practice of determining which members could join and publish on their platform. The court stated that given the nature of transmission of information, which can be classified as interstate commerce since the Associated Press has a nation-wide presence, prohibiting members from engaging in the platform violated antitrust laws and First Amendment principles. The case determined that a media conglomerate has too much power in determining what members can join and what members are not allowed to.

A similar situation is present in today's social media market with conglomerates such as Facebook. Facebook's abusive power in acquiring social media companies leaves the market with very few alternatives. Not only can Facebook censor speech or ban membership on its own platform, it can also do so on its subsidiaries' platforms too. Just as in *Associated Press v. United States* where potential members were discriminated against joining, Facebook has broad authority to dismiss membership with very little retribution. In the ongoing case *Federal Trade Commission v. Facebook*[61], the FTC must prove that in an alternate reality, without Facebook's competition fixing, access to social media regardless of one's viewpoint or social identity would be easier due to the existence of competition. *Associated Press v. United States* played along parallel lines as the AP was noted to have stifled competition by absorbing publishing organizations and rejecting membership applications for publishers not on their target list. Both the Associated Press and Facebook have been noted to fix the competition landscape, and as a result, stifle First Amendment privileges.

Given Facebook's current predicament in court with anticompetitive precedents to point to such as the aforementioned case, the District Court of the District of Columbia will most likely agree that Facebook, and other social media platforms like it, are complicit in tearing the fabric of the First

[61] Kendall, Brent, and John D. McKinnon. "Facebook Hit With Antitrust Lawsuits by FTC, State Attorneys General." *The Wall Street Journal*, Dow Jones & Company, 10 Dec. 2020, www.wsj.com/articles/facebook-hit-with-antitrust-lawsuit-by-federal-trade-commission-state-attorneys-general-11607543139.

Amendment. Previous precedent creates a difficult defense case for Facebook to prove that their actions do not violate antitrust or free speech principles.

III. POTENTIAL RAMIFICATIONS FOR FREE SPEECH IMBALANCE ON SOCIAL MEDIA PLATFORMS

Civil suits in the likes of *Associated Press v. United States* and *Federal Trade Commission v. Facebook* are brought about in the cloud of concern that social media companies have too much broad authority, thereby rendering them as monopolies in a market that is supposed to be free and competitive. There has always existed a struggle between free market consumers and users of social media and companies to find a just balance between protected and unprotected speech, and the exercise of monopolistic authority has continuously led to censorship of speech that is naturally granted by the First Amendment. Dissent and contrarian viewpoints are healthy, but often dismissed and outright expurgated. The challenge this poses to the democracy of the United States is immense, as the nation's core values reside in rigorous debate and opposition to the status quo. Accountability will be the cornerstone of free speech in an increasingly digitized age, therefore it is imperative to find solutions that meet the constitutional challenges of our time.

A. DECLARING SOCIAL MEDIA AS FIRST AMENDMENT ACTORS

Social media has become a hub for chatter in domestic and international affairs. It is very reasonable to state that a democracy as large as what the United States has become would be highly inefficient without the ability to communicate freely on a digital platform. Social media is an indispensable part of the civic process. From a legal standpoint, there is an argument to be made that

social media companies must adhere to First Amendment principles due to their obvious necessity for civic participation.

However, there are multiple barriers that stand between considering and enforcing First Amendment statutes to companies such as Facebook. The "Good Samaritan" statute of Section 230(c)(2) states that social media platforms that utilize computer services are immune from: "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[62] While Section 230 protects social media from the various content posted by third-party users, social media should not be immune to violating core rights that all Americans are entitled to. This precedent enables civil suits such as *Manhattan Community Access Corp. v. Halleck* to foment in the legal system that social media companies are above and beyond what is morally permissible. Contrary to the doctrine that was pushed in favor of the media corporation MCAC, simply because an institution is private should not make it immune to the repercussions of denying the right to free speech.

The decision made on what type of speech should be considered acceptable and unacceptable has been historically consistent in protected versus unprotected court cases. The Schenck and Brandenburg doctrine from *Schenck v. United States* and *Brandenburg v. Ohio*, respectively, have been used for decades to describe unacceptable speech to be such that causes imminent danger[63]. The legal system has not made any other form of speech unlawful, in fact, *Island Trees Union Free School District v Pico by Pico* is routinely cited to drive the fact that political or philosophical disagreement should not be a valid reason to remove mediums of speech.

Laws in the United States code make it very difficult to hold social media companies accountable for their censorship actions, however, it may be time to revisit them as America's evolving democracy

[62] 47 U.S.C. § 230, a Provision of the Communication Decency Act
[63] Vile, John R. *Incitement to Imminent Lawless Action*, mtsu.edu/first-amendment/article/970/incitement-to-imminent-lawless-action.

hinges on access to digital communication. The case for social media to be considered a public good must be made to protect dissent and civil discourse in a country whose government is run by the people.

B. ANTITRUST ENFORCEMENT

Antitrust enforcement for social media companies is a more than viable option to pursue the cause of increased accessibility to social media and promote free speech on all platforms. Free market competition is missing in digital media. Facebook has constantly engaged in horizontal integration by absorbing companies it deems to be a potential competitor that can replace its digital product offerings[64].

Allowing this to continue will ensure Facebook's, Google's, and Twitter's monopoly on access to and communication on digital mediums. However, we can look to cases such as the Bell Systems breakup in *United States v. AT&T*[65] to guide the path of breaking up current social media monopolies. In the 1970s, the US government had determined that AT&T had violated the Sherman Antitrust Act by hindering competition in communication services and supply of telephones and computers.Through a consent decree established in 1956, administered in the United States District Court for the District of New Jersey, and AT&T knowing that they would lose their antitrust case, AT&T proposed its divestiture and breakup into seven different entities. It also had a hold on local communication operating companies, however, the company agreed to allow the local companies to operate as their own entities to increase competition of communication and supply operations.

A similar principle can most definitely be applied to entities such as Facebook that consume competition in an effort to hinder the check and balance efforts of the free market. Users of products in a free market system are entitled to the best of services, but such is not possible when a monopoly exists.

[64] Kang, Cecilia, and Mike Isaac. "U.S. and States Say Facebook Illegally Crushed Competition." *The New York Times*, The New York Times, 9 Dec. 2020, www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html.
[65] United States v. AT&T, Inc., No. 18-5214 (D.C. Cir. 2019)

Free speech is a hallmark of communication in the United States, and should be rigorously applied to any medium of communication that exists. Even though legal barriers exist that make it difficult to declare social media entities as public goods, the break up of these monopolies can create competition that the system is lacking[66].

Different policies on permissible speech on different platforms will ensure that the more just and fair platform survives the rigor of the free market system. Social media behemoths such as Facebook and Twitter must be held accountable by the free market and divest from their subsidiaries to allow the public the chance to decide what product is the best. As the American public naturally gravitates towards the freedom to communicate, antitrust enforcement will set the path for a diverse number of social media platforms to take the stage in being crucial instruments that hold strong to the principles of American democracy.

CONCLUSION

Lack of accountability in digital communication has allowed social media monopolies to control a vast number of channels of speech. This unparalleled power has led to the hindrance of First Amendment rights, as social media company boards often use subjective methods to determine acceptable speech. Any dissent from these subjective viewpoints often leads to censorship or total deplatformation, and with a lack of competition, those affected are left with very little options to resort to. Given social media's evolving and growing role in engaging civic participation in American democracy, social media companies need to uphold the principles upon which the country was founded. While digital communication platforms should be considered public goods given their indispensable role in our society,

[66] "FTC Sues Facebook for Illegal Monopolization." *Federal Trade Commission*, 18 Mar. 2021, www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

the path of least resistance entails breaking up social media monopolies and allowing the free market to set the free speech precedents that best serves the interests of the American public.

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Microsoft Acquires Nuance Communications

ABSTRACT In recent news, Microsoft Inc. has purchased Nuance Communications for just under $20 billion. Possessing one of the most notable acquisition histories amongst technology companies, Microsoft is seeking to explore the healthcare industry with the help of Nuance's software that will aid healthcare professionals in the process of documenting patient data. Similar to other successful transactions, Microsoft has entered a new field by purchasing a very prominent corporation that is aiming to evolve the medical field as a whole. If this technology truly does revolutionize healthcare, it could propel Microsoft as a leader in yet another field. Ultimately, the near future, depending on the validity of Nuance’s technology and the willingness of Microsoft to remain devoted to it, will determine the true success of the recent acquisition.

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INTRODUCTION

Based in Burlington, Massachusetts, Nuance Communications is a corporation that primarily deals with both artificial intelligence and speech recognition software. After forming in 1992, the company eventually went public in the year 2000 which serves as the beginning of its purchasing frenzy in the field of speech recognition. Five years later, in 2005, Nuance Communications merged with another company, ScanSoft, and began establishing itself as a global leader in both the fields of speech recognition and artificial intelligence.

As they rose to the top, the company gained a substantial number of notable clients in the healthcare industry bolstering their portfolio with names like AthenaHealth and Johns Hopkins. Apart from this, the company proved to be highly successful in building a client list that spans over a wide variety of industries with connections to artificial intelligence. However, with the healthcare industry being a destination for recent AI and speech recognition systems, companies with a presence in the field have been a recent target for tech giants especially during the past year with the existence of Covid-19. Nuance Communications, one of these companies with a large presence ultimately attracted the attention of Microsoft which announced in early April of 2021 that it will buy Nuance for around $20 billion.[67]

In order to better understand recent corporate phenomena like the purchasing of Nuance Communications, it is key to address the purpose, legality, and importance of both mergers and acquisitions. Defined by USLegal as the various activities surrounding the buying and selling of companies, it is important to distinguish a merger from an acquisition.[68] While a merger is the process of multiple companies becoming one, an acquisition takes place when one company acquires another. One notable difference between these two corporate processes is that mergers often take place between

[67] Miller, Ron. "Microsoft is Acquiring Nuance Communications for $19.7 Billion." 12 April 2021, *Tech Crunch,* techcrunch.com/2021/04/12/microsoft-is-acquiring-nuance-communications-for-19-7b/.
[68] "Mergers and Acquisitions Law and Legal Definition." *USLegal.com.* definitions.uslegal.com/m/mergers-and-acquisitions/.

companies of similar size whereas an acquisition primarily includes a larger company purchasing a smaller one. Amongst many others, some reasons for companies to either merge or acquire one another include the seeking of mutual benefits as well as hope for expanding corporate horizons. In order to ensure that these transactions take place in an efficient and law-abiding manner, company's attorneys facilitate, negotiate, and aid their clients in the processes of both mergers and acquisitions. In the case of Microsoft acquiring Nuance Communications, the purchase allows for Microsoft to further broaden its horizons by exploring the potential of dominating the healthcare industry that was once entirely foreign to them.

I. MICROSOFT'S ACQUISITION HISTORY

In an effort to better understand Microsoft's current strategy and rationale, one would need to examine the company's aggressive acquisition history as well as the impacts of each event. Nearly three and a half decades ago, Microsoft made its first notable acquisition in July of 1987 by purchasing Forethought Inc. for $14 million.[69] Primarily known for creating the PowerPoint software, Forethought Inc. gave Microsoft a significant purchase in the software industry while also providing them with both a platform and foothold in Silicon Valley by being based in Sunnyvale, California.

Following various acquisitions and maintaining a stature as one of the world's most powerful companies, Microsoft further reinforced its position under new leadership in the second decade of the 21st century. In 2014, after succeeding Steve Ballmer, Satya Nadella became the CEO of Microsoft and currently remains in the position while faithfully executing his duties. Under Nadella, in 2016, the company made its most expensive acquisition ever by purchasing LinkedIn for $26 billion. While it may seem odd for a company primarily dealing in technology to involve itself in the business of social

[69] "COMPANY NEWS; Microsoft Buys Software Unit." 31 July 1987, *The New York Times,* www.nytimes.com/1987/07/31/business/company-news-microsoft-buys-software-unit.html.

networking, the LinkedIn purchase allowed Microsoft to access and eventually mobilize LinkedIn's hundreds of millions of users as customers of Microsoft products.[70]

In comparison, despite being significantly cheaper, the acquisition of Nuance Communications is now the second most expensive Microsoft acquisition following that of LinkedIn. This further emphasizes the importance and magnitude of the recent transaction as well as the impacts it may have. Interestingly, the current two most expensive acquisitions in Microsoft history have been companies in entirely different fields than what Microsoft is accustomed to. However, this is what makes them so unique and ultimately highly profitable. By purchasing companies in different fields, Microsoft is essentially able to expand the sales of Microsoft products.

During the time Satya Nadella has headed Microsoft, the company has sought to increase its presence in various other fields like gaming and now healthcare. By having a presence in the healthcare industry, an abundance of opportunities may arise for the global powerhouse. Ultimately, Microsoft may have the chance to foster an entire revolution in the healthcare industry as a whole. By implementing Nuance's highly advanced technology, it is said that healthcare professionals will be able to use artificial intelligence and voice recognition as a way to document patient data more efficiently and in a less time-consuming manner. Now owning the material that Nuance has created, Microsoft is able to make its mark on the healthcare industry by providing some of the most advanced technology to enter the field.

II. OTHER IMPORTANT CORPORATE ACQUISITIONS

Although it is crucial to understand the history of notable transactions Microsoft has been involved in, it is also important to recognize other examples of both successful and failed acquisitions that

[70] "Microsoft Buys LinkedIn." *Microsoft,* news.microsoft.com/announcement/microsoft-buys-linkedin/.

have or could have had an impact on global business. By doing such, it is easier to understand what makes an acquisition successful and how they can impact businesses worldwide.

In late 2019, Google announced that it would be purchasing Fitbit, but the deal only closed in January of 2021. Purchasing the health tracking company for $2.1 billion, Google intends on further expanding both itself and Fitbit as a way to maximize reach and eventually profits.[71] In a very similar manner to the acquisition of Nuance Communications by Microsoft, this deal revolves around one of the world's leading tech giants acquiring a smaller company in an entirely different field which implements technology. While Nuance Communications primarily dealt with the development and distribution of software for the healthcare industry, Fitbit had little relation to healthcare but revolves heavily around fitness. One may wonder why the world's leading tech giants are delegating their efforts towards the purchasing of companies focusing on healthcare and fitness, but the reality is that every industry is depending on technology more and more, so the companies leading the surge are getting targeted by the giants as a way to enter, dominate, and profit in new fields of business.

On the other hand, there have also been deals that were intended to be extremely successful but eventually ended miserably and without acquisition. One such transaction was the purchasing of Nokia by Microsoft in 2013. Intending on purchasing Nokia for $7 billion, it is crucial to use this example as one to compare to Nuance, since they both involve Microsoft. In other words, it is more valid to compare the differences between success and failure since the acquiring company in both cases is Microsoft.[72] Essentially, under former chief executive officer Steve Ballmer, Microsoft sought to use Nokia as a way to enter the phone business. However, after the realization that entering such a business would not be a successful endeavor, Microsoft gave up on Nokia and lost around $8 billion in the process.[73]

[71] Landi, Heather. "Google Closes $2.1B Acquisition of Fitbit as Justice Department Probe Continues." 14 January 2021, *Fierce Healthcare,* www.fiercehealthcare.com/tech/google-closes-2-1b-acquisition-fitbit-as-justice-department-probe-continues.
[72] Patel, Kison. "The 8 Biggest M&A Failures of All Time." *DealRoom,* dealroom.net/blog/biggest-mergers-and-acquisitions-failures.
[73] Warren, Tom. "Microsoft wasted at least $8 billion on its failed Nokia experiment." 25 May 2016, *The Verge,* www.theverge.com/2016/5/25/11766540/microsoft-nokia-acquisition-costs/.

Under new control in 2014, new CEO Satya Nadella decided to avoid the creation of phones and instead directed the company's acquisition attention to other fields such as gaming and healthcare as previously mentioned. From his successes, it seems to be that the key to a successful acquisition derives from both the goals of the parent company as well as the field that they are attempting to enter and the manner in which they do so. In the case of Microsoft, it seemed to be to broaden their horizons and enter new industries. Under Steve Ballmer, one of their goals was to make phones which is why the Nokia acquisition resulted in the loss of money. On the other hand, under Satya Nadella, the company deviated from phones and entered gaming and healthcare. By purchasing Nuance, what seems to be a successful acquisition based on the goals of Microsoft, the company is taking control of a company that is making breakthroughs rather than one that is declining the way Nokia was. Despite such assumptions, the success of the Nuance deal will be validated in a few years' time once it can be determined whether Microsoft was able to break through into the healthcare industry or if they are forced to scrap the project the way they did Nokia.

III. SIGNIFICANCE OF NUANCE ACQUISITION

Despite not knowing whether or not the Nuance acquisition will prove to be successful, it can currently be seen as an extremely beneficial asset of Microsoft. By using Nuance as the gateway to a new field as predominant as healthcare, especially during Covid-19, there is a tremendous upside to the deal. In regards to acquisitions as a whole, it seems that entering a field is both an extremely risky yet rewarding endeavor. Essentially, it seems that deciding to embark on such an adventure solely depends on the willingness and worth of the party taking the leap. A company such as Microsoft with a wide reach, hefty goals, and a nearly endless flow of income, it is entirely understandable to risk acquiring a new

company as a way to dominate yet another field. Through such aggressive acquisitions, Microsoft can eventually lead several fields the way they serve as one of the world's "tech giants."

Both mergers and acquisitions seem to allow the various companies in different industries of the business world to intermingle with one another. In doing so, it fosters deep-rooted connection and is what allows one group to seek superiority and dominance in relation to their competition. Similar to how Google is seeking to join the fitness industry by purchasing Fitbit before Microsoft purchased Nuance, competing companies in one field are seeking to gain footholds in other similar industries. However, now that every industry requires technology, the companies with such tech capabilities can own substantially more than assets in the fields of entertainment or software development.

In regards to why there are many more acquisitions than mergers from the larger companies like Microsoft, it is due to the sizes of the company itself and the companies they are contemplating joining forces with. As previously mentioned, companies tend to only merge when they are of similar size, and most of the companies equal in size to Microsoft Inc. are its own competition. In other words, it can almost be compared to some sort of ultimate power grab in which competitors seek dominance by purchasing smaller companies and reinforcing their corporate arsenal.

CONCLUSION

Ultimately, through the acquisition of Nuance Communications, Microsoft has placed itself in a prime position to further broaden its own horizons by exploring and potentially dominating the healthcare industry that was once entirely foreign to them. For years to come, the Nuance acquisition could be considered a historic moment in corporate history in which one of the world's most successful companies gained its foothold in an entirely foreign industry, healthcare, during the Covid-19 pandemic in which it was one of the most profitable fields. With Nuance's advances in the field, this moment may also serve as one that revolutionized healthcare as a whole. Impacting the corporate world as a whole, this notion may

serve as a successful example for others seeking to broaden their own horizons by either merging with or acquiring a company dealing in an alternative industry. On the other hand, if the Nuance acquisition were to backfire in some way for Microsoft either in terms of generating profit or intervening in a foreign field, this purchase will serve as a warning to others in the future to carefully consider deviating from their respective industries. Regardless, due to both its potential to entirely alter the corporate world and healthcare industry while also possessing one of the most expensive price tags, the purchasing of Nuance Communications by Microsoft Inc. will be remembered for years to come.

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Xochitl Buenabad

On A Return to the Brandeis Standard of Antitrust Law

Abstract. This article aims to analyze the issue in a return to the Brandeis Standard of antitrust law. It will explore the fundamentals of both the current standard, known as the Consumer Welfare Standard, and the previous standard, Brandeis Standard. I will draw a real-life connection through the analysis and breakdown of some of the most famous antitrust law cases of the past twenty years. The article will explore the rationale behind the rulings and the ways such rationale has shaped a modern-day understanding of antitrust law. Specifically, this article will explain why a potential return to the Brandeis Standard of antitrust law is not just unwarranted, but unnecessary as stricter antitrust laws will only lead to an anti-competitive market.

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INTRODUCTION

The controversy surrounding some of the world's most influential companies can be traced to one source, antitrust law. This article aims to explore the court cases that have shaped antitrust law into what we know it today and formulate an answer to a question being debated center stage in the past twenty years. What should be done to regulate big businesses? The controversy has found itself to be especially pernicious in the ongoing big tech debate, a fight about whether big tech will only lead to monopoly, and if anything should be done about it. Two general legal principles are governing our current understanding of antitrust laws, and comprehending exactly what they do is key to understanding the matter at hand. There are standards for evaluating antitrust law that have evolved as a result of litigious courtroom sagas and serves as the framework for a court evaluation. The current standard for evaluating antitrust laws is commonly referred to as the Consumer Welfare standard, a standard that makes legal decisions based on the harm done to consumers and not to compete. The second legal principle is the Brandeis Standard, a standard that equates "bigness', per se, as being inherently bad for the economy overall. However there are issues to both standards, for instance, the Antitrust Law Consumer Welfare Standard can be ineffective in stopping monopolies and oligopolies because of its limited scope. Critics are pointing out that big tech companies have a huge portion of the market captivated, and therefore, a bigger slice of the market. They argue that this effect leads to bigger economic power in comparison to other smaller companies and may lead to oligopolies and monopolies. The concerns over the role have created a new movement to push for a reversal to the Brandeis Standard of antitrust law, placing huge limits and stopgaps in corporations from growing in size. However, there is a strong voice from both economists and legal scholars alike that a return to the Brandeis standard would discourage company growth and innovation. The legal question at hand is centered around whether or not the judicial system should revert to the Brandeis standard of antitrust legislation, effectively divesting from the consumer welfare standard. In this article, I aim to explain the increasing debate over tech antitrust lawsuits, the reasoning behind

such lawsuits, and why proposals to reverse the current antitrust standard to the Brandeis standard would lead to the discouragement of company growth. I will do this through the analysis of antitrust cases that have been evaluated through the use of the Brandeis standard and the current consumer welfare standard. This essay will draw a modern connection through the big tech antitrust controversy of the last decade and some of the most influential cases in the history of antitrust enforcement.

I. A BRIEF HISTORY OF ANTITRUST LAW AND THE BIG TECH CONTROVERSY

The rise of Big Tech has been widely regarded as nothing short of "revolutionary." In a little over 50 years technology has evolved at such a rapid rate that many are left questioning if society has evolved too much. With multiple multimedia interfaces and inventions at the fingertips of so many consumers, there is no shortage of praise for some of the technology mega-mavericks. Yet, in a time and age of mass media consumption and technology ubiquity legal scholars are starting to raise some concerns about just how stringent antitrust legislation applies to big tech. Seven of the ten "largest companies globally are technology giants, and in many jurisdictions, scholars, lawmakers, and the public at large have articulated concerns that Big Tech has become too big."[74] As a result, there has been an increasing call by critics for a return to stricter antitrust enforcement, particularly, the Brandeis Standard of antitrust enforcement. However, these new policy proposals ``challenge long-standing assumptions in antitrust and competition law"[75] and are believed to threaten existing business mode. The main regulatory body for any and all antitrust law issues is the FTC, otherwise known as the Federal Trade Commission. The commission is one of the most well known entities within government as of late. The FTC has made it clear that its honest mission is "to enforce the rules of the competitive marketplace[76]" and furthermore, to enforce

[74] "Big Tech & Antitrust." *Yale Law School*, https://law.yale.edu/isp/events/big-tech-antitrust
[75] "Big Tech & Antitrust." *Yale Law School*, https://law.yale.edu/isp/events/big-tech-antitrust
[76] "Guide to Antitrust Laws." *Federal Trade Commission*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws

antitrust laws that "promote vigorous competition and protect consumers from anti-competitive mergers and business practices."[77] Many companies have been caught in the antitrust fire as their operations expand and they achieve bigger market shares in various areas. Standard Oil, AT&T, Microsoft, and, Facebook have been raising alarms for many antitrust enforcers for "growing large by besting (and, often, buying) their competitors."[78] They have merged and acquired huge stakes in competing companies and are regarded as titans in their respective industries. The current debate is centered around the fear that big tech has become too big, and that the judicial system must change the standard for evaluating big companies because of big tech.

The Brandeis Standard, introduced by Judge Louis Brandeis was introduced as an avenue to curb "bigness" in competitive markets and allow for competitors to stay afloat by dissolution of any company that gets "too big, so to speak. Brandeus advocated for "go[ing] beyond the risk of economically contagious failure." He believes that "bigness" also pertains to being too powerful to "leave rivals a level playing field, too big to be managed efficiently, and too overbearing for a culture that values the dignity and value of the individual."[79] Brandeis opted for something that looked at more big economic terms and scopes as opposed to how a company is providing goods and services to consumers, and the quality of said goods and services. Brandeis is essentially asking, how powerful are they? This principle is really at the center of the evaluation, a "litmus test" if you will. Through his use of market analysis and company practices Brandeis aimed to determine how a company may be harming competitors through their business practices, and how they could be stopped. His approach was to "find enforceable legal standards that identify harmful industrial conduct in a manner that vindicates social and democratic values,"[80] an

[77] Guide to Antitrust Laws." *Federal Trade Commission*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws
[78]Geoffrey A. Manne and Justin (Gus) Hurwitz, *Cato Institute* https://www.cato.org/policy-report/may/june-2018/big-techs-big-time-big-scale-problem
[79] Albert A. Foer, "Louis D. Brandeis and Antitrust 100 Years After His Nomination - Commentary by Bert Foer." *American Antitrust Institute*,
[80] Jon Sallet, "Brandeis's Framework for Antitrust and Competition." *Benton Foundation*, 5 Nov. 2018, https://www.benton.org/blog/brandeis%E2%80%99s-framework-antitrust-and-competition

approach that was adapted for over 70 years. The opposing standard and the one utilized today is the Consumer welfare standard, which "directs courts to focus on the effects that challenged business practices have on consumers, rather than on alleged harms to specific competitors."[81] The Consumer Welfare standard focuses its attention on how a company's action affects consumers. At the heart of it, the consumer welfare standard bases much of its interpretation in evaluating how consumers may hurt or benefit from a company's practices/ mergers, and sees it as the groundwork for evaluating business practices. However, critics of the standard argue that it doesn't exactly address firms that may "occupy a dominant position in an industry,"[82] and believe that an emphasis on consumer welfare does not capture all harmful behavior that could be coming as a result of a company's action. They believe that while there is harm to their competitors, it also overlooks "harmful concentrations of political and economic power by biasing antitrust enforcement against intervention" and "contributes to … harms [such] as environmental degradation, income inequality, and bargaining disparities for labor."[83] Narrowing in on anti-competitive practice concerns, under the consumer welfare standard, an act is deemed anti-competitive "only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."[84] However, while companies may provide services to consumers at a relatively low cost, or sometimes even free, there isn't much attention put to how it may affect competitors, a key issue debated in the big tech battle. As companies such as Facebook, Google, and Twitter wage their way in a flurry of fear, antitrust law reform calls to action are only growing steam.

[81] Samuel Bowman et al. "Tl;Dr - Consumer Welfare Standard." *International Center for Law & Economics*, https://laweconcenter.org/resource/tldr-consumer-welfare-standard/
[82] Jonathan H. Hatch, "Congress Hears Challenges to the Consumer Welfare Standard: Antitrust Update." *Patterson Belknap Webb & Tyler LLP*, www.pbwt.com/antitrust-update-blog/congress-hears-challenges-to-the-consumer-welfare-standard.
[83] Samuel Bowman et al. "Tl;Dr - Consumer Welfare Standard." *International Center for Law & Economics*, laweconcenter.org/resource/tldr-consumer-welfare-standard/.
[84] *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

II. AN OVERVIEW OF THE LEGAL EVOLUTION OF ANTITRUST LAW

The foundation for modern-day antitrust laws dates back to the early 1900's. One of the most vital cases of the evolution of antitrust legislation, the 1911 Standard Oil case, is credited for creating an immense call for antitrust laws. The case became infamous for creating the belief that bigness was not welcomed in the American economy. Standard Oil was an American oil company operated by John D. Rockefeller and Henry Flagler from 1879 to its eventual 1911 dissolution. The company, which operated refineries all throughout America rose through the economic ladder by acquiring competition and driving out dominating the oil market, eventually being ordered to dissolve. "By 1880, through elimination of competitors, mergers with other firms, and use of favourable railroad rebates, it controlled the refining of 90 to 95 percent of all oil produced in the United States."[85] This eventually resulted in the company breaking up and separately merging with other oil companies. "The remedy to be administered in case of a combination violating the Sherman Antitrust Act is two-fold: first, to forbid the continuance of the prohibited act, and second, to dissolve the combination as to neutralize the force of the unlawful power."[86] At the time of the ruling Louis Brandeis, American attorney and eventual Supreme Court judge expressed some concerns over the grounds for the ruling as it was believed that Standard Oil's actions were "unreasonable" restraints of trade were illegal under Section 1 of the Sherman Act,"[87] grounds that Brandeis felt weren't expansive enough. With the momentum growing for stronger antitrust laws following the Standard Oil case, Brandeis capitalized off the call for action and met with President Wilson to discuss his concerns. Many of his ideas culminated in the passage of the 1914 the Federal Trade

[85] Brian Duignan, "Standard Oil." *Encyclopædia Britannica*, Encyclopædia Britannica, Inc., https://www.britannica.com/topic/Standard-Oil

[86] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

[87] Standard Oil v. United States, 221 U.S. 1, 66 (1911). In Standard Oil, the Supreme Court introduced the rule of reason when it concluded that Section 1 of the Sherman Act only bars contracts and other agreements that constitute an "undue restraint" of commerce. Id. at 59–60. See also United States v. American Tobacco Company, 221 U.S. 221 (1911) (reaffirming Standard Oil's adoption of the rule of reason)

Commission Act, and the Clayton Act, groundbreaking legislation for antitrust. The second element of the Brandeis effect is the creation of the Brandeis Standard for antitrust enforcement.

The next case up for analysis is Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 US 477 (1977). The first shine of light on antitrust, the suit stemmed from "a private antitrust action in the United States District Court for the District of New Jersey" as it was asserted by competing bowling alleys certain that Brunswick Corporation, one of the country's "two largest bowling equipment manufacturers" had violated antimerger provision 7 of the Clayton Act, 15 U.S.C.S. § 18, by acquiring bowling centers that had defaulted in payments for equipment purchased from Pueblo. Brunswick was the largest operator of bowling centers, and had a relatively big position in the market. Pueblo Bowl-O-Mat, Inc. (Pueblo) alleged that the acquisitions might "substantially lessen competition or tend to create a monopoly" because as a result of Brunswick's size, it had the capacity to take out smaller competitors. The jury initially ruled in favor of Pueblo, under the guise that their profits would have seen an increase if Brunswick had let the defaulting centers go out of business. As per the ruling "Pursuant to 4 of the Clayton Act 15 U.S.C.S. § 15, the District Court awarded treble damages, and, sitting as a court of equity, ordered divestiture."[88] The United States Court of Appeals for the Third Circuit reversed and remanded the action, but agreed with the theory. The case found its way to the Supreme Court where it was found that the "antitrust laws . . . were enacted for ``the protection of competition, not competitors."[89] The reason is that even though Pueblo was, indeed, harmed by the acquisition, it wasn't a harm that the antitrust laws were meant to protect. The acquisition actually increased competition. Absent the acquisition, "Pueblo would have gained market share. But with the acquisition, the market included both Pueblo and the bowling alleys that would have left the market—i.e. more competition."[90]

[88] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. - 429 U.S. 477, 97 S. Ct. 690 (1977)
[89] Bona Law PC, "Antitrust Injury and the Classic Antitrust Case of Brunswick Corp v. Pueblo Bowl-O-Mat." *The Antitrust Attorney Blog*, https://www.theantitrustattorney.com/antitrust-injury-classic-antitrust-case-brunswick-corp-v-pueblo-bowl-o-mat/
[90] Bona Law PC, "Antitrust Injury and the Classic Antitrust Case of Brunswick Corp v. Pueblo Bowl-O-Mat." *The Antitrust Attorney Blog*, https://www.theantitrustattorney.com/antitrust-injury-classic-antitrust-case-brunswick-corp-v-pueblo-bowl-o-mat/

The next case to be examined is the 1984 AT&T (Ma Bell) antitrust case. The case is centered around the monopolization of AT&T, then named "Ma Bell," of telephone service. It was alleged that AT&T was a threat to smaller competitors as they didn't allow for cell phones from other carriers to be used with their company, and "local and long-distance calls traveled over their lines. They ran their own research laboratory. AT&T was, in every sense of the word, a monopoly."[91] In 1984, AT&T's service was broken up into seven "Baby Bells", companies that were to operate in different regions, and essentially start from scratch. The split of the monopoly did grant consumers an outlet to experience "more choices" and "lower prices" for long-distance service and phones. However, the breakup is speculated to have delayed the availability of high-speed internet service for many consumers. More importantly, AT&T and the Baby Bells had many successes after the breakup. By 2018, "most of the Bells were together again as a single company called AT&T."[92] The breakup of the company really only led to mergers and acquisitions that resulted in AT&T once more.

One of the most pivotal cases for the antitrust legislation one sees now is the 1998 Microsoft case, a case that would alter the way America perceives big tech for years to come. The United States Department of Justice and 19 States sued Microsoft alleging that it had "monopolized the market for operating systems of personal computers , ... took anti-competitive actions to illegally maintain its monopoly; (ii) attempted to monopolize the market for Internet browsers because such browsers would create competition for operating systems; (iii) bundled its browser (Internet Explorer) with Windows;"[93] and that it furthermore, participated in a series of "anti-competitive exclusionary arrangements with computer manufacturers, Internet service providers, and content providers attempting to thwart the distribution of Netscape's browser," one of its leading competitors at the time. The complaint alleged that

[91] Brian Naylor, "Could The Old AT&T Break-Up Offer Lessons For Big Tech Today?" *NPR*, https://www.npr.org/2019/06/26/736344175/could-the-old-at-t-break-up-offer-lessons-for-big-tech-today.
[92] Andrew Beattie, "AT&T: One of the Successful Spinoffs in History." *Investopedia*, https://www.investopedia.com/ask/answers/09/att-breakup-spinoff.asp#:~:text=In%201984%2C%20AT%26T's%20local%20telephone,internet%20service%20for%20many%20consumers.
[93] Nicholas Economides, "The Microsoft Antitrust Case." *SSRN Electronic Journal*, pp. 1–37., doi:10.2139/ssrn.253083.

Microsoft created and installed Internet Explorer on its computers "to quell incipient competition," and went so far as to "bully" its computer makers into carrying Internet Explorer by "threatening to withhold price discounts." The complaint then went on to argue that Microsoft made requests that computer makers leave out their rival, Netscape's, browser in their computers as a "condition of licensing the Windows operating system."[94] In essence, Microsoft created many barriers to entry and sustainment as they encapsulated the computer market with their innovations, whilst also icing out their competition by making it difficult for users to operate its own browser, Internet Explorer, to compete with the Company Netscape. The case was later repealed, with a District Court judge ruling that Microsoft didn't have to split into two separate entities, but acknowledging its anti-competitive practices.

The last case for the analysis is very recent, and still ongoing. As a disclaimer, any and all information presented about it are allegations and are yet to be proven in a court of law. This case concerns our main focus of analysis, the Big tech controversy. The 2018 case of Facebook originates from an FTC complaint alleging that Facebook, over the course of many years, has "imposed anti-competitive conditions on third-party software developers access to valuable interconnections to its platform, such as the application programming interfaces ("APIs") that allow the developers' apps to interface with Facebook. In particular, Facebook allegedly has made key APIs available to third-party applications *only* on the condition that they refrain from developing competing functionalities, and from connecting with or promoting other social networking services."[95] The case is currently being disputed by Facebook.

[94] James V. Grimaldi "Judge Says Microsoft Broke Antitrust Law." *The Washington Post*, WP Company, https://www.washingtonpost.com/archive/politics/2000/04/04/judge-says-microsoft-broke-antitrust-law/165a2acf-05a1-45fd-9dc0-2a3992752804/

[95] "FTC Sues Facebook for Illegal Monopolization." *Federal Trade Commission*, https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

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III. AN ANALYSIS OF THE PROPOSED BRANDEIS STANDARD RETURN

Arguing in favor of keeping the Consumer Welfare Standard, it is evident that the Brandeis standard only leads to extensive mergers and acquisitions. It is inherently counterproductive to the desired outcome of the laws set in place. The Brandeis standard with its emphasis on an anti-bigness philosophy and subsequent anti-growth nature is harmful to businesses looking to make strides in their respective fields, while also encouraging mergers and acquisitions, leading to a boom and bust cycle that will only be repeated. In contrast, the consumer welfare standard achieves its desired aim of safeguarding consumer rights and finance within all markets. While the controversy over the standard has drawn criticism from various corporations over the past twenty years, Big Tech is not immune from protecting consumers. The consumer welfare standard has its roots in the protection of consumers, and in such a precarious time for Big Tech companies, it is crucial to keep this in mind.

As evident in the Standard Oil Co. of New Jersey v. the United States, 221 US 1 ruling of 1911, the suit brought against the company and its various trusts ultimately led to Standard Oil dissolution as a solution to the issues that were imminent as a result of the bigness. As outlined in the ruling "[t]he bill charged that, during the second period, *quo warranto* proceedings were commenced against the Standard Oil Company of Ohio, which resulted in... a decree adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement, in and of itself, was in restraint of trade and amounted to the creation of an unlawful monopoly"[96] Page 221 U. S. 39-40. The ruling ultimately led to the dissolution of the Standard Oil corporation into many groups. These groups eventually merged into other companies such as Texaco and Exxon. These companies have become mega-corporations within the United States oil market. Had the courts instead focused on the altering of the companies as opposed to dissolution, the M&A rush would not have happened. The

[96] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

significance of the court's decision and the subsequent action on behalf of the Standard Oil corporation has only been cemented throughout the years as cases such as United States v. AT&T would follow.

In one of the first cases to challenge the Brandeis Standard, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,17, the Supreme Court found that "antitrust laws . . . were enacted for 'the protection of competition, not competitors."[97] The case was one of the first formal introductions to the Consumer Welfare Standard. The Brunswick corporation case resulted in the Court siding with Brunswick, rewarding them for seizing an opportunity that Pueblo Bowl-O-Mat did not take advantage of while still allowing space for competition. The ruling found that "The acquisition actually increased competition. Absent the acquisition, Pueblo would have gained market share. But with the acquisition, the market included both Pueblo and the bowling alleys that would have left the market—i.e. more competition."[98] The Brunswick corporation case can be assumed to be one of the first gleaming lights in the antitrust field.

Once more following the Brandeis standard of antitrust law, it is evident that mergers and acquisitions in a Brandeis standard courtroom will only breed similar outcomes. Yet, the monumental telecommunications case against AT&T, centered around the company's aforementioned monopoly led to the separation of the company into separate entities in different counties. The 1984 lawsuit, brought by the United States Department of Justice, alleged that AT&T had a monopoly over the telecommunications market, had its ultimate ending as multiple "Bell" entities that eventually merged and acquired each other, resulting in the company eventually being together once more in 2018 under the name AT&T. In addition, while some hold that the access to more choices and lower prices for long-distance service and phones was a positive for many, the separation is also believed to have caused a delay in the availability of high-speed internet for consumers, another loss as a result of the Brandeis system.

[97] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. - 429 U.S. 477, 97 S. Ct. 690 (1977)
[98] Bona Law PC, "Antitrust Injury and the Classic Antitrust Case of Brunswick Corp v. Pueblo Bowl-O-Mat." *The Antitrust Attorney Blog*, https://www.theantitrustattorney.com/antitrust-injury-classic-antitrust-case-brunswick-corp-v-pueblo-bowl-o-mat/

Moving forward, the Consumer Welfare Standard reigned supreme as courts adopted a bigness friendship for big companies. The standard has since protected consumers from harmful corporate actions such as those from Microsoft in 1998. In the case of United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001), Microsoft clearly demonstrated very little discretion and corporate safeguards when it made deals with OEM suppliers to solely include Microsoft-related applications. Such an act was clearly in violation of the Sherman Antitrust Act, specifically, violations of Sections 1 and 2 of the Sherman Act.[99] Such a violation was therefore amended by the implementation of a different OEM protocol and was subsequently blamed as the reason why Bill Gates stepped down from his post in Microsoft. However, as controversial as it was, it ultimately protected consumer welfare from a monopolistic computer market. Had Microsoft not been stopped it would have outpaced the rest of the computer market and created a monopoly over an emerging and rapidly growing industry.

The last case examined is one of the most monumental cases within the Big Tech industry controversy of the last decade and is still ongoing. Upholding the consumer welfare standard is vital to this case as Facebook has committed multiple serious transgressions in its ascent to tech super stardom. Its transgressions have clearly concerned outcomes such as anticompetitive conditions on third-party software developers and merging and acquiring its competition. Rival apps such as Instagram and Whatsapp were quickly offered large sums of money by Facebook in return for merging with Facebook. While M&A isn't inherently harmful, the practice of icing out competitors is and the damage of such action is substantial. Facebook's merited lawsuit isn't a case of innovation, there is clear wrongdoing. The standard is doing its job.

[99] Complaint: U.S. V. Microsoft Corp, The United States Department of Justice, United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001)
https://www.justice.gov/atr/complaint-us-v-microsoft-corp

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CONCLUSION

It is evident that a return to the Brandeis standard of antitrust law is not only unwarranted but inefficient. The consumer welfare standard is more than sufficient to achieve its desired outcomes, and additional restrictions on business would defeat the purpose of market competition. There is no denying that a return to the Brandeis standard of ruling would have not only disastrous effects for the companies involved, but have a disastrous effect on regular day to day consumers as well. Through the analysis of landmark cases such as United States Department of Justice v. AT&T (Decided 1982, remedied 1984) it is clear that an application of the Brandeis Standard of Antitrust has prevented the legal principles of consumer protection and safety from emerging victorious. It had instead resulted in the push towards anti-competitive mergers and acquisitions such as that of Standard Oil in 1911. The case illustrates a clear picture of a flawed standard, not feasible in a competitive market. The "big is bad" mentality is just another barrier keeping a successful business from innovating. By contrast, the Consumer Welfare Standard as the antitrust law mode of evaluation is crucial to maintaining a competitive and healthy market. Evident in the cases of Brunswick v. Pueblo Bowl O-Mat Inc. antitrust laws were defined by the Supreme Court as being enacted for "the protection of competition, not competitors)," cementing a definition of antitrust law enforcement that protects the Consumer Welfare Standard. As outlined in the United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001), antitrust law enforcement is best executed when its method of enforcement prioritizes consumers and avoids monopoly. Microsoft's actions warranted a legal repercussion and ultimately insured consumers' choice in a competitive market. The Consumer Welfare Standard is what fundamentally safeguards a free and competitive market.

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Patrick Ma

ERISA: The Pebble in the Shoe of Health Care Reform

Abstract. Part I is a brief history of The Employee Retirement Income Security Act of 1974 (ERISA) and an explanation of how a law that was originally written for pensions came to be so consequential in the field of health care.

Part II goes over the judicial history of the law, and how the opinion of the Court has changed over time when it comes to the scope of the statute and the range of the many exceptions embedded in the statute.

Part III discusses the practical ramifications of both the statute and the judicial indecision regarding the statute. It discusses why ERISA reform is an issue everyone should be interested in, regardless of political beliefs, and how that reform might occur.

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INTRODUCTION

ERISA is a shape-shifting federal statute that freezes state-led health care initiatives to stone, relegating some state laws to litigative Purgatory while holding the rest to a constant threat of litigative Purgatory, both of which stun reform.

It is a law that was written broadly, with an exceptionally powerful preemption clause that overrides state laws. It has porous exceptions like the savings clause and the church clause, which vaguely grant some laws leniency from the statute's power.

The Supreme Court over the years has tried to implement reasonable limitations onto the law, but it has been indecisive, backtracking, and even self-contradictory, leaving state legislators without proper guidance for how state reform should be written to tiptoe around the edges of ERISA.

All the while, as the meaning of the law is constantly expanded and shrunk in federal court, statewide health care reform moves forward with a permanent yellow light, not knowing when to speed ahead or when to press on the brakes, always afraid that a sudden red light will appear in the form of a preemption or a changed Court opinion.

Reform is in the best interest of most health care reformers: ERISA is a boulder blocking the path to every kind of health care reform. The most likely path is through the Supreme Court, but the most transformative change will probably occur by Congress. Either way, certain elements of the statute must be clarified, and the language of the text must be rewritten with some locked gates in place.

PART I

The Employee Retirement Income Security Act of 1974 (ERISA) was never meant to be a health care law. It was a labor law meant to protect people's pensions.[100] At the time, pensions and benefit plans were not nearly as secure as they are today. They were poorly funded, often fell apart, and filled with sneaky terms and conditions that ran people dry when they came knocking for their money.[101] Back in the early seventies, when Americans put their income into a pension, they were essentially throwing their money in the air. And sometimes, the bills never came back down, seeming to vanish into the air.

In 1972, NBC broadcasted a TV special called *Pensions: The Broken Promise*, and Americans realized that the case of disappearing pensions was not only happening to them. Public outrage entered the halls of Capitol Hill, and ERISA came out the other end.

It passed overwhelmingly. As demanded by public sentiment, the law set national standards for private pension plans and employee benefit plans. It affected most benefits that employers give to their employees.[102]

To make sure that all states abide by these standards, ERISA includes a uniquely powerful preemption clause. Preemption means that the federal statute can override, or preempt, any state law that contradicts or conflicts with ERISA. The goal was to set uniform standards across the entire country, so pensions in Idaho were just as secure as pensions in Florida. If a Florida legislature passes a law that tries to set different standards, then ERISA preempts it, meaning that ERISA cancels the Florida law.[103]

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[100] Carmel Shachar & I. Glenn Cohen, HealthAffairs, *Restoring The Preemption Status Quo: Rutledge, ERISA, And State Health Policy Efforts* (2020), *available at* https://www.healthaffairs.org/do/10.1377/hblog20201216.308813/full/.

[101] Delfino Green & Green, DGG Law, *The History of ERISA* (2020), *available at* https://www.dgglaw.com/news-blogs/2020/february/the-history-of-erisa/#:~:text=ERISA%20was%20officially%20launched%20in,elements%20of%20employee%20benefit%20plans.

[102] Rebecca Miller, Robert Lavenberg, & Ian MacKay, Journal of Accountancy, *ERISA: 40 years later* (2014), *available at* https://www.journalofaccountancy.com/issues/2014/sep/erisa-20149881.html.

[103] Jim Schonrock, FindLaw, *ERISA Preemption: What You Need to Know* (2016), *available at* https://employment.findlaw.com/wages-and-benefits/erisa-preemption-what-you-need-to-know.html.

In most cases, ERISA works great. Today, most people can feel secure about the money they are putting into their pensions. But where ERISA is a lovely rose for pension plans, it is a poisonous seed for health care, spreading under the ground, disrupting health insurance plans, drowning initiatives in a wave of litigation.

ERISA was never meant to be a health care law, but it has infected the field of health care with problems. The reason this pension law has been transmitted over to health care is that so much of United States health care lies in the private sector.

An important distinction must be made between healthcare providers and health care insurance. Providers are what people usually think of when they think of health care—doctors, hospitals, pharmacies, and so on. Insurance is how people pay for those providers. The idea is that people pay insurers premiums every month, and in return, the insurer will help pay for medical services if they are ever needed. Insurers must manage risk pools so they can balance what they charge insured customers with the expected cost of serving those customers so they can make money. [104] Here in America, both insurers and providers are private entities.[105]

About fifty percent of Americans get their insurance through their employer. They get their health insurance through a scheme regulated by ERISA.[106] So, whenever a state passes a law that has to do with health care, it runs the risk of interfering with ERISA and having the law preempted. This by itself would

[104] David Blumenthal & Robert Galvin, Commonwealth Fund, *The Private Sector Takes on Health Care* (2019), *available at* https://www.commonwealthfund.org/blog/2019/private-sector-takes-health-care.

[105] The United States is special in this respect. Other countries have their governments manage the conundrum of health care. The British have their National Health Service, which delivers health care wall to wall. A government bureaucracy provides care and guarantees all citizens access to that care. Private actors have nothing to do with it. A less extreme example like the Canadians have their government fund health insurance so all citizens have access to private providers like physicians and hospitals. Nora Groce & Nancy Groce, The BMJ Opinion, *Comparative twin study: Access to healthcare services in the NHS and the American private insurance system* (2020), *available at* https://blogs.bmj.com/bmj/2020/02/17/comparative-twin-study-access-to-healthcare-services-in-the-nhs-and-the-american-private-insurance-system/.

[106] Edward Berchick, Emily Hood, & Jessica Barnett, The United States Census, *Health Insurance Coverage in the United States: 2017* (2018), *available at* https://www.census.gov/library/publications/2018/demo/p60-264.html.

be no issue. Legislatures would just examine their proposed laws and amend them to make sure they abide by ERISA before passing them.

The trouble is that the regulations set forth by ERISA, so clear when it comes to most pensions, become foggy when it comes to health insurance. State legislators must jump through federal hoops—that is fine; those hoops are always there for most state-led initiatives—except that in the case of health care, those hoops are essentially invisible, constantly growing and shrinking with every Supreme Court decision, teleporting from place to place all the time, making it difficult to know whether a state law is acceptable now, and nearly impossible to know whether that same law will be acceptable five or ten years from now.

It is so complicated in part because of the exceptions to ERISA. Because the preemption clause is so broad, Congress put in many exceptions so that the federal rule would not overwhelm all statewide initiatives that even smelled of having to do with pensions. The most important exception when it comes to health insurance is the 'savings clause,' which states that all state laws which regulate insurance are immune to ERISA regulation.

At first, it appears that all laws that deal with employer-sponsored health insurance plans are in the clear. After all, health insurance is a form of insurance. But intense litigation has ensued about what it means for a law to be 'dealing with' insurance.

Over the years, the Supreme Court has attempted to put in rules to define 'dealing with' insurance. In some instances, it has also forgone the rules and tried to implement a 'test of common sense'—essentially, determining whether a law, by common sense, can be reasonably said to be involved in insurance. It is as vague as it sounds.

The other complication comes from the nature of ERISA itself. It can only preempt laws that interfere or contradict federal guidelines, but whether any given state law interferes with federal

guidelines is also up for debate—and, like the 'savings clause,' it has been debated in front of the Supreme Court many times.[107]

When it comes to formulating state laws under the shadow of ERISA, these are the two questions that must be answered: first, what does it mean for a state law to interfere with federal guidelines; and second, what does it mean for a state law to deal with insurance and therefore be exempt from ERISA via the savings clause?

Though these are the two major questions, there are many other mini concerns that must also be addressed for any given state law. There are too many bumps to address here, but one other exemption stands out because it has re-entered the limelight after decades of hibernation: the 'church plan' exemption, which exempts retirement plans established by religious organizations from ERISA. Rather sleepy for most of its existence, the scope of this exemption has started to awaken and widen in recent years.[108]

PART II

Our story begins with *Union Labor Life Ins. Co. v. Pireno* (1982), which set three criteria that must be met for an entity to be considered within the "business of insurance." Deciding whether an entity falls within the "business of insurance" is very important because such entities are exempt from ERISA through the 'savings clause.' Here are the three criteria:

[107] Abbe Gluck, Allison Hoffman, & Peter Jacobson, Health Affairs, *ERISA: A Bipartisan Problem For The ACA And The AHCA* (2017), *available at* https://www.healthaffairs.org/do/10.1377/hblog20170602.060391/full/.
[108] Robert Rachal, Benefits Law Advisor, *Eighth Circuit Rules on ERISA's "Church Plan" Exemption* (2020), *available at* https://www.benefitslawadvisor.com/2020/03/articles/church-plan/eighth-circuit-rules-on-erisas-church-plan-exemption/.

"First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."[109]

This rule was applied to decide that the Union Labor Life Insurance Co. (ULL) was not acting within the "business of insurance" when it partnered with the New York State Chiropractic Association (NYSCA). This ruling was the first time the Supreme Court laid down rules to define what the "business of insurance" was. Before, it relied on a "common-sense view of the matter."[110]

But sixteen years later, the Supreme Court changed these mandatory criteria to mere guideposts in UNUM Life Ins. Co. of America v. Ward (1999), when it decided that a California law was considered within the "business of insurance" even though it did not meet all three criteria.[111] Even though the Court admitted that the law failed the test set by *Pireno*, it still said the law dealt with insurance and therefore was exempt from ERISA.[112] The case essentially overrode the test introduced in *Pireno*, reverting to a test of common sense to decide whether a given entity is working in the field of insurance.

But this reversion to a test of common sense was not to last. In Kentucky Association of Health Plans, Inc. v. Miller (2003), the court looked to the enacted law rather than the involved entities, setting

[109] *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129 (1982).

[110] In the case, ULL was trying to figure out which chiropractic treatments to cover as required by state law by determining which were necessary and reasonably charged. To help with the decision-making, they worked with the NYSCA, a professional group of chiropractors. The respondent Pireno, a licensed chiropractor, accused ULL of conspiring to fix prices in violation of the Sherman Act. ULL responded that it was exempt from such antitrust scrutiny because it operated within the "business of insurance," as guaranteed by the McCarran-Ferguson Act. The Supreme Court decided that ULL was not acting in the "business of insurance" using the three-part test. The details of the case are not relevant to the discussion at hand. What is highly relevant is the test made for deciding whether an entity is operating in the "business of insurance," which pertains directly to ERISA. *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129 (1982).

[111] *UNUM Life Ins. Co. of America v. Ward,* 526 U.S. 358, 370 (1999).

[112] The California law in question requires insurance companies to give customers one year and 180 days to provide proof of claims after the onset of disability before they can deny a claim. John Ward became disabled in May 1992 and informed the insurance company less than a year later in his insurance claim. However, because his insurance claim was late under the company's policy, the company denied it. He filed suit to get his disability benefits, invoking the California law, but the insurance company said the law was preempted by ERISA and therefore not binding. *UNUM Life Ins. Co. of America v. Ward,* 526 U.S. 358, 370 (1999).

up a two-part test to decide whether a law regulates insurance and is therefore exempt from ERISA. The test is as follows:

First, the law must be "specifically directed toward" the insurance industry. Second, it must "affect the risk pooling arrangement between insurer and insured."[113] In other words, it must be directly aimed at some component of the insurance industry and influence how the insured creates liability on the insurer.[114]

This ruling was the most recent in deciding whether any given law is related to insurance and therefore exempt from ERISA under the savings clause.

However, the savings clause is not the only element in ERISA that has been scrutinized by the courts. While the savings clause gives exceptions to the statute, it is the preemption clause that gives ERISA the power to override state laws in the first place. Contesting ERISA can occur on two fronts: either claim the state law in question falls under the savings clause and is exempt or claim that the preemption clause does not apply at all. Over the decades, the Court has tried to establish under what circumstances preemption can occur.

The first major case in this arena was New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (1995), which set the rule for preemption as follows:

"ERISA preempts state laws that mandate employee benefit structures or their administration as well as those that provide alternative enforcement mechanisms."[115]

[113] *Kentucky Association of Health Plans, Inc. v. Miller,* 538 U.S. 329, 338 (2003).
[114] Using this rule, the Supreme Court decided that a Kentucky law which prohibited insurance companies from excluding providers from their network was adequately related to insurance and therefore excluded from ERISA under the savings clause. The Kentucky law passed both tests. First, the law blocks insurer actions and is therefore directed at said insurers. Second, the law indirectly affects the insured patients by determining whether their providers are included in a health insurance plan. Such a law was disruptive to the plaintiff since their insurance business model was based on cutting costs by being selective about which providers were included in their network. This model is called a Health Maintenance Organization (HMO), popular in some parts of the country. *Kentucky Association of Health Plans, Inc. v. Miller,* 538 U.S. 329, 338 (2003).
[115] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 660 (1995).

Essentially, ERISA can only preempt state laws that demand a specific form of an employee benefit structure or in some way dictate the administration and enforcement of those structures. If a law does not manifestly change one of these functions, but only tinkers at the edges, then ERISA has no say in the matter. Also, almost as a side note, the Court mentioned that the law could stand because it did not contradict federal regulations, the avoidance of which was the whole point of ERISA in the first place.[116]

For two decades it seemed that only a special subset of laws that failed the test set by *Travelers* would find themselves in the crosshairs of ERISA's preemption clause—until Gobeille v. Liberty Mutual Insurance Co. (2016) came along. A Vermont law that forced all health care plans to put their claims data into a state-wide database was struck down, not because it interfered with federal regulations or initiatives, but because it posed the potential to. Curiously, the decision based itself on the afterthought of the *Travelers* case—that the pre-emption clause affected laws that interfered with national standards—rather than on the rule imposed by that case.

For people in the health insurance world, it now appeared that a law could be struck down for merely posing the risk of interfering in the future.[117] People held their breath for Rutledge v. Pharmaceutical Care Management Association (2020), but when the ruling came out, state legislators exhaled again, because the Court held up an Arkansas law that regulated drug prices, in essence shrinking the purview of ERISA.[118] According to the Court, even though the law affected organizations that work with employer sponsored health plans, those organizations did not directly affect those health plans, so the

[116] The Supreme Court used this rule to exempt a New York state law from ERISA's preemption. The state law required patients from commercial insurers but not from a Blue Cross/Blue Shield plan to give extra fees to hospitals. Those commercial insurers complained that such a rule violated ERISA because it forced them to pay extra money. But the Supreme Court disagreed, saying that such a mandate could not be considered the enforcement of an employee benefit structure. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 660 (1995).
[117] *Gobeille v. Liberty Mutual Insurance Co.*, 557 U.S. ____, 200 (2016).
[118] *Rutledge v. Pharmaceutical Care Management Association*, 592 U.S. ___, ___ (2020).

law fell outside the scope of ERISA. With such logic, the Court largely hopped over the *Gobeille* decision from two years prior back to the *Travelers* decision from two decades prior.[119]

A final, recent case expanded the church exemption in ERISA to include not only health insurance plans created by a church, but any insurance plan maintained by a church-affiliated organization. In Advocate Health Care Network v. Stapleton (2017), Advocate Health Care Network was a religiously affiliated hospital system. It had some contracts with the church but was not owned by the church.[120]

It is unknown now how far this definition of 'religiously affiliated' can be stretched, and what an organization must do to qualify for the church clause and therefore be exempt from the standards set forth by ERISA.[121]

PART III

In the past few decades, ERISA has swayed in the breeze, keeping state-led health care reforms frozen on the ground. Because the Court keeps amending itself when it comes to the preemption clause or the savings clause—or in recent years, even the long untouched church clause—a state law protected from ERISA today might not be tomorrow.

The evolution from *Pireno* to *Ward* to *Miller* is particularly striking example of federal unpredictability: in two decades, the Supreme Court implemented a three-criteria system for determining whether an entity 'deals with insurance,' changed those criteria to guidelines, and then scrapped those

[119] The Arkansas law was called "Arkansas Act 900." It lowered drug pricing by putting price ceilings on pharmacy benefit managers (PBMs), which reimburse pharmacies for drugs. Other states have implemented similar laws to bring down the price of pharmaceutical drugs. *Rutledge v. Pharmaceutical Care Management Association*, 592 U.S. ___, ___ (2020).

[120] *Advocate Health Care Network v. Stapleton*, 581 U.S. ___, ___ (2017).

[121] The plaintiff Maria Stapleton sued the network for failing to uphold ERISA regulations. But the Supreme Court ruled that it did not have to meet ERISA standards because it was sufficiently associated with a church and therefore exempt under the church clause. *Advocate Health Care Network v. Stapleton*, 581 U.S. ___, ___ (2017).

guidelines altogether in favor of two new rules. So, in those two decades, any entity trying to fit itself into ERISA regulations might see itself violating the rules, and then not violating the rules, or vice versa, all without doing anything.

And the change from *Travelers* to *Gobeille* to *Rutledge*, though less dramatic, illustrates the same sort of mutation: the conditions of preemption were defined one way, then another, and then back to the original way, all within the span of three decades.

What is preempted by ERISA today might not be tomorrow. What is expected one day might find itself exposed the next day. Any law that even remotely pertains to employer-based insurance exists like a man whose head is placed in a rickety guillotine. Even if a disastrous ruling does not come down today, it might tomorrow, or the day after—if the eventual ruling itself does not kill the state law, then the endless litigation that ensues will. All relevant laws live in this condition of fear, of uncertainty. It is no wonder, then, that most state leaders prefer to keep their hands clean—to stay away from the health reform business altogether.

This stifles innovation. It stifles risk-taking. It strikes at one of the fundamental features of federalism: that states be given some leeway to try new things. Justice Louis Brandeis wrote in 1932, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[122] When it comes to health care, federal indecisiveness on ERISA shuts down these laboratories.

And it hampers all state-wide reform, liberal and conservative alike. It forces the issue of healthcare to the federal level, where the specter of ERISA does not hang overhead. One oft-cited concern with the proposal to implement a national single-payer health insurance program is that it is too dramatic; that it changes too many people's relationships with health insurance at once.[123] But because of ERISA,

[122] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 50 (1932).

[123] Steven Johnson, Modern Healthcare, *AMA maintains its opposition to single-payer systems* (2019), *available at* https://www.modernhealthcare.com/physicians/ama-maintains-its-opposition-single-payer-systems.

such reform is very difficult to be implemented on a state-wide level, even in those states that would like to try it.

Extensive research has been done on how to draft single-payer legislation that avoids ERISA.[124] Scholars have written about focusing on providers rather than insurers, different funding strategies, specific syntax to be used in the legislation, but all this trimming at the edges eventually faces the same problem: federal rules can be shifted at any time to destroy the state law. For something as seismic as a single-payer system, that is often a risk not worth taking.

It is not only single-payer advocates that have something to lose. Conservatives are also impeded. Their philosophy towards health care is that it is better managed by the states. The American Health Care Act of 2017, introduced by a Republican congress, emphasized the need to let states do the innovating—to let states lead the way. But states cannot innovate, much less lead the way, when they are chained down by ERISA—when any step outside of federal regulations might lead to a preemption.[125]

And beyond major overhauls like single-payer health care or the AHCA, even small changes to health care on a state level can find insurmountable issues with ERISA. Such a trend can be seen even in the ERISA cases that make it to the Supreme Court: almost every time, it is a specific state law that deals with one corner of healthcare—regulating pharmaceutical drugs, setting reimbursement rates for different insurance companies, creating a database for insurance claims, and so on. Whenever somebody bumps into a state health insurance law he does not like, he may as well sue on the grounds of an ERISA violation—after all, he never knows what the court's appetite will be.

Desire to reform ERISA should have bipartisan and nonpartisan support: it is an imprecise, ever-changing statute that gets in everyone's way. The easiest path to reform is also the least satisfying—with more Supreme Court cases. It is true that the Court has expanded and shrunk the power of ERISA since the law's inception, but if the Court continued to shrink it in a consistent manner over the

[124] Erin Brown & Elizabeth McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. Pa. L. Rev. 389 (2020). *Available at* https://scholarship.law.upenn.edu/penn_law_review/vol168/iss2/3.
[125] See *id.* at 8.

next few decades, then the law might reach a point at which it specifically deals with some forms of health insurance but not others. Then, state legislators would begin feeling more comfortable passing state initiatives, and one day, the problem of an overbearing ERISA might be passed.

However, this is a passive approach. There is nothing to do but twirl one's fingers and wait for the nine justices to slowly narrow the boundaries of ERISA's reach. Also, it requires that the justices, for no reason, begin a new path off-course of the zigzags they have made in recent decades. There is little indication that such a swerve is likely. The more recent case about the church exemption expanded the scope of ERISA—the opposite of what is needed. Moreover, most of the major ERISA cases have been decided unanimously or near-unanimously. A changing Court will probably not be followed by changing opinions.

The other approach is legislative action. It is wrong to be too critical of the Supreme Court: the original law was extraordinarily broad—so broad that, theoretically, ERISA preemption could override every single statewide health care initiative. If the Court seems to be drawing the boundaries quite wide, it is at least doing the important job of setting up the fences in the first place, because a literal reading of the original statute produces an open field.[126]

Revisions could be made to the law to precisely answer the questions that the Court has been trying to answer from the start: what does it mean for an institution to be dealing with insurance? Under what circumstances can a state law be preempted? Judicial musings can be replaced with legislative stamps.

Until such action, though—whether it be an upward judicial climb or decisive legislative action—state-wide health care reforms will continue to find themselves in a special kind of Purgatory—not exactly cut down, but not exactly safe either—and eager state legislators who enter the forest of health care reform will always do so with the shade of ERISA hanging over their heads.

[126] See *id.* at 1.

CONCLUSION

ERISA is an overbroad statute that must be limited by judicial or legislative action, lest it continue to block state-led health care reform. Presently, the law hampers state-wide experimentation by not only striking down existing state laws but by threatening to strike down others.

Of the two possible methods of reform, judicial restrictions are the less likely one given what historically has occurred. Even recently, the Supreme Court seems more inclined to broaden rather than tighten the statute. Ultimately, legislative action is the strongest path to rewrite a law that was extremely broad when it was first passed in 1974.

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Effects of the EU-GDPR (2016/679) on US businesses in light of missing federal US data protection regulations.

Abstract. The differences in US and EU data protection legislation are examined through the use of comparative legal analysis. The history and development of US legislation, state and federal, regarding data protection are examined along with the resulting status quo. An examination of the development of EU data protection regulations and pertinent European Court of Justice (ECJ) rulings establishes the origins of the EU - General Data Protection Regulation (GDPR) - and the associated equivalency schemes. An analysis of these equivalency schemes reveals the motives of the ECJ as well as the weak points inherent to such a scheme. By juxtaposing the existing US and EU data protection frameworks, the main issues preventing the effective implementation of a GDPR equivalency scheme are made apparent. By analysing the benefits of a GDPR equivalency scheme on US businesses the reasons for pursuing such a scheme as well as the necessary federal regulations is made clear. Also the need for homogenization of these data protection frameworks is made apparent. An analysis of the GDPR, the applicable equivalency schemes and the associated ECJ rulings allows for a detailed understanding of the changes required for the exchange of data between the US and the EU to resume unhindered in the future. Finally, a examination of the The California Consumer Privacy Act of 2018 (CCPA) and the principles stipulated within reveals possible solutions to the criticism levied at the current system of US federal data protection regulations.

INTRODUCTION

The US is undoubtedly one of the world's most impactful centers for technological advancement, with a plethora of service providers and innovators vying for a global customer base and it's data. It would be easy to assume that any data transfer tangentially related to the US would either be directly federally regulated or subject to some grand transnational agreements. In reality US businesses have found themselves in a position where they must routinely adhere to foreign, specifically EU, regulations without much or any support from US federal legislation. This leaves them vulnerable to the whims of the European Court of Justice (ECJ)[127] and greatly limits their growth potential in the european market. The free exchange of data between businesses and consumers is as essential for free trade across borders as it is for the basic day to day operations of any enterprise in today's global market. By self-regulating and raising the standards which limit the processing of personal data on US soil, legislators could go a long way in levelling the playing field and making all US businesses more competitive in the EU market once again.

I. RELEVANT DEFINITIONS

In order to be able to fully appreciate many of the concepts central to the topic of data protection it is crucial to be familiar with certain legal definitions stipulated by Art. 4 GDPR. "Personal data" means any information relating to an identified or identifiable natural person. These natural persons are referred to as "data subjects." Furthermore "processing" means any operation or set of operations which is performed on personal data by a so-called "processor." These terms are purposefully abstract to capture as many forms of data as possible and are therefore suited for discussing data protection in general.

[127] General Data Protection Regulation (EU) 2016/679 , Apr. 14, 2016, https://gdpr-info.eu/

The differences in the current systems of data protection regulations in the US and the EU are glaring, however they exist for several distinct reasons. They are in no small part due to a difference in culture and values. Historically the US values individual freedom and self determination while the EU values solidarity. This has led to a difference in priorities over the years that is readily apparent in the context of data protection. It is important to note that both the US and the EU employ a system of federal and state legislation. Therefore they have the choice to either federally regulate all member states at once or to allow each state to come up with its own legislation. Naturally, in both cases, federal legislators only [128]regulate topics which they deem worthy of their time and efforts. Should the task of regulating a topic be delegated to the member states, it is an indication that they are either more suited to do so, or the topic simply is not deemed worth the effort.

A. IN THE US

Despite its individualist reputation the US has seen the passing of a number of federal regulations which limit the ways in which citizens data can be used. These include the US Privacy Act of 1974 regulating governmental agencies use of private data, the HIPAA (1996)2 regulating the health insurance industry and the GLBA3 establishing financial data regulations. Those readers who have spent some time on YouTube will be familiar with a far reaching and much welcomed attempt at federal regulations, that being COPPA4 which regulates data collected from minors. Notably these are all specific to a perceived high risk demographic or field. To this day there is no concept of protected personal data, data subjects or data processors established federally and abstractly outside of very particular fields. This is in stark contrast to the previously established definitions drawn from the GDPR.

As all of the current federal data protection regulations are specific to certain types of businesses and do not attempt to establish overarching federal parameters for data collection, protection or storage,

[128] Health Insurance Portability and Accountability Act. Pub. L. No. 104-191, § 264, 110 Stat.1936. (Aug. 21, 1996).

many businesses and consumers are left unregulated and unprotected. The implementation of the framework surrounding the sparse federal legislation has always been left to each State to handle individually. This means that businesses in identical sectors are potentially held to different data protection standards depending on the jurisdiction. More crucially, consumers are granted a varying amount of data protection rights depending on their own place of residence. The current patchwork that is US federal data protection regulation simply does not provide protection for everyone equally. Despite being largely ineffective and inadequate, this exact criticism has motivated competition amongst the [129]States to come up with their own comprehensive data protection framework. Some of these frameworks may even hold the key to successful federal legislation in the future.[130]

B. IN THE EU

The history of data protection in the EU is one defined by many of its founding principles, mainly by the "right to respect for private and family life" stipulated in Art. 7 of the EU Charter of Fundamental Rights. In the past the EU faced a similar issue to the one plaguing the US today. Every member nation had its own unique set of laws governing data protection, severely hampering citizens' access to adequate protections and failing to provide equal protections and rights to all. In response to this the EU began "harmonizing" these national regulations under one all-encompassing legislation. This resulted in the GDPR. The GDPR grants every person in the EU and their personal data the same minimum protections. Having established these protections within the borders of the EU, the question of maintaining them across borders quickly arose. The initial solution to this was a set of so-called "Safe Harbour Privacy Principles". They were developed leading up to the 2000s in order to protect customer data when being

[129] 5 International Safe Harbor Privacy Principles, U.S.-EU., Jul. 2000, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32000D05206 Schrems v. Digital Rights Ireland., C-362/14., (2014)

[130]An Act to deter and punish terrorist acts in the United States and across the globe, to enhance law enforcement investigatory tools, and for other purposes.

exchanged between the EU and the US. In order to be Safe Harbour compliant US Companies had to self certify that they were adhering to Data Protection Directive 95/46/EC. This directive stipulated seven principles mainly: it required individuals to be informed their data was being collected and how it will be used, as well as giving them the option to opt out of the collection. In addition the loss of data had to be prevented and the integrity of the stored data had to be guaranteed. This scheme was widely criticized and eventually overturned by the European Court of Justice (ECJ) due to Schrems I6. Not only were many businesses self certifying without offering any real transparency, but the reach of the US government through the Patriot Act7 specifically appeared to render the whole process moot. The european courts decided that all data stored and processed in the US can be at any time accessed by intelligence agencies [131][132]and therefore cant be GDPR compliant. Around this time in 2016 the General Data Protection Regulation (EU) 2016/679 (GDPR) was codified into law and replaced the Data Protection Directive. The GDPR greatly increased the rights and protections afforded to EU citizens and their data while giving all data processors, foreign and domestic, increased responsibilities. US businesses needed a certification scheme now more than ever to reflect their compliance with this new and improved regulation. In response the privacy shield agreement was drafted and signed. It was intended to more accurately verify data protection standards but left much to be desired once again. It stipulated all of the same seven principles and left many of the same issues unresolved. It too was overturned by the European Court of Justice in 2019 in a ruling over Schrems II 9. The ECJ argued that US businesses can not be compliant with EU data protection regulations because of the overwhelming freedoms afforded to certain agencies in the name of national security as well as a total lack of regulatory oversight. Once again the transfer of EU data to the US is unregulated, with the responsibility being placed on each individual business to be GDPR compliant if they wish to process EU data. This wouldn't pose such an issue if the GDPR was not

[131] 8 EU-US Privacy Shield, U.S.-EU. Jul. 12, 2016, https://www.privacyshield.gov/eu-us-framework.
[132] 9 Data Protection Commissioner v. Facebook Ireland., C-311/18., (2018)

such a particular and demanding piece of legislation. This leaves EU personal data very thoroughly regulated but without a clear means of enforcing data protection outside its borders.

II. CONCEPTUALIZING THE GDPR

The GDPR most crucially grants data subjects a variety of rights pertaining to their personal data that would otherwise not be considered by most businesses. Primarily the GDPR grants the right to access, delete and correct incorrect personal data (Art. 12 GDPR ff.). Also explicit consent and opt out rights are granted to all data subjects when a service wants to access their data. These rights go hand in hand with certain responsibilities for data processors such as data protection by design and default (Art. 25 GDPR) as well as maintaining meticulous records of processing activities (Art. 30 GDPR). These are only a small selection of the pertinent rights and responsibilities but they are intended to help give a picture of the goals behind the GDPR. The GDPR as a whole is massively complex and filled with a web of regulations all of which must be adhered to fully.

When analysing the responsibilities of the data processors the first potential difficulties faced by any business trying to be GDPR compliant become apparent. “Data protection by design and default” implies creating the entire business data structure around adherence to the GDPR. Every email account, every laptop, every printer, every database. Everything has to be engineered to specifically capture only the data you have permission to capture, and process it in the way you have permission to process. US businesses are founded and designed in accordance with US laws, and so are their services, revenue streams, databases etc. This poses a big problem when entering the EU market as much of what the GDPR stipulates requires pre-planning, very purposeful execution and a significant budget meaning it is often impossible to implement retroactively leaving many (especially smaller) businesses perpetually non compliant without a remedy. The rights granted to data subjects pose no smaller difficulty either. Many businesses don't have on site professionals or well structured databases in which they can easily find,

correct and delete customer data. All of this is unlikely to be implemented ahead of time and can be borderline impossible to implement retroactively. However, the main issue faced by these businesses, ironically, is the only bit of federal legislation that does apply to them. In concreto the patriot act, as previously mentioned, renders all of these efforts fruitless. In the EU the GDPR limits the federal authorities as much as it does private businesses. The methods by which businesses must secure access and storage against intruders cannot simply be circumvented even in matters of national security. This is frequently criticized but nonetheless the largest issue preventing seamless exchange of data between the EU and the US. This is exemplified by the two cases in which the European Court of Justice repealed the two attempts at regulating said exchange of data.

A. AN ANALYSIS OF SCHREMS

The focus of this analysis will be on the case of Schrems II as it is the most recent example of the same arguments brought forth by the ECJ repeatedly. In the case of Schrems II a Austrian data protection activist filed a complaint against Facebook for perceived GDPR violations. At the time Facebook, along with the rest of the US businesses processing personal data from the EU, were subject to the "EU-US privacy shield agreement." This GDPR equivalency scheme certified them as GDPR compliant. Mr. Schrems claimed these businesses violated the principles required in order to be privacy shield compliant and should therefore be prevented from processing EU personal data. He specifically argued that Facebook is transferring EU personal data from the Facebook headquarters in Ireland to servers in the US, where many businesses, including Facebook are not held to acceptable data protection standards. Furthermore, he argued that this personal data could be accessed by US intelligence agencies primarily through use of the US Foreign Intelligence Surveillance Act (FISA) and the United States Intelligence Activities executive orders. This gives US intelligence agencies the right to access personal data of data subjects for national security reasons without any of the normal limitations pertaining to data processing.

Not only that, but the entire process lacks transparency and is totally out of the control of european courts. In addition the Court found that the rights of data subjects were not enforceable against US authorities which it deemed unacceptable. The efficacy of all EU regulations which grant rights to persons is, in no small part, measured by the ability of said rights to be enforced directly by the ECJ. Furthermore US federal legislation, or lack thereof, regarding the sale of customer data without disclosure contributes to a situation in which the ECJ simply does not trust US businesses with EU personal data. It believes that many businesses are entirely built on the premise of receiving payment from third parties for personal data, ultimately requiring those parties to be GDPR compliant as well. For these reasons it declared the "EU-US privacy shield agreement" invalid, without implementing a replacement. The solutions it offered were far from optimal and once again left some businesses more equal than others. US businesses are encouraged to set up headquarters and servers in Europe and store, manage and process all EU personal data there without ever transferring it to the US. While this may well be a short term fix, it does put all the responsibility on a foreign business owner to find a local provider just on the off chance they encounter EU personal data. Another proposed solution are standard contractual clauses (SCCs). The ECJ decided that while these remained valid the country with which the SCC is signed must itself be GDPR compliant. [133]This, ofcourse, does little to facilitate improvement. Ultimately there is no satisfactory long term solution to this state of non-compliance until there is a change in legislation from either side.

PART III.

Arguably the US will have to be the side to adapt to an increasing awareness of data protection as the EU has already, in many people's eyes, established the baseline from which to develop any further

[133] 10 Foreign Intelligence Surveillance Act of 1978, Pub.L. 95–511, 92 Stat. 1783, 50 U.S.C. ch. 3611 Exec Order 12333, (Dec. 4, 1981)

legislation. In my opinion US businesses are at a severe disadvantage in EU-US relations when transferring and processing data across borders due to the lack of overarching federal data protection regulations. Despite allowing businesses free reign with personal data seeming like a competitive edge, it ultimately limits the access of these businesses to the european market. The US doesn't have cohesive and overarching federal data protection regulations and therefore has very little bargaining power when faced with the rigid and demanding GDPR. Instead of US businesses benefitting from transnational agreements, such as GDPR equivalency schemes, they are required to adhere solely to EU regulations. Meanwhile they are at a constant risk of severe penalties from EU authorities if found non-compliant. Even if the private sector is able to implement all the technical necessities, the government does not appear to want to sufficiently regulate itself. As there are virtually no regulations placed upon most US businesses by the federal lawmakers, the ECJ assumes that data is unprotected by default as soon as it crosses the border. The issues raised in Schrems I and II, such as the access by governmental agencies or the selling of data to third parties, indicate this is very much the case. Without an effective and enforceable GDPR equivalency scheme and the necessary underlying federal data protection regulations US businesses are stuck in limbo.

I believe comprehensive federal data protection regulations are necessary to rescue US businesses from this state of limbo and allow for negotiations between the US and the EU on acceptable data protection standards. Reaching an agreement on said standards would afford US businesses the chance to comply with their own federal laws without fear of international reprisals. US businesses wouldn't even need to know the GDPR exists, and neither should they have to. These desired federal regulations are not as far fetched as one might think, case in point the “California Consumer Privacy Act” (CCPA). The CCPA and it’s comprehensive framework for data protection is, in my opinion, exactly the right approach and should be implemented federally. Not only is it a fantastic piece of legislation which grants consumers effective and direct rights to their personal data. It is also inspired and motivated by a US-centric understanding of data and property and is subsequently much more likely to take hold on a

federal scale than regulations imposed by the EU would be. In fact the CCPA is remarkably similar to the GDPR. This similarity should allow for a simple and effective GDPR equivalency scheme were the CCPA to become federal legislation. US businesses would no longer need to self certify, as the federal authorities would be responsible for enforcement, and any business compliant with US federal data protection regulations would automatically be GDPR compliant. As a refresher, the GDPR grants data subjects the right to access, opt out, delete and security among several others. The CCPA in contrast grants data subjects the right to access their data through specific requests. Furthermore businesses are not allowed to sell data subjects personal data without providing an opt out option. The "right to delete" is also afforded to data subjects under the CCPA, as well as rights of action to sue if the necessary measures aren't taken to protect their data from a breach. The CCPA also utilizes a definition of personal data that is equally abstract and tied to identifying a person as the GDPR does. The only points not covered by the CCPA that are contained in the GDPR are the "right to correct incorrect data" and the requirement of explicit consent for data collection in general. In my opinion a lack of these requirements does not indicate an unwillingness to raise the standards in the future. Instead I believe it is simply due to the lack of similar legislation in other states and the difficulties imposed on Californian businesses should they become over regulated in comparison to the national average. An indication of the effectiveness of the CCPA is the number of states "imitating" it with some slight variations. The overall zeitgeist is seemingly shifting towards a recognition of the value of data as property and it is only a matter of time before the bar is raised entirely. The importance of cohesive and federal data protection regulations cannot be overstated however. Each state devising its own data protection legislation is a great way to quickly progress towards one optimal solution. That solution then still has to be implemented federally to bind all data processors equally and provide adequate and equal protections. Of course no amount of legislation will solve the main issues preventing the next GDPR equivalency scheme if legislation around the access of data for reasons of national security change. While a federal CCPA would most certainly result in private businesses being GDPR compliant, it would need to have an effect on the powers granted to the federal

authorities for reasons of national security. The federal government would have to limit its own ability to access data on it's own soil in order for any of the proposed regulations to even become relevant. This will always be a hard sell but is ultimately the crux of the issue. The ECJ demands everyone, even the NSA, is GDPR compliant. In my opinion, this self regulation by the federal government is the only way forward. It will allow for the next iteration of a GDPR equivalency scheme between the US and EU and finally reduce the artificial limitations currently placed on both systems. This way US businesses will be compliant with US laws while still fulfilling all GDPR requirements. Simultaneously EU businesses would be held to identical standards when processing US customer data and the free exchange of data would be restored. The reasons because of which this state cannot currently be achieved aside, it simply isn't tenable not to strive towards it. Free trade and equally, the free exchange of data is central to the everyday operations of each and every business and increasingly so. It is only a matter of time before the desire to ease global trade will once again allow for positive development and open collaboration in the context of cross border data processing.

CONCLUSION

Both the US and the EU have a history of recognizing the need to federally regulate the use of personal data for particular high risk businesses or demographics. The US has historically chosen to keep these federal regulations to a minimum, focussing mainly on the protection of minors as well as the financial and insurance industry while leaving large numbers of other businesses unregulated, and data subjects unprotected. In contrast the EU member states each had some overarching national regulations, before the EU decided to harmonize the treatment of personal data based on its founding principles mainly "the right to respect for private and family life." Due to the high priority placed on data protection by the EU, the European Court of Justice established abstract and generally applicable legal terminology, with the goal of establishing equal protection for all EU persons and their data across all member states.

This in conjunction with comprehensive “General Data Protection Regulations” (GDPR) has granted EU persons substantially more rights than US persons have under US legislation. Equally it burdened businesses with countless responsibilities. The vast difference in rights and responsibilities facilitated the implementation of GDPR equivalency schemes in order to open the EU market to US businesses otherwise governed solely by comparatively lax US laws. While these schemes were celebrated and adhered to widely by US businesses they left much to be desired in the eyes of data protection activists. More unscrupulous actors would often lack transparency and manipulate the self-certification process. For these reasons ECJ was contacted by Mr. Schrems and asked to rule on the effectiveness of the scheme in regards to Facebook's data processing practices. The ECJ repeatedly voiced that US businesses were unable to be GDPR compliant so long as they physically process any data in the US. The ECJ determined that while US businesses themselves may be putting in all the necessary efforts to be GDPR compliant, the current federal national security regulations around the PATRIOT act make any data on US soil accessible to governmental agencies, without any applicable data protection measures. Furthermore EU data subjects would have no recourse against said agencies in case of a data breach, violating a core principle of the GDPR namely the enforceability of the guarantees provided. As a solution the ECJ proposed businesses make use of data centers in the EU and open separate headquarters responsible for EU data exclusively. These solutions may provide short term relief but they come at great costs and provide little to no stability as the limitations on data processing could be increased with the next big ECJ ruling. The solution proposed in this article is not a quick one. However, given the context in which it has already been applied I believe it is absolutely realistic. California's CCPA offers many of the same protections offered to data subjects by the GDPR, while also utilizing many of the same abstract legal definitions.

Furthermore it is born out of a US-centric understanding of data protection lending itself to being federally enacted and accepted. Where such legislation to be federally enacted it should bind the authorities as much as any business, allowing for a foundation from which to establish a truly functional

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GDPR equivalency scheme. Such a scheme is the foundation for the free exchange of data between the US and the EU, and therefore a large part of the power that should be wielded by US businesses in the EU market. Without it US businesses will remain at a disadvantage with no improvement in sight.

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Alex Kermani

An Analysis of Section 230 and Online Free Speech

Abstract. Section 230 of the Communications Decency Act of 1996 provides the unique privilege for online platforms to dismiss liability from the actions of third parties on their websites. Through the freedoms granted with this section, the Internet has grown to become a hub of discourse and communication for many. While there are many benefits to this unprecedented growth, many prevalent online platforms such as Facebook and Twitter have restricted speech for their users and as a result, American public discourse has suffered. This has occurred due to the continued disregard of the 1st Amendment and its principles such as Milton's Marketplace of Ideas and Mill's Harm Principle by many of these online platforms. In order to simultaneously protect speech rights and the nature of online discourse, I believe that Section 230 should be reformed to require that sites must choose to either maintain the ability to editorialize their content while also becoming liable for the messages appearing on their site or the inverse. With such a reform in effect, many websites would be able to maintain a large portion of their business models while the typical citizen also has the ability to ensure that they have the ability to perform free and open discourse with others.

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INTRODUCTION

A legal protection unique to the United States is the freedom of speech provided by the 1st Amendment of the Bill of Rights. While restrictions to speech such as defamation and obscenity still exist the United States is unique in its vast degree of allowed speech when compared to other nations.

A way in which these unique freedoms are being undermined in recent times is through the moderation of social media sites and the systematic deplatorming of users who express an unpopular or questionable opinion online. As social media platforms have grown in recent years, they have served as hubs for discussion and interaction between a significant portion of the US population, but have struggled regarding determining the content that can appear on their platform.

These platforms are granted the ability to editorialize the messages that appear on their site while also avoiding liability through Section 230 of the Communications Decency Act of 1996. This section allows for social media platforms to create a grey area in which these sites are neither considered to be a public domain or unable to promote editorialized content with liability. While one may believe this Section to serve as a beneficial privilege for social media sites in order to improve public discourse, I hope to express through The Framers' intentions of 1st Amendment rights, Milton's Marketplace of Ideas Theory, and Mill's Harm Principle the dangers of limiting more forms of speech and especially those allowed through the 1st Amendment. I believe that Section 230 initially served a valuable role in fostering growth in the realm of online communication, but that the extent of these companies' influence and disregard of traditional 1st Amendment rights, as well as their anti-competitive actions have shown that Section 230 is no longer a necessary protection for social media sites that undermines our rights. As a result, we must either partially or wholly repeal the section and replace it with language that does not provide such overarching privilege to social media sites such as Facebook and Twitter. This is because while the 1st Amendment can allow discourse that may appear to be distasteful or unpopular, the unique

protections of the 1st Amendment are vital to effective discourse in the United States and any attempts to undermine its primary properties must be actively resisted.

PART I.

In recent times, the extended pervasiveness and significance of social media is such that it cannot be overlooked. Social Media has become an increasingly prominent form of communication as it has garnered cultural significance and influences the behavior of many in the physical world ranging from teenagers to politicians. Within the US, researchers estimate that 72% of US citizens have a social media profile and spend an increasing amount of time browsing social media sites.

An issue that has followed many social media companies throughout their unparalleled growth has been moderating speech that may deter other users from using their service while also ensuring that freedom of speech is protected for those on the platform. As an attempted remedy to this issue, many social media platforms have a specific Terms of Service (ToS) which limits the types of speech that are allowed on the platform and is signed by the user in order to create their account. While a ToS may seem like a step in the right direction, many argue that these agreements are naturally vague and are often not always enforced equally among users. Furthermore, having a compulsory ToS in order to communicate online can be interpreted as a limit to 1st Amendment rights and as an infringement upon the freedom of speech rights of American social media users. With rising political tensions and polarizations in the US, many have also taken note of social media platforms favoring certain political messages while strictly moderating others. As emphasized by the banning of former President Donald Trump, the subject of who and what social media platforms choose to moderate has been brought into the national spotlight and has become a contentious debate in regards to the relationship between Social Media, the 1st Amendment, and the American people. One of the influences of the 1st Amendment was Milton's Marketplace of Ideas Theory. John Milton argued that only through "a free and open encounter" can speech flourish and that

ideas should be available for many to hear. Milton claims in the Marketplace theory that unless emergency situations present themselves, ideas should be able to be expressed freely and without restriction at any level. The theory continues that naturally the right idea will always prevail over more flawed ideas without any outside intervention. While this concept has not been entirely adopted, it nonetheless has been one of immense significance in the US as the consensus legal opinion has remained that the primary and most effective method to combat bad speech is with good speech and that the federal government should maintain a minor role in the moderation of speech. With the advent of the Internet and social media, the Marketplace of Ideas has shifted to the online realm as no other medium exists in which the transfer of ideas and concepts is so convenient yet thorough. With this development, the US must maintain a commitment to the marketplace theory in order to foster an open environment for speech in the near future.

Another core motivator for the 1st Amendment was John Stuart Mill's Harm Principle. Mill makes the important distinction that there is a vital difference between both harm and mere offense in that unwelcome consequences onto others do not necessarily always constitute an act of harm. Rather, for an act to qualify as harm through the Harm Principle, "an action must be injurious or set back important interests of particular people, interests in which they have rights." Part of Mill's intention with the rigid qualification for an act to qualify as harm specifically stem from his beliefs regarding individuality and personal liberties. The intersection of Mill's Harm Principle and his beliefs on individual liberty lay on the idea that neither the government or even society should play a role in whether one can make specific choices or commit certain actions, so long as they do not cause harm to others. However, this logic also provides the ability for the government to infringe upon personal liberties when it is deemed that specific acts are in fact causing harm, but Mill maintains through the harm principle that speech cannot cause harm alone. The influences of Mill and Milton are both present in the 1st Amendment through the Free Speech Clause which restricts the government's ability to moderate the speech of citizens. Through this clause, American citizens are typically granted the ability to the freedom to speech and is generally

understood as a blanket protection to speech with a few exceptions. Furthermore, the Supreme Court has determined that 1st Amendment rights carry over to the Internet and that it is one of the most influential places for "the exchange of views." Section 230 does not provide any additional speech protections beyond the scope of the 1st Amendment and instead serves more so to determine if the speech or actions on a platform are subject to liability. The primary distinction of Section 230 is that it provides social media platforms the ability to moderate the content on their sites while also maintaining a lack of liability for the claims made that may violate speech laws in the US.

PART II.

Section 230 of the Communications Act of 1934 was enacted as part of the Communications Decency Act of 1996. This section provides immunity to users or providers of online services through language stating that neither will "be treated as the publisher or speaker of any information provided by another information content provider." . An early challenge for the legitimacy of Section 230 in the courts was Zeran v. AOL, a case in which a user sued AOL for failing to remove an advertisement that linked them to the Oklahoma City bombing attack in 1997. The 4th Circuit sided with AOL and in their decision claimed that Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." This decision was very impactful for the Internet as it allowed many online service providers the freedom from liability necessary to grow at the rate in which they did and to further foster a network of effective communication between users. However, the seemingly unending freedom online services held eventually met some restriction with lawsuits brought against Roommates.com. The case was centered around the site's mandatory questionnaire that required information such as the sex, ethnicity and race of a user, and the race they preferred their roommate to be. The 9th circuit courts in 2008 determined that such a questionnaire violated discrimination laws and that the required profile questionaire made the site am information

content provider and as a result ineligible to utilize the protections of §230(c)(1). This decision served as a gut check for many online services as prior to this decision there were next to no restrictions in the past, but this decision has still maintained a large portion of the initial protections nonetheless.

In contemporary times, Section 230 has received increased scrutiny from both sides of the aisle. Many politicians, especially those on the Republican side of the aisle claim that social media sites such as Twitter do not neutrally enforce their ToS and selectively restrict those they disagree with politically such as Donald Trump. Meanwhile, those on the Democratic aisle tend to argue that large social media sites have an obligation to limit disinformation and hate speech online but have not yet done so. As a result H.R.492 - Biased Algorithm Deterrence Act of 2019 and S.1914 - Ending Support for Internet Censorship Act have both been introduced to Congress as a potential remedy to the scrutiny of Section 230.

H.R. 492 was a bill proposed by Republican Congressman Louie Gohmert in 2019 and modifies the language of Section 230. The change includes that "an owner or operator of a social media service that hinders the display of user-generated content shall be treated as a publisher or speaker of such content, and for other purposes." H.R. 492 has since been referred to the House Subcommittee on Communications and Technology. The language of this bill can be interpreted such that any social media platform that relies on algorithms to promote or hide certain posts artificially for any reason. Currently, all major social media sites invoke algorithms to create a specific feed of posts for users and as a result they would all completely lose access to the protections from Section 230. As a result, this would be a very controversial bill as it is currently written due to the fundamental changes that social media platforms would incur as a result in the sense that they would either lose access to valuable algorithms or the legal protections that Section 230 provides.

In addition to H.R. 492, S. 1914 which was proposed by Republican Senator Josh Hawley in 2019 serves to also modify the language in Section 230. It accomplishes this by removing protections from platforms with more than 30 million active monthly users in the US and more than 300 million worldwide, or have over $500 million in annual revenue worldwide, unless they receive an exemption

from the FTC. Such an exemption can only be granted provided that they do not moderate against any political viewpoint whatsoever and have not for the past two years. A national survey showed that a majority of respondents supported this bill by roughly 27 points, regardless of their political affiliation. While this bill would not be as logistically difficult as H.R.492, S. 1914 would still require a shift in the ways that social media platforms moderate content and would have little to no effect in regards to disinformation or hate speech as either of these types of speech could be aligned with a certain political group. Nonetheless, this bill has been referred to the Committee on Commerce, Science, and Transportation within the Senate for further evaluation.

In addition to these two bills being introduced in Congress, On May 28, 2020, Former President Donald Trump made the “Executive Order on Preventing Online Censorship" (EO 13925) with the intention of prompting regulation of Section 230. Trump went on to claim in this order that any content that is moderated and limited by social media sites outside of those in the Good Samaritan clause in Section 230 are by nature enacting editorial behavior. This EO was very controversial at the time of its conception as many Democratic politicians attributed the order to political theatre due to Trump’s disagreements with Twitter at the time. Furthermore, Democrats including the Senator who wrote Section 230 argued that the Section was a one that should be carefully discussed rather than having such a brash EO with murky intentions affect the issue . As a result, the EO met massive amounts from digital advocacy groups as well as some free speech groups claiming that removing Section 230 would result in even more restriction of speech but from the government rather than Big Tech itself. As a result, President Joe Biden rescinded EO 13925 on May 14, 2021, but debate still persists on the Democrat side of the aisle as to the role that Section 230 may have played in major social media companies allowing for disinformation to spread online prompting the January 6, 2021 riots at the Capitol.

This is a unique scenario in which there is bipartisan support for the repeal or removal of a specific law, but that the reasons for doing so vary so widely. Nonetheless, the discussion surrounding

Section 230 is only beginning and will continue to evolve in the coming years as communication online and through social media becomes even more commonplace.

PART III.

While Section 230 played a crucial and beneficial role during the birth of the Internet, I believe that it has now outlived its use and must be fundamentally changed. As the law currently stands, Section 230 permits online companies the ability to simultaneously moderate the users who can have access to their services while also claiming that they are not liable and able to effectively control the actions of users on their platforms. This issue seems plausible when operating at a now very rudimentary level, however social media companies such as Facebook, Twitter, and Google constitute some of the largest and most influential companies in the world. I believe that Section 230 should be repealed in such a way that social media platforms must choose to either become liable for the speech that is spread on their platform while maintaining the ability to editorialize their content, or that they should lose their ability to editorialize the content on their platform while simultaneously avoiding any liability for the content that takes place on their site.

A useful comparison to the situation social media platforms would find themselves in with my proposed solution would be to compare them to either telephone companies like AT&T or to news publishers such as the New York Times. A telephone company such as AT&T for example does not have the ability to actively moderated and specifically choose who is qualified to have access to a telephone or the ability to call somebody else on a telephone, but they are also not liable to the words that someone may say on their telephones no matter how unlawful or egregious they may be. Meanwhile, a news publisher such as the New York Times has full control to choose the content that appears on their newspapers and website, but they are held liable for the speech that they include in their media.

Through this proposed solution, each online platform would have the ability to distinguish their core mission and values surrounding their service. If the company values the free flow of communication with minimal restrictions, they could choose to follow the AT&T plan and simply inform users of their site that they may be exposed to conversation or speech that may appear distasteful or abhorrent to some and allow the individual to weigh the costs and benefits on their own. Inversely, if a site would rather focus on providing a concise message or worldview, they could choose to follow the New York Times plan and simply accept liability for the speech that their users post while having as strict of an editorial team that they may choose. With these two plans, each site has the ability to choose the method that follows their ideals while also ensuring our freedom to speech is maintained. Through this method of restricting Section 230, the American people will have the ability to approach such platforms with a clearer understanding of their goals and to choose the site that best matches their intentions when communicating online.

As a counterpoint to worries regarding Section 230, many discuss that these social media platforms are private companies and may choose to moderate speech however they may please. I believe such an argument to be flawed due to the pervasive nature of social media into daily American life. With a majority of US citizens actively using a select few platforms on a very consistent basis, it is concerning that there have not yet been steps taken in order to protect free speech no matter how controversial. This is the case because it is important that individuals are exposed to ideas that may challenge them intellectually and morally, as many can benefit from such tests in regards to their preconceived notions. No matter how unpopular speech may seem to be, when dissenting ideas or opinions are silenced artificially, democracy suffers as a result.

One may consider that such a restriction being placed upon platforms like Facebook may be counterproductive when trying to stimulate conversation, but I do not believe this to be the case. Section 230 in its initial purpose provided a special and unique privilege to online platforms and allowed for growth without complete realization of the potential consequences. It seems unreasonable that social

media platforms play no role in the spread of communication or ideas on a platform that is designed and specifically edited in order to promote a certain worldview.

Furthermore, when considering the nature of the 1st Amendment in the United States, many focus on the concept of a public square and how one must maintain the ability to speak in such an area freely. As emphasized in recent times especially through the Covid-19 pandemic, social media platforms such as Twitter and Facebook serve as a quasi-public square in which US citizens are able to communicate with one another despite a global pandemic or any other disturbances to daily life. When taking this utility of social media to function as a public square as well as its massive user base into account, it is undeniable that the sheer influence these platforms hold surpass the need for a federal protection such as Section 230 as it currently stands. As a result of the ways in which many social media sites have operated with regards to rights to speech, many worry that the 1st Amendment as it is currently interpreted is in grave danger. Many are concerned with the uneven enforcement of rules and policies by social media sites against users that they may disagree with. Especially egregious has been the systematic removal of Donald Trump from Twitter and Facebook with the reasoning that they must "permanently suspend the account due to the risk of further incitement of violence." While such a suspension is controversial due to the newsworthy nature of a former President, it is further emphasized when other world leaders such as the Iranian Ayatollah Khamenei preach for the destruction of Israel and the West on Twitter with no fear of punishment.

With this being said, it appears to be reasonable to demand a degree of transparency and fairness within one of the most influential media of communication in modern times. As we continue to increase our reliance and usage of social media platforms, it is imperative that substantial changes are made to protect the unique freedoms of speech provided to Americans through the 1st Amendment. Additionally, it is important that such protections are enforced in such a way that limits and protects speech through an objective lens and disregards any subjective claims. I am optimistic that such a determination will be made regarding the fate of Section 230 as it appears to be a topic of extreme significance to many throughout the nation and the surrounding world as a result.

CONCLUSION

The world around us is continuously evolving, and the same can be said in regards to the methods of communication we operate through. Throughout much of the Internet's history, it has been protected by Section 230 of the Communications Decency Act of 1996. This section provides for platforms online a freedom from liability in regards to the content posted by third parties on their sites. Through such an exception, communication online has blossomed and developed to serve as a primary form of discourse for many throughout the United States and the world as a whole.

As a result of the continued growth of discourse taking place online, some have begun to notice that Section 230 has allowed the unique privilege for social media websites to both editorialize the content and communication that appears on their site, while maintaining freedom from liability for the message posted by their users. This has led some to believe that these platforms have undermined the 1st Amendment and the crucial principles that inspired it such as Milton's Marketplace of Ideas theory and Mill's Harm principle. These concepts have played a vital role in the success of free speech within the United States and continue to protect the speech of the minority. The current state of Section 230 is flawed such that it provides a privilege to large social media platforms and is abused at the expense of the common American citizen. While this section is disliked by both sides of the political aisle, no substantive changes have taken place thus far to remove or reform Section 230. To combat this gridlock, I propose that limits are placed on Section 230 such that online communication platforms are clearer with their intentions for the American people. This would be accomplished by mandating that such companies must either maintain their freedom from liability for third party posts, while allowing all opinions to be heard, or that these platforms may continue to editorialize their sites and posts, but at the expense of becoming liable for the content that is included through their product. With such a compromise, I believe that both the American people and large social media companies will be able to reach a happy medium in which freedom of speech can be protected and that open discourse may continue to flourish.

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The Case For Expanding Public Accommodation

Abstract. Section II of the article, Introduction, focuses on defining what the term "Public Accommodation" is and how it has been interpreted to include certain areas of business such as physical locations. Section II also covers the Americans With Disabilities Act, Accommodations and how the language of the law protects individuals with disabilities from facing certain types of discrimination. The final part of section II is the thesis statement that summarizes my argument for going against precedent and pushes for the court and congress to take legal action in expanding the purview of what is a place of "Public Accommodation." Section III of the article focuses on discussing the case of Gil v. Winn-Dixie Stores and how the court case brought up the topic of whether or not the internet should be brought under consideration as a place of "Public Accommodation." This section also discusses what the court has used to define what is a place of "Public Accommodation." Section IV covers other court cases that dealt with the concepts of "Public Accommodation" and title III of the Americans With Disabilities Act, Accommodations. Each one of these court cases covers how "Public accommodation" was brought into the courtroom and how different judges and courts chose to justify their rulings on what constitutes a place of "Public Accommodation." Section V covers my own personal analysis on the opinions given in each court case and why I disagree with the courts persistence on not counting internet spaces as areas of "Public Accommodation." This section will also go into reasoning for why the court should consider breaking precedent and how it has done so in the past in order for the law to reflect societal changes. Section VI will be the conclusion that reiterates the points and reasonings used by judges and the court in the past. The section will end with me briefly explaining why my insistence on including internet places as places of "Public Accommodation" is necessary in our current society.

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INTRODUCTION

I. A BRIEF HISTORY ON THE ISSUE OF WHAT CONSTITUTES A PLACE OF PUBLIC ACCOMMODATION

The debate on what is considered a place of “Public Accommodation" is rooted in its definition. The Bouvier Law Dictionary defines a place of “Public Accommodation” as being an enterprise that provides services to members of the public. This includes businesses that offer places for people to stay for a short period of time in exchange for a specific rate, or food as in a restaurant, or shelter as in a bus stop or taxi stand, or meeting facilities.” The reason for bringing up what constitutes a place of “Public Accommodation" is that it serves as the basis for what is protected by the Americans With Disabilities Act, Accommodations. The law explains that no individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of “Public Accommodation” by any person who owns, leases, or operates a place of “Public Accommodation.”[1]

A. AMERICANS WITH DISABILITIES ACT, ACCOMMODATIONS (ADA)

The Americans With Disabilities Act, Accommodations was passed in 1990 and it provides protection to citizens against discrimination they may face in places of “Public Accomodation.” The law specifies that, “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of “Public Accommodation” by any person who owns, leases or operates a place of “Public Accommodation.” These places were specifically said to include restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. The act

goes as far as to say that private clubs and religious organizations are exempt from the ADA's title III claus. The ADA clearly defines what is a place of "Public Accommodation" but it should also be remembered that the writing for the law itself is from the 1990 an era before the internet was as important to everyday life as it is today.

B. THESIS

The definition of what a place of "Public Accommodation" is should be changed to include virtual spaces.The reason for doing so is that the Internet was not taken into consideration when the Americans With Disabilities Act, Accommodations was written. Since the Internet was made public for people around the world to use, it has become the main avenue for consumers to shop. Due to this development, Internet spaces like store websites receive more traffic than real life stores. Since the law only considered in person locations as falling under the umbrella of what is a place of "Public Accommodation" the Internet wasn't thought of as a place that needed regulations. The amount of growth in Internet traffic to online websites and the high levels of importance online spaces play in a consumer's everyday life should constitute enough reason for internet spaces to be regulated in order for people with disabilities to have as much access as an able-bodied person.

II. SHOULD THE INTERNET BE CONSIDERED A PLACE OF PUBLIC ACCOMMODATION?

A. GIL V. WINN-DIXIE STORES

The case of Gil v. Winn-Dixie Stores touches on the issue of what should be considered a place of "Public Accommodation" when it comes to the application of Americans With Disabilities Act, Accommodations. The case of Gil v. Winn-Dixie Stores involved the grocery chain of Winn-Dixie who

ran a website that allowed customers to shop online at their own convenience and refill prescriptions for in-store pickup. The website failed to offer the sales it had in its physical location online. This created a scenario where in person shoppers could obtain a better deal by visiting a physical location. Juan Carlos Gil had been a customer of the grocery chain for many years and shopped at a physical location for that entire time until learning that the grocery chain had an online website. Gil, who is legally blind, uses screen reading software that vocalizes the content on websites allowing him to navigate them. When GIl learned of the existence of Winn-Dixie's website and tried accessing their services he learned that their website was not programmed to be compatible with the software he used. This meant that the only way Gil could shop would be in person since shopping online made it impossible for him to do so because of the website's layout. This placed the shop in potentially a bad place when it came to providing equal access to all customers on the basis of disability. Gil technically did not have the same level of accessibility as a customer who could see when operating the website. Winn-Dixie also did not include the deals it offered at its physical locations on its website, creating another example of Winn-Dixie making it more difficult for those with a disability to have equal treatment to an able-bodied customer. Getting to a physical location is more difficult for a person with a disability, creating a scenario where Winn-Dixie created an environment where an able-bodied consumer had more inherent accessibility than a disabled customer. Gil v. Winn-Dixie Stores brought up the question of whether or not the internet space should be brought under consideration of title III of the ADA that defines "public accommodation." If the internet spaces were brought under the title III of the ADA then internet spaces would be forced to accommodate the disabilities of their customers.3 This would make it so that stores like Winn-Dixie would have to make their website more accessible for all of its customers.

B. RULING

The Holding of the case was that the customer's inability to operate the website due to its programming's incompatibility with his screen reading software did constitute a form or injury that was concrete. The language in Title III of the ADA that governs what is considered a place of "Public[134] Accommodation" was clear and left little space for interpretation. It linked the definition of a place of Public Accommodation to physical spaces meaning that websites were not considered under the ADA's original intended meaning of what can be a place of "public Accommodation." Since the judge refused to break precedent and expand the definition of what a place of "Public Accommodation" is, the case was vacated and remanded. The judge argued the only way to bring Winn-Dixie under the purview of the ADA would be if the website constituted a barrier to the customers ability to access and experience the physical store itself. The website did not do so, the only way for the court to rule in Gil's favor going forward would be if congressional action was taken to broaden the definition of what is a place of "Public Accommodation" to include web spaces. The court chose to leave the definition of what is a place of "Public Accommodation" in the hands of congress rather than taking judicial action to establish it themselves.

C. EXPANDING PLACES OF PUBLIC ACCOMMODATION

The topic of congress expanding the definition of what constitutes a place of "Public Accommodation" was mentioned in the Judges holding. It leads to the question of whether or not the importance and prominence of the internet should lead judges to either take judicial action or whether congressional officials should expand the definition of what constitutes a place of "Public Accommodation." The holdings of the case stated that an injury was committed indicating that there was

[134]Gil v. Winn-Dixie Stores, Inc., 2021 U.S. App. LEXIS 10024, 993 F.3d 1266, 28 Fla. L. Weekly Fed. C 26734

a sort of injustice committed to Gil. It's just that there wasn't enough legal precedent for the court to side with his position. There are millions of people who suffer from different forms of a disability whether it be blindness or an inability to hear to name a few. I'm arguing that it is inherently unfair and unjust to subject people with a disability to an internet that isn't regulated to accommodate their needs when some actions like shopping or requesting a tax transcript can be done more efficiently online.

IV. CASES RELEVANT TO THE TOPIC

A. RENDON V. VALLEYCREST PRODS

The case of Rendon v. Valleycrest Prods covers plaintiffs filing a class action lawsuit against both ABC and Valleycrest who jointly produce the show Millionaire. The nature of their grievance comes from the selection process of potential contestants that the show employs when picking who will be on the show. Millionaire implements a format that relies on an automated telephone answering system where prospective contestants call a toll-free number and answer pre-recorded questions using the keypad on their phones. The contestants who answer all the questions correctly would then move on to the second stage which encompasses a random drawing. The nature of the lawsuit comes from the toll-free call part of the 1st round. Aspiring contestants who suffer from being deaf, could not hear the questions asked by the automated system, or those who failed to move their fingers fast enough to record their answers on the screen pad were set up to not be able to compete in the 1st round. Rendon v. Valleycrest Prods focused on plaintiffs Rendon, Leon, and Norris who suffered from a condition that limited their fingers mobility. The aspiring contestants argued that the show could easily accommodate them if they chose to use services like TDD that would have allowed them to compete in the fast finger response aspect of the TV shows screening process. Four Millionaires' decision to not make the process accessible to those with a disability set these prospects up to not be able to compete. The ruling on the case by the presiding judge

was that the court granted the motion to dismiss the case on the behalf of the show Millionaire because the telephone screening system that the show used when selecting contestants did not constitute protection under the ADA because it was not administered at a public location. This points to the subject of their being a physical location as essential when applying title III of the ADA. The logic used in the judges ruling differs from the logic used in Gil v. Winn-Dixie Stores to some extent. The judge in Gil v. Winn-Dixie Stores established that the stores website could not be considered as a place of "Public Accommodation" unless congress took action to include web spaces in the definition of what is a place of "Public Accommodation." The case rested on the terms definition rather than if an injury was committed since the court had agreed that one had occurred. The judge's ruling in Rendon v. Valleycrest Prods relied on the selection process of the show Millionaire being administered at a physical location instead of over the phone in order to implement the ADA on the behalf of the plaintiff. Both cases had a similarity in that an injury and injustice was committed against the plaintiffs in each situation but the ADA's definition of a place of "Public Accommodation" needing to be tied to a physical location kept both injuries from being addressed by the court.

B. ACCESS NOW V. SOUTHWEST AIRLINES

The case of Access Now v. Southwest Airlines covers the claim made by customers of Southwest Airlines that focused on their website being inaccessible to customers who are blind and use screen reading software when navigating the website. Southwest.com offers deals on tickets, hotels, and reward programs that its customers can take advantage of on the web. Certain aspects of the website such as its visual graphics that lack labels and data tables all make it impossible for the screen reading software to properly allow blind customers to navigate the website and take advantage of the same deals able bodied individuals have at their disposal. The court ruled that the website itself failed to constitute a place of public accommodation leading to the use of title III of the ADA being obsolete.5 Access Now v.

Southwest Airlines resembles Gil v. Winn-Dixie Stores since both court cases rested on the judges' insistence that both Winn-Dixie's website and Southwet.com were not by definition a place of "Public Accommodation." Access Now v. Southwest Airlines like Gil v. Winn-Dixie Stores never failed to say that people with disabilities had received unfair treatment that constituted an injury. The reason why the judge failed to rule in favor of the plaintiffs in both situations was that the court refused to take judicial action to expand the definition of what is a place of "Public Accommodation." They would rather wait for congress to do that themselves, It is important to note that the action of expanding the terms definition itself was not questioned as being wrong. This means that the action would make sense, it's just that the process of doing so is supposed to go through congress and the judicial system.

C. DEL-ORDEN V. BONOBOS, INC

The case of Del-Orden v Bonobos, Inc revolves around a legally blind plaintiff that sued Bonobos because of how Bonobos website sold clothing and accessories but failed to be compliant with the ADA in giving blind customers equal access to shopping. The premise of their argument was that Bonobos put up barriers that made it difficult for its blind customers to shop on their website and buy products. These barriers constituted a challenge that directly targeted those with a disability. Del-Orden v. Bonobos, Inc brought up the topic of discussion among the legal community as to whether or not the ADA applies to private commercial websites since if answered to be Yes then they would be considered places of "Public Accommodation." The court decided to side with a growing movement to make commercial websites count as areas of "Public Accommodation" leading to protections given to blind customers and others who have disabilities in physical locations extending to give them protection on commercial websites.

D. THE STANCE OF THE LAW

These court cases demonstrate that the law has for the most part favored falling back on precedent and focussing on keeping the definition of "Public Accomodation" clear and only grounded in physical spaces. Del-Orden v Bonobos, Inc is a step in making Internet spaces areas of "Public Accommodation" by opening up commercial websites to be affected by the ADA. This is important because by opening the door for even just commercial websites to be considered when discussing areas of Public Accommodation, court cases in the future now have a form of precedent to reference. Del-Orden v Bonobos gives plaintiffs a leg to stand on when trying to justify why lawsuits against the accessibility of websites should be able to invoke title III of the ADA. If an exception was made for commercial websites, an exception being made to other types of websites would be justified because it could be argued that Del-Orden v Bonobos threw out the argument that there has always been a clear definition of what is a place of "Public Accommodation."

V. PERSONAL ANALYSIS

The issue is that while I can understand that virtual spaces were not mentioned when the Americans with Disabilities Act was passed as an example of where the law applies, I believe it should be interpreted to do so. This is because of how court cases in the past have challenged precedent to move the country forward into a more modern time. For Roe V Wade the court used reasoning like their task being to resolve the issue of abortion by constitutional measurement without taking emotions and other influences into account. This meant that the court wanted to use a legal arguement as their justification for making abortion legal rather than on a belief that society at the time had come to believe in. The issue was that the right to have an abortion had been put down by precedent in cases that came before Roe V Wade and so the court in voting to make abortion legal under a persons right to privacy broke precedent. Even

though the court used a legal argument to say that under the right to privacy women have a right to an abortion, nothing had changed in terms of the law. The only thing that had change since cases that came before Roe V Wade was that society came to see an abortion as being acceptable. This means that while the law is the law there is some space for interpretation as Roe V Wade demonstrates since the court chose to break precedent in order to rule in a way they viewed as being right for their time7. The same could be done for court cases like Gil v. Winn-Dixie Stores since the judge presiding over the case didn't say the application of title III of the ADA was unreasonable or that an injury was not committed against the plaintiff. The judge said that the only way for the court to apply the ADA was for Internet spaces to be explicitly included by congress as qualifying as a place of "Public Accommodation." This explanation by the judge points to the issue being the legal process of making websites a place of "Public Accommodation " rather than the plaintiff's case. The judge's own reasoning for not expanding the definition implies that he would rather not use a legal power that judges are not explicitly said to have in the constitution to make his decision. The internet wasn't established on a world wide scale at the time that the Americans With Disabilities Act, Accommodations was written into effect so it would stand to reason that now that the internet space is such a big area of commerce and interaction that it should be an area of public accommodation. Human beings navigate the web more often than they go outside for shopping and it has never been more important to make these spaces accessible than now. The Covid pandemic demonstrated that society could shift to most of their operations being online and so all websites should be seen as public spaces since people have come to see them as essential for their daily tasks. The pandemic took aways people's ability to go outside and forced the web to become their new form of being in a public space since it was their only real way to interact with others in a safe way. What if a student who was blind during the pandemic was forced to do research about a topic but the website they were trying to get their information off of was incompatible with screen reading software leading to them not being able to do their work? The pandemic just demonstrated how important it is to make the internet as accessible as can be to everyone. We live in the virtual age and virtual spaces may be even

more important than the physical world for our daily tasks. While the global pandemic may be becoming less of a danger with vaccination rates going up and infection rates going down there is still the possibility of the virus mutating and putting society back in the same place it was in a few months ago. The pandemic showed that our ability to choose whether we can go out in public at our own leisure can be taken away so there has never been a stronger aspect for web spaces to be considered a place of “Public Accommodation" since we could someday again only use the web as way to interact with others. I believe it is important that we prepare for the possibility of it occurring again today in order to make sure that everyone has the same level of accessibility down the line.

VI. CONCLUSION

The article began by discussing Gil v. Winn-Dixie Stores and how the plaintiff raised a lawsuit on the premise that the Winn-Dixie grocery chain was at fault for failing to provide an equal amount of accomodation for its blind and disabled customers as it does for those who suffer from no disability. The website's programming failed to allow the plaintiff in the case named Gil to use his screen reading software to properly navigate the store website to refill his prescriptions. This meant that for Gil he would only have the choice to go in person to the store to refill his prescription and take advantage of deals that Winn-Dixie provided for its customers. For someone who is blind going out to the store is much more difficult than it is for someone who can see and so by making the website less accessible for people like Gil, Winn-Dixie made the experience of shopping different for those who could not see. Winn-Dixie stole Gil’s right to choose and provided him with no alternative to going in person. Winn-Dxie made it more difficult for those who are blind causing an injury because of how inaccessibility could lead those who have a disability to miss a refill or choose not to go to the store at all because of how the process is for them. My solution is that congress should take action to expand the definition of what is a place of “Public Accommodation" because of the court's stance on the issue differing in multiple cases. It is

important for congress to do so because if the internet is brought under the purview of being a place of "Public Accommodation" then websites would be forced to have their programming adjusted to allow people who are blind to have a better shopping experience. Their experience would finally be comparable to their able bodied peers. Plaintiffs in multiple court cases explained that it would not be difficult for companies to make their websites more accessible. Doing so would only increase the profit margins of stores because it would increase the accessibility of their website to a bigger audience leading to more possible sales. People who have a disability or, in the case of Gil v. Winn-Dixie Stores, are blind would be able to take advantage of sales and shop in a more comfortable environment that should foster more commerce. The technology as described in the court case that would make this possible is not expensive pointing to the only issue being that of websites not wanting to do so by choice. Even if it was expensive, the Americans with Disabilities Act forced stores to make their facilities more accessible no matter the cost and the saem should be done here. The economics of the law and situation did not matter before and they should not matter now. I can understand that by bringing all websites under the purview of what is a place of "Public Accommodation" the court is opening the door for possible lawsuits for multiple companies and websites[135]. It could shock companies who are oblivious to the matter and force them to shift their websites around due to it being a legal liability. That is why I propose that there would be a grace period that allows companies to make the changes they need to their websites in order to properly accommodate their customers. This would be a win-win situation for all parties involved. The law may be the law but the interpretation of the law has changed over our country's history in order to fit with the current ideology society holds over issues. The Internet has become too big for it to not come under some form of regulation by the government in order to keep things fair for all consumers.

[135]Gil v. Winn-Dixie Stores, Inc., 2021 U.S. App. LEXIS 10024, 993 F.3d 1266, 28 Fla. L. Weekly Fed. C 2673 10