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Beyond Unprecedented: The Post-Pandemic Economy
Season 4 Premiere:
"Reintroducing *Beyond Unprecedented*: Season 4"

[00:00:03] **Lauren Hirsch:** There's a whole breadth of unanswered questions and opportunities: AI is very top of mind. The future of DEI. Antitrust actions under Biden. The next five years of EVs. With the upcoming election, the stakes are huge.

[00:00:21] **[Music and media clips of journalists]:** The coronavirus pandemic has tanked the global economy with unprecedented speed. The steepness of the decline here is unprecedented. This is a crisis that is unprecedented. It is unprecedented, and we just don't know.

[00:00:36] **Eric Talley:** This is *Beyond Unprecedented: The Post-Pandemic Economy*, a limited series podcast from Columbia Law School and the Ira M. Millstein Center for Global Markets and Corporate Ownership. I'm Eric Talley, Salzbacher Professor at Columbia Law School and co-director of the Millstein Center.

[00:00:52] **Dorothy Lund:** And I'm Dorothy Lund, Columbia 1982 Alumna Professor of Law at Columbia Law School and co-director of the Millstein Center.

[00:01:05] **Talley:** We're kicking off our fourth season of *Beyond Unprecedented* and finding that economic and legal issues confronting workers, investors, and companies have only grown more complex. New technology, new strategies in finance and law, and new legal developments related to racial diversity are challenging corporations, markets, regulators, and lawyers who serve them. And to unpack those issues with our guests this season, I'm absolutely thrilled to welcome my new Columbia colleague, Professor Dorothy Lund, who's joining me as a co-host. Now, Dorothy is a world-renowned expert in corporate law and corporate governance and has written some amazingly important work on how large investors and corporate governance interact with one another. So I can't imagine to have a more talented academic joining me, but also a really good friend. Dorothy, it's fantastic to have you join us.

[00:02:02] **Lund:** Wow, Eric, thank you so much for that introduction. I'm thrilled to be here, and joining this wonderful podcast. And I'm so glad it's a podcast, actually, because if you saw my face right now, it'd be bright red. I'm blushing from that really nice introduction. It’s great to be here. And we’ve got such an exciting series ahead. So, we thought we’d give you a little preview today of some of the exciting questions we’re going to be asking. So, one of the big questions on our mind today is, what are the key business opportunities and regulatory challenges raised by artificial intelligence? We’re also going to ask, how should we understand the increasingly important area of legal financial arbitrage, especially in light of more aggressive M&A antitrust enforcement? We’ll also ask, what’s the future of the market and regulation for electric and autonomous vehicles? And finally, we’re going to explore the implications for the corporate and legal sectors of the Supreme Court’s 2023 decision in *Students for Fair Admissions*. And we’ve got an awesome lineup of guests who are going to help us answer these questions and help us really get at the core of this podcast, which is the interaction between current economic and market conditions and our legal and regulatory frameworks.

[00:03:17] **Talley:** All right. You know what you signed up for, Dorothy Lund. You ready to roll?

[00:03:21] **Lund:** Let’s do it.

[00:03:23] **Talley:** Do you have any favorites among our proposed programs to come up?

[00:03:28] **Lund:** Oh, man. That’s like asking me to pick my favorite child.

[00:03:32] **Talley:** Yeah, well, you did tell me something about your favorite child the other day, but I won’t....

[00:03:36] **Lund:** Hey, hey, hey, that was not for public dissemination, Eric. If any of my children are listening, I have no favorite children. No, you know, I have to say, you know, the AI conversation has been so top of mind for me in terms of my research and also in thinking about how to just superpower my teaching, but also, you know, it sort of gets existential with AI sometimes. So, I think that’ll be really interesting to dive in there. How about you, Eric? Do you have a favorite child coming up this season?

[00:04:08] **Talley:** Yeah, I’ve got a conflict of interest here because I am actually teaching a class in legal financial arbitrage this coming fall, and that is going to be one of our topics, so only coincidental. I need to warn you. But like you, Dorothy, I do not have favorite children. And I don’t have favorite episodes—at least yet. But the one thing that I think we both would value is someone who can help us triangulate these topics that we’re going to be covering this season against sort of, you know, practical, even broader-scale newsworthy items that are coming down the pike as well. And I can’t think of a better person to help us kick off this series and preview these episodes than Lauren Hirsch. Lauren is a reporter for *The New York Times*, where she covers deals and the biggest stories on Wall Street, and she notably helped lead the *Times* coverage of Elon Musk's $44 billion acquisition of Twitter. Previously, Lauren covered retail as well as the intersection of business and policy at CNBC. She studied comparative literature at Cornell University and has an MBA from the Tuck School of Business at Dartmouth College. Lauren, we are excited to have you here.

[00:05:23] **Hirsch:** Thanks for having me.

[00:05:25] **Lund:** We are hoping you can help us wade through and get your expert thoughts on some of these issues that we're planning to discuss this season. And so, we're going to look at some of these headline-grabbing stories, many of which you worked on. But we also want to dig into the impacts beyond the headlines. And so, let's jump in with artificial intelligence. OK, this is a big story, obviously, and there's a lot of dimensions here that we could, we could get into. But I thought we'd maybe start with some recent news that the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) are expected to move forward with antitrust investigations into Nvidia, Microsoft, and OpenAI. So, I'd love to hear your take on this, Lauren, and how we should understand these investigations in the context of these broader debates and conversations about the development of AI. So, what are the stakes here?

[00:06:20] **Hirsch:** The stakes are huge. I actually interviewed [Assistant Attorney General Jonathan] Jon Kanter over at the DOJ last week, actually, and AI is very top of mind for him, for regulators. It's an entirely new landscape that I think they're very wary of, you know, they have felt—this breed of people, in antitrust, really felt like there's been a couple of times where there has been new technology and they missed the ball. They kind of waited too long to step in and develop policy. So they're very focused right now on developing policy very early. And they really view AI as a potential threat. You know, one of the things that AG Kanter and I spoke about was this idea, if you have algorithms who are basically talking with each other about pricing, like, does that become collusion in the same way that two humans talking might be? So, there's a whole kind of breadth of, you know, unanswered questions and opportunity for regulation and potentially enforcement action. So, it is a major priority.

[00:07:18] **Talley:** Lauren, there's a pretty big literature right now in machine learning as applied to sort of business and markets in which a lot of different authors have been basically able to show how algorithmic trading platforms, even without being asked to do so, kind of figure out how to collude with one another—to keep prices high, keep prices low, to manipulate markets. And one of the things that's hard in antitrust is, you know, there's this distinction supposedly between consciously trying to manipulate the market and merely being interdependent with one another. How do we even make that determination in AI?

[00:07:57] **Hirsch:** It's a great question. And one of the things that AG Kanter said to me was, you know, if your dog bites someone, you're responsible for your dog biting someone. And his view is if you have technology, if you have AI, you are responsible for what it does. You don't get to say, well, the technology did it, it's not my fault. It's your job to put in compliance and systems to manage it. So, it's a great point and it will absolutely be, you know, something I suspect will be hotly debated over the next year.

[00:08:25] **Lund:** And, Lauren, these current investigations against Nvidia, OpenAI, and Microsoft, they're alleging things that are more basic. Right? It's sort of like more of like our typical antitrust violation where, oh, you know, Microsoft, you bought too many rivals or you've Nvidia has become too big. What's going on exactly with those arguments in the investigation?

[00:08:49] **Hirsch:** You know, it's very early on all of those investigations. But I think, you know, what they're wary of doing is kind of not allowing the way that they view antitrust in the way that they view the landscape to evolve with these questions. So, you know, with Microsoft, OpenAI, right, that's not a full acquisition. Those are just investments in OpenAI. So maybe several years ago that would have been ignored, you know, it's not an acquisition, it's not within our realm of focus. But I think that they're viewing it as an entirely different legal landscape, potentially. And so, they're looking at it through that new lens.

[00:09:23] **Talley:** Well, I want to pivot to another episode we're doing. Financial arbitrage has been around for a long time. This is really just either buying low and selling high or selling high and buying low, but ultimately, it's an attempt to make money by, you know, essentially betting on price discrepancies between two or more identical investments or underpricing or systematically overpricing of certain financial securities or assets. Now, a version of that, legal financial arbitrage, focuses on pricing irregularities triggered by, you know, legal regulatory uncertainties. And, I think, you know, the Elon Musk Twitter bid was a great example of that. When he tried to back away from that deal, arbitrageurs, by and large, all assumed—incorrectly, as it turned out—that Musk could just walk away very, very cheaply. And the stock swooned well below the $54 deal price. But legally savvy investors saw our friendly-to-seller-side contract, and this was really a buying opportunity for them. How were you sort of experiencing how the markets were making predictions about this transaction, and how sort of people who are trying to really spend their time in the, you know, in the, in the, in the mud of the contract itself, were thinking about it?

[00:10:42] **Hirsch:** Well, you know, it's funny because if there's anyone that's hard to predict, it's Elon Musk. So, so unsurprisingly, you know, the market got it wrong, many investors got it wrong. I, as an M&A reporter, I mean, obviously you need to be paying attention to what the stock is doing. And certainly, the companies I'm covering are paying attention. But I do find that stock swings can often be, you know, pretty misleading. There's not, you know, it often quite reflects that they don't have all the nuance and frankly, right, like a lot of times I do have access to material nonpublic information that they don't. And so, it does fascinate me how often investors will, frankly, get it wrong. And yet, with a situation like Elon Musk, who is so volatile—and I think there was a lot of misinformation that was out there, there was a lot of nuance and legal expertise that I think was lacking. And I think journalists, you know, I was really learning as I was going, so it was definitely like a very interesting example of the disconnect that we can see between how investors view things and, you know, how things are ultimately going to end up.

[00:11:45] **Talley:** And, you know, you talk about M&A generally, you know, this idea of arbitraging M&A deals is nothing new. These legal financial arbitrage opportunities can arise any time there is some forward-looking uncertainty about regulatory risks associated with some announced deal, whether it's foreign direct investment, tax or, most famously, probably antitrust. And we've seen a lot of, you know, people trying to read the tea leaves around announced mergers involving Microsoft and Activision—which is a really interesting recent example—Kroger and Albertsons, Spirit, JetBlue, and so forth. And, and and you know, a lot of these are essentially bets on whether, you know, a regulatory intervention is going to go the direction of the government or it's going to go the direction of the parties. And a lot of times this is being updated in real time. It's become probably even more interesting under the Biden administration, which is itself taking a very aggressive approach towards antitrust enforcement. And while the administration, with this more aggressive approach, has had some successes, they also seem to be willing to take more high-profile losses as well. And now we've got an upcoming election in which we're not really even sure how the election is going to go. And if it goes in the direction of, say, Donald Trump, is that going to, you know, give rise to a complete scale back of some of this antitrust activity? So, this is kind of an interesting moment for both deal activity and people who trade on the basis of making forward-looking bets about regulatory intervention. You got any thoughts about this, or what are you hearing?

[00:13:23] **Hirsch:** Well, there's certainly a view that if Trump is reelected, it will be a looser regulatory environment. And I—listen, no one really knows. I suspect there is truth to that. I think people overestimate how lax they were when it came to antitrust and M&A. You know, they looked—we got the AT&T deal. They're not…. Makan Delrahim, who was the antitrust chief under Trump, was pretty aggressive in certain areas. I think the difference between a Trump administration and a Biden administration is more the…. I think some dealmakers were concerned about the lack of consistency under Trump. They didn't always really know what they would move to block and why they wouldn't. So, I do think it would be less aggressive under Trump. But I don't know that it would be like a free-for-all that many people seem to think it might be.

[00:14:13] **Lund:** And Lauren, I'd love to just hear you reflect generally on the Biden administration's antitrust strategy. You know, we've seen sort of a tradeoff: They've set forth these really ambitious goals, reframing the way we think about merger enforcement. And they haven't had a very high win rate, but they have, you know, had some wins in terms of, you know, new merger guidelines, a couple, you know, wins in litigation.

[00:14:39] **Hirsch:** It's interesting because, you know, everyone kind of lumps in the FTC and DOJ in terms of these antitrust actions. And I think there's actually been a little bit of a disconnect. I would say the FTC has seemed to have had more losses. And frankly, one of the knocks that I hear against them is maybe they're not always choosing the best case to make their point. And to your point, they aren't afraid of losing and they have had some big losses. I think their view is they're testing the system, but I think it also kind of taints public perception, too, at the same time. Even if you're OK with losing in court, are you fully thinking about the impact on public perception? But they certainly have some big losses. There have some big wins. You know, the DOJ won a big airline. They blocked the JetBlue deal. That was pretty significant. They blocked a book publishing deal that, you know, brought forward this whole new theory of thinking about labor as a key component of deals rather than just, you know, passing on efficiencies. So, I think sometimes the antitrust actions under Biden get painted with a pretty broad brush, and there's some nuances in there. And, you know, with anything, some wins and losses.

[00:15:50] **Talley:** Lauren, can I follow up on that? Because there's one thing that I've always thought is curious about antitrust. And I'll just—I'll own up to the fact that I'm also an economist as well as a law professor. But that's the sort of a habitual, over the years, focus on output markets to consumers as the key touchstone for antitrust law. But markets are all around companies, right? Input markets, labor markets, land markets, leasing markets, supply markets, distribution markets, and companies will intersect in any number of these markets in which they might or might not have market power. So regardless of what happens, say, with the administration, do you get the sense that this move towards a more holistic account of, hey, listen, you intersect in a lot of markets, and if you start to have market power in those, then it's going to be more naturally something that fits within antitrust scrutiny.

[00:16:44] **Hirsch:** Gee, I mean, it's funny, I was chatting with an antitrust lawyer the other day. We were talking about my interview with AG Kanter, and he was saying the frustration, among some people, that there has been a disruption of their economic models where it's kind of been this assumption that capitalism works, basically, and the regulation works, and competition is kind of like, you know, it'll find its own level. So, all to say, I don't think anything changes. I don't think any company is going to be like, well, maybe I should think about competition in a different way, and I'm not going to do the deal that I want. I think it's all about, you know, who is the regulator in charge, and what is their personal view?

[00:17:24] **Lund:** All right, let's shift gears here—no pun intended—and let's talk about autonomous and electric vehicles. The last few months, we've seen signs of a slowdown in the transition to electric vehicles. In April, Tesla reported its first year-on-year quarterly drop in deliveries since 2020. And this recent stockholder vote ratifying Musk's invalidated 2018 compensation contract doesn't seem likely to lift sales. Beyond Tesla, we've seen the EV market stalling—again, no pun intended—over the last quarter of 2023. So, what are you hearing, Lauren, and what's going on in the EV market?

[00:18:05] **Talley:** I just want to say, Dorothy, you've got some of the best EV dad jokes out there. But go ahead, Lauren.

[00:18:12] **Hirsch:** Oh, alright.

[00:18:13] **Dorothy Lund:** I'm charged up today, I guess.

[00:18:17] **Hirsch:** I mean, listen, I think that there appears to be less demand for EVs in the U.S. than a lot of people would have hoped. And it's very expensive to compete against China, which has, you know, an entirely different economic support system for the industry. So, and we've obviously seen a lot of car companies kind of pull back and delay a lot of their promises. So it'll be interesting to see, obviously with, you know, the Elon Musk of it all, we have a whole other set of unique factors as it pertains to him. They did just vote in favor of his pay. I think if you're buying in Tesla, you're buying as much in Elon Musk as you are, you know, the next five years of EV. So, they have a little bit of wind behind their backs that other carmakers don't. But it's an interesting time. And I think it does kind of defy a lot of expectations what we're seeing in the EV market versus what we thought it would look like a year or two years ago. And then just, you know, with the upcoming election, how does Trump feel about EVs? He's made some negative comments in the past, but he also likes Elon Musk so—or seems to like Elon Musk—so you know there's more questions on the way.

[00:19:22] **Talley:** Do you actually think that may be one of the biggest benefits to Tesla and the EV industry and the stockholders ratifying Mr. Musk's contract, that it's going to allow Tesla and maybe even some of its EV competitors to bootstrap themselves to the budding bromance between Mr. Musk and Mr. Trump.

[00:19:42] **Hirsch:** It's certainly a possibility, you know? But it's funny, right, because Trump is also obviously very hard on China. Hugely important market for Musk. How does that play out? So, there is a lot of—I'm sure there is hope, amongst carmakers about the relationship between Trump and Musk. But I think as with everything with both Trump and Musk, it's going to be complicated.

[00:20:06] **Talley:** And what about this? You know, one of our episodes is on AI and another one is on EVs. Is that an artificial distinction? I mean, yeah, on some level, EVs are gigantic roving data collectors and processors. Is that just something that, you know—I'm going to get my own dad joke in here—are those two going to collide with one another, sort of, you know, inevitably at some point down the road?

[00:20:33] **Hirsch:** I mean, you have Elon Musk, right? Who is very interested in AI. He was an early investor in OpenAI. So, I think that we will see further intersection of the two, particularly when you have some of the same key figures in both industries.

[00:20:46] **Lund:** And the geopolitical environment has become sort of complicated, regardless of the administration in the EV market, right? I think the Biden administration has taken steps to make it harder to import low-cost Chinese electric vehicles. And I doubt that Trump would rock the boat on that policy. So, there's sort of an intersection point here between those policies, and, you know, our transition to a net zero economy as well. I wonder if you have any thoughts on that, Lauren?

[00:21:15] **Hirsch:** No, I mean, the, you know, relationships, it's like many things, right? You can have two goals that unfortunately don't always align, right? And I think that in the U.S. there has been a desire amongst many politicians to extricate ourselves from China. Kind of a bipartisan focus. But that doesn't always align with environmental goals. And so, how do you, what do you prioritize and in what order, I think, is a challenge and will be a challenge for either administration.

[00:21:44] **Talley:** So I want to jump to the last of the episodes that we are planning this season. I would just explore the implications of what is now a year-old Supreme Court opinion in the *Students for Fair Admissions* case. The cases that were before the Supreme Court then, in which the majority sort of famously, you know, overturned race-conscious admissions in universities, namely at Harvard and University of North Carolina, that decision pertained largely to the constitutionality of affirmative action at universities acting either as state actors or receiving federal money. But there were a lot of breadcrumbs in that opinion that suggest that there's going to be larger implications for corporate pipelines, for recruitment, for hiring practices in DEI and inclusion initiatives and affirmative action hiring, and contracting initiatives inside companies—even private companies. So, what's your sense of how companies have been reacting to this, or preparing to react to it? What are the impacts just generally across corporate America on what seems to be an opinion that may itself get expanded over the next few years?

[00:22:56] **Hirsch:** You know, there's two levels to this. One is the potential legal ramifications of that actual ruling, and then one is just what we had, frankly, already been seeing in corporate America, which was a DEI backlash. And so maybe if you were feeling frustrated with DEI programs, this is a great excuse to peel back. And we're seeing a lot of companies do that, whether that's for legal reasons, whether that's because they think it was ineffective, whether because they thought it was too expensive. You know, what the company says is a reason isn't always going to be the reason. But I think the future of DEI, companies' investment in DEI, the best way to do DEI will absolutely continue to be a massive conversation among employers.

[00:23:36] **Lund:** And, Lauren, can you just connect the dots for the audience about how exactly the Supreme Court decision matters for corporate America? Because technically, it shouldn't affect the legal obligations for what private companies have to do, right? That a ruling that binds universities—so, in your mind, is this just an excuse for people to pare back further, based on some sort of connection with the law, or is there some, some something deeper going on here?

[00:24:05] **Hirsch:** So if you speak to labor lawyers, correct, they will tell you there is nothing about that Supreme Court ruling as it pertains to schools that should directly impact employers. But what it could do is give rise to further lawsuits—that is the way the American system tends to work—and we know that attorneys general have taken, you know, have really been aggressive in going after corporate policies that they don't like, whether it be ESG investing or potentially DEI. So, it could give fodder to later suits. And so, one thing you could do with a company is say, well, it might not be a problem now, it could be a problem in the future, so, I'm going to pare back because I'm concerned about the legal implications. And it could also give excuses to someone who is already thinking about paring back, saying, well, now I can pare back and blame it on the law or the potential, you know, future litigation.

[00:25:00] **Talley:** Lauren, what other topics should we be covering this year?

[00:25:05] **Hirsch:** I mean, one thing that we have found fascinating at DealBook, and I certainly have, is to what extent does corporate America want to get involved in politics, period? To what extent do they want to speak up? To what extent do they want to be in the spotlight? That's, you know, for sure, going to be a big topic for us, something that were paying a lot of attention to.

[00:25:22] **Lund:** We're in an election year and corporate political spending in the regulatory environment around that, or lack thereof, is a big topic. And I think, you know, you sort of see this coming up in an election cycle as there's outsized money in politics, a lot of it coming from corporations, a lot of it not disclosed, to their shareholders. And so, you know, this is may be another great topic for us, especially in an election year.

[00:25:48] **Hirsch:** For sure. You know, after January 6, we saw a lot of companies pull back on PAC spending. A lot of that, unsurprisingly, has restarted. And of course, PAC spending is what's public, right? And it's often a small portion of what people are spending when you expand it to dark money. So, there's a whole layer of the way the money is flowing.

[00:26:13] **Talley:** You know, it's interesting where almost a decade, a decade and a half after the famous *Citizens United* case that, yes, opened the doors to a much larger-scale corporate political spending, essentially inviting corporate actors to get involved in politics. And in some ways, the chickens are coming home to roost, right? How attractive of a door prize is that? And do corporations actually want to take that invitation?

[00:26:39] **Lund:** Yeah, Eric, you're exactly right. Because, you know, the more that the political environment is—the perception at least that the political environment is—being affected by corporate spending, it sort of then again thrusts corporations in the limelight, right? That, well, you know, there's regulatory dysfunction. There's, you know, problems here, and these corporations need to solve them. And so, this is coming up, as Lauren mentioned, in pressure on corporations to take political stances and to participate in debates on abortion and, you know, fund travel costs for employees who have to leave the state. So, yeah, there's a really interesting intersection here between these two proposed topics. So, Lauren, we'll have to ask you next time, before the next season, to share some thoughts with us.

[00:27:24] **Hirsch:** Yeah.

[00:27:26] **Lund:** All right. Well, Lauren, thanks so much for joining us today. It was a real pleasure and a great way to kick off our season together.

[00:27:34] **Hirsch:** Happy to do so.

[00:27:36] **Lund:** Our guest today was *The New York Times* reporter Lauren Hirsch.

[00:27:40] **Talley:** Join us this season on *Beyond Unprecedented,* and make sure to follow us on Apple, Spotify, or wherever you get your podcasts. Thanks so much for listening.

[00:27:49] **Lund:** *Beyond Unprecedented* is brought to you by Columbia Law School and the Ira M. Millstein Center for Global Markets and Corporate Ownership. This podcast is produced by the Office of Communications, Marketing, and Public Affairs at Columbia Law School. Our executive producer is Michael Patullo. Julie Godsoe, Cary Midland, and Martha Moore, our producers. Editing and engineering by Jake Rosati. Production coordination by Elise Dunaway. Special thanks to Erica Mitnick Klein and Molly Calkins at the Millstein Center, with research assistance from Narda Vasquez Arancibia. If you like what you hear, please leave us a review on your podcast platform. If you're interested in learning more about law, the economy, and society, visit us at law.columbia.edu or follow us on Facebook, Twitter, and Instagram.