

## Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation

Angela Huyue Zhang  
Oxford University Press, 2021

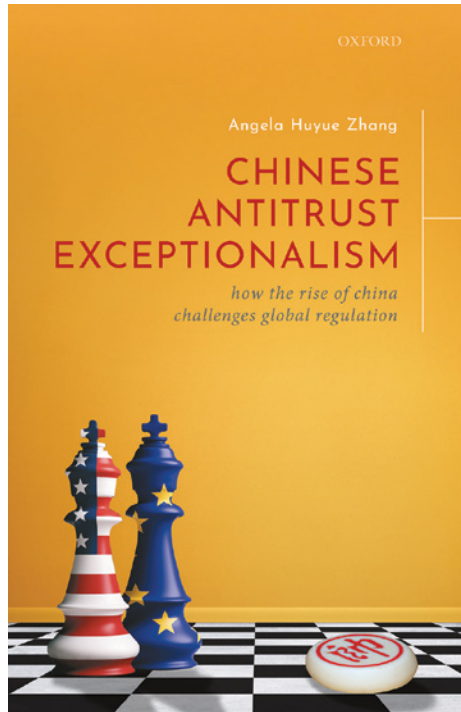
Review by Don Allen Resnikoff

Deeply versed in business regulation both in China and the United States, Angela Huyue Zhang writes about Chinese antitrust law from a unique vantage point, offering key insights for U.S. companies currently doing business or interested in doing business in China — and negotiating the country’s famously difficult bureaucracy.

But for many readers, the most striking aspect of Zhang’s book concerns international politics and economic rivalry: how antitrust and other business regulations are used as weapons of economic rivalry between China and the United States.

In Zhang’s view, the “weaponizing” of competition policy and other business regulations is an aspect of economic rivalry among nations that has escalated over time. She explains that the Chinese government has increasingly wielded its antitrust laws as part of its “tit-for-tat” trade war strategy against aggressive U.S. sanctions imposed on Chinese technology companies.

Zhang, a professor of law at the University of Hong Kong, agrees with U.S. experts like DLA Piper’s Nathan Bush that it would be useful for the United States and China to more directly tackle the obstacles hindering more positive and cooperative trade relations and coordination of competition policy between the two countries. In the December 2021 issue of the ABA’s *Antitrust Law Journal*, Bush wrote that there is “value in preserving constructive engagement” and collaboration between the



United States and China with regard to competition policy.

According to Zhang, China views U.S. sanctions against Chinese companies, such as high tariffs initiated during the Trump administration, as an undesirable and unjustified weaponization of business regulation policy. She also points to U.S. restrictions on Chinese tech companies such as ZTE and Huawei, which produce telecommunications equipment and services, on the asserted grounds of security risk by the Federal Communications Commission. China has disputed these purported security concerns as a U.S. ploy to gain unfair competitive advantage.

China uses its power to delay or refuse approval of U.S. company mergers as retaliation against what Chinese officials view as hostile U.S. trade policies, according to Zhang. As an example, she recounts Qualcomm’s termination in 2018 of its proposed takeover of Dutch semiconductor company NXP in response to the Chinese government’s failure to approve the transaction. NXP executives complained that China offered no explanation for disallowing the takeover and that the companies had met all regulatory requirements.

Zhang says there is widespread consensus that “the Chinese government used Qualcomm, in

the same way that the Trump [a]dministration exploited ZTE, as a bargaining chip in trade negotiations.” That view was confirmed when China’s President Xi Jinping communicated to Trump that he was “open to approving the previously unapproved Qualcomm–NXP deal, should it again be presented to him.”

Zhang hopes that such tit-for-tat weaponizing of business regulation will not continue to harm both the United States and China. She believes it will help if both countries encourage imports from each other and support more economic interdependence, leading to better cooperation in return. She is concerned by the tendency of U.S. politicians to discourage imports of Chinese tech products, suggesting that “[e]conomic interdependence raises the costs of conflict and increases the incentives for countries to cooperate.”

In addition to recommending increased trade and economic cooperation, Zhang suggests that U.S. politicians and regulators take what she argues is a more realistic view of antitrust enforcement and business regulation generally. “Antitrust lawyers and academics should also abandon the utopian ideal that antitrust law analysis is completely immune from political influence. It cannot be ... [T]he fine lines between competition law, trade law, and national security are becoming increasingly blurred.”

Some U.S. experts may push back against Zhang’s suggestions for international trade cooperation and flexibility on antitrust matters. Many U.S. competition policy experts would like to retain doctrinal rigor in application of antitrust laws. That is, antitrust litigation targets should be apprised of well-defined, fair, and consistent legal requirements and given an opportunity to defend themselves before fair and impartial judges.

Another obstacle to reducing international trade tensions is the view of many U.S. politicians and government agencies that China does not play fair in matters such as the adjudication of antitrust issues affecting U.S. and European litigants. In addition, many U.S. officials and business leaders believe telecommunication products exported by Chinese companies often raise security concerns with regard to use of customer information.

But, as previously suggested, there is consensus among many U.S. experts that enhanced coordination and improved relations between the

two countries are important goals. In his journal article, Bush supported Zhang's views when he said that "[p]eer engagement among competition policymakers, scholars, and the [b]ar remains the most promising channel for promoting convergence with prevailing international practices ... Peer engagement implies a willingness to consider the possibility that China's enforcement actions might sometimes stem from good-faith differences of opinion or innovative approaches."

Zhang's insights make her a valuable participant in the international engagement among policy makers, scholars, and the bar that Bush advocates. It may be a difficult engagement, but the United States and China cannot escape being coinhabitants in commerce on a small planet and would do well to get along. 🚩

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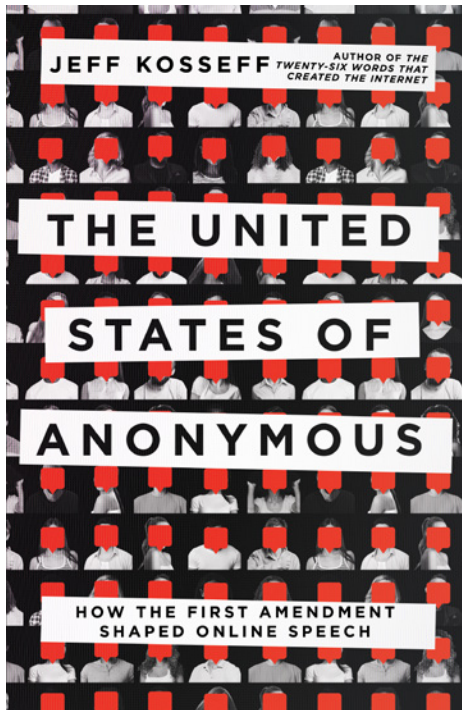
## The United States of Anonymous: How the First Amendment Shaped Online Speech

Jeff Kosseff  
Cornell University Press, 2022

*Review by Ronald Goldfarb*

The subject of anonymity has long occupied social and political discourse. Not only has the concept captured the imaginations of fiction readers over centuries — recall *Cyrano*, *Zorro*, and the *Lone Ranger* — but it has also influenced the evolution of important social policy.

Anonymity helped legitimize the *Federalist Papers* and allowed women to write in times of discrimination, whistleblowers to confide in journalists, and potential witnesses to assist police in investigations. In contrast, the ability



to remain hidden has helped to protect sheeted Klansmen, masked muggers, and online mischief-makers

As a constitutional question, anonymity also has an interesting history. The U.S. Supreme Court has dealt with the issue, sometimes with conflicting results. Allowing authors to remain anonymous when writing controversial criticism protects them from recrimination, but it can be a two-sided weapon that also can hide irresponsible attacks. In short, anonymity can be "a blunt instrument," writes Jeff Kosseff in the *United States of Anonymous*.

The book thoroughly tells this fascinating story, illustrating when courts will and will not "pierce the veil of anonymity." Grounded in the First Amendment, anonymity "undergirds American democracy" when the state is involved in political discourse, but not when private parties are involved in what might be considered a "stab in the back."

When Alabama demanded that the NAACP disclose the names of its members, the U.S. Supreme Court held in 1958 that the NAACP's lists were protected as their exposure could lead to retaliation against civil rights advocates. But when the KKK's membership lists were sought in a 1928 case, the Court found that 14th Amendment protections did not apply to

organizations where secrecy serves as "a cloak for conduct inimical to the personal rights of others."

Courts have wrestled with claims of anonymity and have developed standards for protecting it or not, depending on whether the facts of each case warrant unmasking for solid policy reasons like privacy, copyright, and criminal investigations. U.S. courts are inclined to safeguard free speech protections.

New technologies have added to the dilemma of when to protect anonymity and when not to. They cause "complex menus of costs and benefits," Kosseff writes. In modern times the internet permits broad access to free speech, but its anonymity allows abuses that can injure people. One scholar complained that the internet blogger can "create for themselves a shameful zone" where they may libel others. Anonymity permits a new brand of misconduct — bullying, doxing, sexting, and hacking. *New York Times* columnist Maureen Dowd pointed out this danger in an August 25, 2009, op-ed:

The Internet was supposed to be the prolix paradise where there would be no more gatekeepers and everyone would finally have their say. We would express ourselves freely at any level, high or low, with no inhibitions. Yet in this infinite realm of truth-telling, many want to hide. Who are these people prepared to tell you what they think, but not who they are? What is the mentality that lets them get in our face while wearing a mask? Shredding somebody's character before the entire world and not being held accountable seems like the perfect sting.

The First Amendment protects against government action but is of little use in resisting some of modern technology's techniques in the private sector. Kosseff concludes that "anonymity is an unalloyed societal good," but he concedes that it also is "the source of much that is wrong with society." He adds, "The benefits of America's strong anonymity protections far outweigh the harms ... [and] allow courts to unmask bad actors in extraordinary cases" such as cybercrime, harassment, and stalking. 🚩

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